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REAL ESTATE NEWSLETTER

Dossier on

Reorganising real estate assets

Recent developments

Editorial

Recurring legal or regulatory changes, potential retroactivity of the effects of certain statutes, perspectives of reform within the framework of a new legislature: it has now become more and more intricate for professionals and individuals alike to plan – if merely in the medium term – the conditions and consequences of their reorganisations. Although considered historically as a safe haven, the property sector has unfortunately not come through the turbulence unscathed. Between a “wait and see” attitude or sudden restructuring, there is often a dilemma. Is it urgent… to do nothing? But is there really any choice? Because at a time at which financing conditions are being tightened up and at which needs in terms of cash are increasing, real estate can represent a significant source of savings …or quite the contrary if one is not careful.
With or without good legal visibility, reorganising one’s real estate assets can prove to be as much a necessity as an opportunity. This is why for this special issue we focused in particular on certain modes of internal restructuring which exist or which are recent enough not to be reconsidered between now… and the end of the year. You will find herein, for instance, the mechanisms for mitigating (or averaging) costs that could be experiencing their last moments and that it would be a shame to miss. For those who already have their sights set on a change of their real estate holding structure, it is necessary to throw light onto the current impacts of sale and acquisition projects in view of recent changes. Attention must also be drawn to all of the consequences likely to be attached to these changes in light both of transfer tax and of cost management in terms of local taxes.

You will also note that it would be wrong to consider that there is no longer any appeal for listed property companies or for OPCIs merely on account of the absence of continuation as at 1st January last of the reduced taxation systems. Even if it is true that the tax benefit vested in article 210 E of the Tax Code is now behind us, this formula for outsourcing is not completely lacking in interest.
In addition, the new context leads us from a legal standpoint to consider structuring alternatives. To this end we considered it worthwhile to take a look at the perspectives offered by contractual and financial tools which already exist and which may, until now, have been concealed by the favourable schemes.

Finally our work would be incomplete without an analysis of the impacts of the possible restructuring projects that are likely to occur in the property company sector … without, for all that, lending ourselves to the exercise of predicting forthcoming reforms, however this must surely be but a postponement! ■

Christophe Frionnet, partner

Leaseback: a few months remaining to benefit from an averaging of real estate capital gains taxation

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Businesses can assign to a financial institution their buildings without loosing the use thereof through the immediate conclusion of a financial lease agreement. They have until 31 December 2012 to benefit in this context from a cash flow benefit in connection with a fractional taxation of the assignment gains. The use of real estate financial leasing as a method of financing professional assets can also be used for the temporary outsourcing of buildings already owned. This mechanism, called a "lease-back" (*cession-bail*) provides that the seller becomes immediately the financial lessee of the asset. At the start, this transaction will enable cash, equal to the value of the buildings, to be raised. The company will then pay thereafter during the term of the agreement, rent instalments composed of the redemption capital and of the financial interests. It will have the option, at the end of the term to retrieve the ownership of the asset in consideration for a price taking into account these extra-rents.
Since 2009, this transaction benefits from a beneficial tax measure which is in principle intended to disappear after 31 December 2012. Article 39 novodecies of the Tax Code provides indeed that the capital gains on the assignment of the building can be spread out in equal shares over the financial years closed during the term of the financial lease agreement, without exceeding 15 years. Instead of being taxed immediately at the standard rate of tax on income (Corporate tax or income tax depending on the enterprise concerned), the seller will see its taxation averaged out, conferring it with an advantage in terms of cash flow which is far from insignificant. Of course, the premature exercise of

"This technique can prove to be particularly interesting on account of the recent reform on the carry forward of losses."

the call option or the termination of the financial lease agreement will entail the immediate taxation of the capital gains yet untaxed. This type of transaction presents thus a dual interest to increase one's short term financial resources:
– on the one hand, the business will immediately collect the price of sale of the building that will be repaid progressively through the rental terms under the financial lease and the possible price for the exercise of the option. The financial lessee may even sub-let the building to increase its revenues;
– on the other hand, the tax benefit will enable it to not disburse immediately the tax due on account of the capital gains.
From the standpoint of companies subject to corporate income tax, this technique can prove to be particularly interesting, on account of the recent reform on the carry forward of losses. Indeed, businesses may now only offset tax losses within the limits of 1 million Euros marked up by 60 % of the profits exceeding this threshold. This considerable modification of the utilisation of tax losses encourages any system aiming to average out these profits, which is precisely what the levelling mechanism for leaseback capital gains taxation purports to do. To date, we have absolutely no certainty as regards the possible continuation of this mechanism. It is therefore strongly recommended for businesses owning a building and that are looking for available cash to look into this right away.
Indeed, its implementation requires first of all an extensive review of the financial and economic data at stake having regard to the rates practiced by the bank, as the tax scheme must not come at the price of additional financial cost.
In addition, one should not lose sight of the downside of all real estate financial leasing agreements: part of the savings realized through the immediate tax deduction of the rental instalments under the financial lease will be taken back at the end of the agreement. This reincorporation corresponds in principle to the theoretical amortizations that the company would not have been able to deduct over the same duration in the event of initial acquisition of the asset. It matters little whether in this regard the business was already, before the lease-back, the owner of the asset. ■

Transfers of title or reorganisations of real estate assets: consequences to be monitored in terms of local tax

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Whether they concern professional premises or residential premises, transfers of title or operations for the reorganisation of assets carry consequences both regarding the identity of the liable party for local taxes (real estate tax on property, Levy on the Property of Enterprises (CFE), residential tax or annual tax in the Ile-de-France region), and regarding the property valuation of the real estate assets transferred. These taxes being established as per the situation on the 1st January of the year of taxation, it is the occupant (for CFE and residential tax) such as the latter is known to the tax authorities as at 1st January and the owner of the asset (for real estate tax on property and annual tax in the Ile-de-France region) such as the latter appears, as at 1st January, on the land tenure records of the land registry office, that will necessarily be chased up as the liable parties. In the event of transfer of title, it will therefore be up to the former and to the new owner to pay particular care to the publication by the notary of the notarised deed on said land tenure records. Failing which the transfer will not be recorded by the tax authorities and legitimately they will seek to collect the tax from the vendor. The latter will have to file a claim should he wish to challenge his liable party status, and scheduling will only be favourably granted after such publication is established, even if such occurred subsequently to the 1st January of the year of taxation. We would specify that in the event of a sale off plans (VEFA), the purchaser will become the liable party for real estate tax on non developed property in respect of the land base right from the year following that of the conclusion of the agreement, and of the construction to be developed under real estate tax on developed property

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right from the year following that of the delivery of the asset. Moreover, where the reorganisation of assets leads to a subdivision of property rights or to the conclusion of specific leases, such as a building lease, a financial leasing agreement or a long-term lease, the statutory liable party for real estate tax on property and for the annual tax in the Ile-de-France region is, in application of articles 1400 and 231 ter of the Tax Code (TC), the usufructuary, the tenant under the building lease, the financial lessee and the long-term leaseholder. Specific clauses tending to place the burden of these taxes on the financial lessee or generally on the user are unenforceable against the tax authorities and are only effective between the parties. The valuation of industrial premises being established according to the cost prices of the fixed assets of a real estate nature listed in the balance sheet of the owner and of the user, transfers of title and as a general rule tax audits, cause the reconsideration of real estate values. This is a good opportunity to recall the return requirements which are incumbent on owners. They must therefore see to it that the fixed assets of a real estate nature (land, constructions) to be declared are separated from the real estate accessories of the construction (to the exclusion of specialized materials and items of equipment) that the administrative authorities are required to record automatically. In the case of transactions restrictively listed under article 1518 B of the Tax Code, the administrative authorities will apply a minimum rental value below which the taxable base can not go. Non-industrial buildings being valued on the basis of their floor area and of their items of comfort, the rental value will be determined by comparison with benchmark rates as at 1st January 1970. Thereafter, changes of owner will not entail systematically the determination of a new property value (unless manifestly under-taxed). This being said, in the event of new constructions, changes of assigned use and of consistency (addition of construction or demolition), a return is mandatory. ■

Real estate investments and transfer tax: what options?

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Investing in real estate is often a major project requiring a great many aspects to be considered, and in particular the issue of transfer tax. One way consists of the acquisition of a building for valuable consideration, which is in principle subject to the standard regime contemplating the collection of transfer tax in the amount of 5.09006 % on the price of the building. However, it is also possible to proceed with real estate investments through the acquisition of legal persons. Thus, the acquisition of the corporate interests of a company or partnership holding real estate assets is conceivable, but the question at to transfer tax has taken on particular importance since article 726 of the Tax Code (TC) was amended by the finance bill for 2012. First of all, one should distinguish cases where the corporate interests of the company concerned are eligible or not for trading on a regulated market. Indeed, according to article 726 of the TC, the acquisition of the securities of listed real estate companies, provided that they are recorded in an instrument, entail since 1st January 2012 the application of the following rates: 3 % for the fraction of assessment base inferior to 200,000 Euros, 0.5 % for the fraction comprised between 200,000 and 500,000,000 Euros, and 0.25 % for the fraction which exceeds 500,000,000 Euros, rates which will be uniformly set as from 1st August 2012 at 0.1 % whatever the amount of the transaction.
A recent tax ruling no. 2012/7 of 21 February 2012 specified that an instrument is any written document forming a title with regard to the parties, whatever its form.

"The question as to transfer tax has taken on particular importance since article 726 of the Tax Code was amended."

Failing an instrument, no tax is due in respect of the transfer.

As concerns unlisted companies, the conclusion of an instrument is irrelevant having regard to transfer tax, which will be due in every case scenario. It will be merely necessary to determine whether said company is a predominantly real estate holding company (SPI), that is to say whether the latter is an unlisted company whose assets are composed by more than 50 % of buildings situated in France or by holdings in other SPIs. The transfer tax applying to corporate interests of SPIs is 5 %. The major question that remains further to the reform of article 726 of the TC is the definition of the assessment basis to which this 5 % is to apply. Indeed, the assessment basis includes, accordingly to the fraction of securities assigned, the effective value of the real estate assets and rights held, directly or indirectly, through other predominantly real estate holding legal persons, after deduction merely of the liabilities pertaining to the acquisition of said real estate assets and rights, as well as the effective value of the other gross assets. The concrete problems that one encounters concern the difficulty to reconstitute the value of the corporate assets, to determine the liabilities pertaining to the acquisition of the buildings, without taking into account the additional difficulty that could emerge in the event where assets of another nature should coexist with buildings entered into the assets.

Finally, in matters of real estate investment, it is also possible to turn to undertakings for collective investment in real estate (*organismes de placement collectif immobilier* or OPCIs), which take either the form of predominantly real estate investment companies with a variable share capital (*sociétés de placement à prépondérance immobilière* or Sppicavs), or of property investment funds (*fonds de placement immobilier* or FPI), and the sale of the shares or partnership shares of which, in application of article 730 of the TC, is exempted from transfer tax, save limited exceptions, in particular where the purchaser should come to exceed a certain threshold of capital.

In conclusion, the variety and the difficulty posed by certain regimes of real estate transfers could incite to retain the most simple options, but these aspects will logically have to be put into perspective in consideration of the project formed by the investor. ■

Contractual UCITS and real estate structuring, an alternative to OPCIs?

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Despite the undeniable benefits that they can represent, undertakings for collective investment in real estate (*organismes de placement collectifs immobiliers*) (of which the Sppicav forms a sub-category) are subject to a certain number of restrictions that can appear ill-suited to complex asset structuring schemes. Indeed, these investment vehicles are by nature intended to carry real estate investments in view of their rental and can not have the objective of their resale[1]. In addition, the rules of diversification which are applicable to them impose an allocation of at least 60 % in eligible real estate investments[2], such eligibility criteria being liable to restrict certain structuring operations for furnished assets. Finally, the investment pocket in assets other than real estate assets also remains relatively restrictive, the possibility to invest, for instance, in an unlisted company which does not present a real estate aspect remaining impracticable. Under these circumstances, rather than to structure two separate vehicles, one to carry the real estate pocket (through a Sppicav for instance), the other for the remainder of the assets (through a high risk mutual fund (FCPR)), it may be contemplated to resort to another form of vehicle, the contractual UCITS. Indeed, the contractual UCITS, whether it takes the form of a company or of a fund, presents the specificity to be able to be invested in any asset, whether movable or immovable, tangible or intangible, to the extent where each of these assets presents the following characteristics[3]:

1. the property of the asset is based, either on a registration, or on a notarised deed, or on a deed drawn up privately whose evidentiary weight is recognized ;
2. the asset is not the subject of any security interest apart from those possibly constituted for the achievement of the organisation's management objective;

"The contractual UCITS provides solutions for complex asset structuring projects."

3. the asset is the subject of a reliable valuation in the form of a price calculated in a precise manner and established on a regular basis, which is either a market price, or a price supplied by a valuation system enabling the value to be determined at which the asset could be exchanged between well advised parties and entering into contractual relations in full awareness within the framework of a transaction carried out on an arm's length basis;
4. the liquidity of the asset enables the organisation to comply with its obligations related to the execution of redemptions with respect to its bearers and shareholders defined by its bylaws or its regulations.

Moreover, this type of fund is not subject to any other rule of asset allocation or diversification than those contemplated in its instruments of incorporation. In other words, the promoters of the vehicle have every leeway to organise the strategy and the rules of investment of the vehicle to the extent that its assets comply with the four aforementioned criteria. Finally, this vehicle can resort freely to financial leverage (or at least, on the same terms as a leveraged Sppicav with a simplified modus operandi (Sppicav RFA EL)).

Thus, the contractual UCIT provides solutions for complex asset structuring projects which would otherwise be unfeasible with just the OPCI (Undertaking for collective investment in real estate). However, the contractual UCIT, under the current rules of the AMF, is theoretically more restricted in terms of lock-in periods than a Sppicav RFA EL: the guidelines which are applicable to the latter limits its "lock-up" to two years. Although the use of a "gate" clause (capping of the redemptions) will enable this default to be corrected to a certain extent, it remains that the OPCI retains an undeniable advantage with these near to ten year "lock-ups[4]". The aforementioned guidelines should shortly be amended to offer greater flexibility to contractual UCITS. In this perspective and with the disappearance of the benefit of article 210E of the Tax Code, the contractual UCIT may appear to be a particularly well suited alternative to the OPCI for asset structuring projects. ■

[1] *L. 214-90 of the Monetary and Financial code (MFC): "The real estate assets can not be purchased exclusively for their resale"*
[2] *L. 214-93 of the MFC.*
[3] *L. 214-36 of the MFC*
[4] *AMF guidelines no. 2005-04 of 25 January 2005.*

Restructuring between the SIIC and the OPCI

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The SIIC (REIT) and the OPCI (Undertaking for collective investment in real estate) (in fact we will be addressing the Sppicav (predominantly real estate investment companies with a variable share capital)) are structures that bear certain resemblances, as they have the same purpose, that is to say the acquisition or the construction of buildings in view of their rental, and the same tax regime to the extent where in consideration for the tax exemption that they benefit from, the SIIC and the Sppicav must distribute 85 % of their rental income, 50 % of the real estate capital gains and 100% of the dividends of their subsidiaries having opted for the same regime, thus placing the burden of the tax on these proceeds on their shareholders. It should also be noted that since 1st January 2012, both can now only offer the benefit of the reduced rate of taxation of 19% to enterprises subject to corporate income tax assigning real estate assets, with respect merely to the capital gains realized on account of the sale of professional premises intended to be converted into residential buildings (new article 210 F of the Tax Code (TC)). From this standpoint, it is befitting to examine the conditions according to which the SIIC and the OPCI can coexist and restructure their assets.

The SIIC and the OPCI can first of all, since 1st January 2010, incorporate joint subsidiaries. Up until then, this possibility was not open to them, at least within the framework of the SIIC regime, to the extent where the law reserved the option for this regime to companies held directly or indirectly for 95 % at least, either through one or more SIICs, or through a single and same Sppicav. It should be recalled that the joint subsidiary must imperatively take the form of a capital company in order to be eligible to the SIIC regime, to the extent where the combination of articles 208 C III bis of the TC and L. 214-92, I-c of the monetary and financial Code (MFC) indeed leads to the exclusion from the option of partnerships subject to corporate income tax, to the difference of those which are held 95 % at least by one or more SIIC exclusively. Another difference comes from the fact that if, by virtue of article L. 214-92, I-c of the MFC, the assets of the subsidiary have to be composed by more than 50 % of eligible real estate assets, in order to be able to be placed under the SIIC regime on the conditions allowed by the tax authorities, this proportion must be at least 80 %.

Another difference between the SIIC and the OPCI must be underlined concerning the dividends received from joint subsidiaries having opted for the SIIC regime and coming from the ancillary activity (taxable sector of the SIIC subsidiary). Whereas these dividends can benefit from the parent company regime at the level of the SIIC shareholder, the OPCI must for its part connect these to its profits subject to the 100 % obligation to distribute. However, as a general rule, the dividends of a Sppicav do not give rise to the parent subsidiary regime and it follows, in this situation, that the results in question, after having been taxed at the level of the subsidiary, will be taxed again in the hands of the legal person shareholders of the OPCI. Next, as concerns sales of assets between a SIIC and an OPCI, or between the joint subsidiary and an OPCI, several case scenarios need to be distinguished. In the case scenario where the subsidiary sells a real estate asset to the OPCI, the capital gains possibly realized can only be exempted (on the condition of distribution) if the OPCI does not control directly or indirectly, whether legally or factually, the subsidiary. Conversely (Sppicav seller and subsidiary buyer), the capital gains are in any circumstances exempted and must be distributed for 50 % at least. A specificity related to the regime of the Sppicav entails that the capital gains on sales are always exempted even if they are realized with respect to a related enterprise, the Sppicav bearing merely the obligation to distribute. Finally, in the case of a sale by the subsidiary to the SIIC, or vice versa, the capital gains will benefit, either from the exemption regime ("non controlling" SIIC), or from the neutralisation regime ("controlling" SIIC). This latter regime uses part of that of mergers, in that it consists of a non taxation of the capital gains at the level of the seller company and of a reincorporation of these same capital gains at the level of the buyer company according to the rules of the favourable merger regime, that is to say over a period of 15 years for constructions and related rights, or over the weighted average amortization period of the asset considered where the capital gains pertaining to constructions and assimilated items construed as a whole (structure and components) exceeds 90 % of the overall net capital gains to be reincorporated. Finally, the question arises as to determining whether there is a favourable regime enabling the conversion of a SIIC into an OPCI, the question being likely to arise on account in particular of the constraints which burden the SIIC in terms in particular of capital holding, as the capital or the voting rights of a listed SIIC must not be held directly or indirectly, for up to 60 % or more by one or more persons acting in concert within the meaning of the article (SIIC apart), this condition being appraised in a continuous manner during the course of each financial year of application of the regime.

"*To date, the transition from a SIIC to an OPCI benefits from no favourable regime, which forces us first of all to draw all of the consequences of exiting the SIIC regime*"

Such a "mutation", although providing an opportunity to elude the SIIC framework which is often deemed too restrictive for average sized structures, whilst retaining the benefit of a nearly identical tax regime, is nevertheless exposed to a high tax cost, especially if it occurs less than ten years after the SIIC option. Such raises in this regard a certain number of queries which remain largely open and which recall that, if the two vehicles are very similar, the frontier between them is however fairly watertight. Indeed, to date, the transition from a SIIC to an OPCI benefits from no favourable regime, which forces us first of all to draw all of the consequences of exiting the SIIC regime – taxation of the results from the first day of the financial year according to standard rules and, if the event occurs within a period of 10 years following the option, an additional amount of corporate income tax on the unrealized capital gains taxed at entry under the regime, taxation of the results previously exempted and not yet distributed, taxation at the rate of 25 % of the unrealized capital gains acquired during the regime, reduced by a tenth fraction as per civil year past since the entry thereunder. In addition to all of these consequences, a new exit tax (19 %) will have to be paid, at least up to the amortizations practiced during the SIIC regime, in respect of "entry under the OPCI regime". The absence of favourable regime or at least of tax neutrality poses a genuine difficulty and one can but hope that the legislator or the administrative authorities will be able to suggest a solution.

In this respect one could use as inspiration the solution contemplated by article 208 C IV of the TC which provides that if during the course of a financial year the capital of a SIIC should come to be held, directly or indirectly, for 95 % at least by another listed real estate investment company, the company purchased can become a SIIC subsidiary, to the extent where it satisfies the obligations to distribute ; that in this situation, the consequences related to the acquired company's exit from the regime shall not be applied, to the extent where the latter will remain a subsidiary up until the expiry of the ten year period. The administrative authorities commented this solution in a ruling no. 2009/61 of 20 October 2009.

The same solution could be contemplated for the case of a listed SIIC becoming the subsidiary of a Sppicav but the question of the capital gains of the SIIC's shareholders that should have contributed or sold SIIC shares to the Sppicav would remain to be settled. ■

Buildings under the test of a restructuring process

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The change induced by a contribution or merger constitutes a chargeable event giving rise to taxation of the capital gains realized on the assets contributed. Various favourable regimes enable however to elude the immediate taxation of these capital gains. If the application of the optional favourable regime for mergers contemplated by article 210 A of the Tax Code (TC) is subordinated to the sole condition of liability for corporate income tax of both companies, surviving and combined company alike, the contributions can only (also upon option) be placed as of right under the favourable regime contemplated by article 210 B of the TC subject to an additional condition related to the consistency of the contribution which has to concern a complete branch of activity. A complete branch of activity is defined as the assembly of assets and liabilities of a company division which constitute, from an organisational standpoint, an independent business unit, that is to say an assembly which is capable of operating on its own resources. If the building stocks of real estate professionals can form part of a complete branch of activity, this is not often the case for buildings recorded as fixed assets. As a general rule, the administrative authorities do not consider contributions of buildings recorded as fixed assets – including when they are under rental – as constituting a complete branch of activity (guidelines of 3 August 2000, 4I-2-00 no. 59). Where an enterprise holds significant real estate assets that it manages actively with the assistance of bespoke material and human resources, it should be possible to consider that this activity effectively constitutes a complete branch of activity likely to benefit as of right from the favourable regime of partial contributions of assets.

“As a general rule, the authorities do not consider contributions of buildings recorded as fixed assets to constitute a complete branch of activity. Hence the interest of assigning this activity to a bespoke structure.”

But even where the real estate activity is exercised under these circumstances, the administrative authorities consider that an approval (or a tax ruling) is necessary to be able to benefit from the favourable regime. It considers moreover that the approval may only be granted in the presence of a client base from outside the group that the beneficiary of the contribution belongs to. Article 210 B of the TC assimilates moreover to a complete branch of activity contributions of holdings applying to more than 50 % of the capital of a company whose securities are contributed or contributions conferring upon the company which is the beneficiary of the contribution a direct holding of more than 30% of the voting rights of the company whose securities are contributed where no other partner holds directly or indirectly, a greater fraction of voting rights, and on the other hand, contributions of holdings conferring upon the company which is the beneficiary of the contributions, which already holds more than 30 % of the voting rights of the company whose securities are contributed, the highest fraction of voting rights of the company. To the extent where the contributing company and the beneficiary company are both subject to corporate income tax, the contribution of a holding assimilated to a complete branch of activity can be placed as of right under the favourable regime whatever the tax regime of the company whose securities are contributed – corporate income tax or partnership regime – or its activity, which can very much be the rental management of buildings without bespoke staff. In the event of restructuring a rental management activity, only the merger or the contribution of the securities will ultimately enable the immediate taxation of capital gains on the elements contributed to be eluded as of right. Hence the interest, in this perspective, of assigning this activity to a bespoke structure. ■

A French SCI held by a Luxembourg resident: What tax consequences in Luxembourg?

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It is not uncommon for a natural or legal person, who or which is a tax resident in Luxembourg, to structure his or its real estate assets situated in France through a French *société civile immobilière* (real estate partnership or SCI).

Qualification of the SCI under Luxembourg law

In the presence of a foreign entity, it is important to determine whether, having regard to Luxembourg tax law, the latter should benefit from the tax treatment applicable to a transparent or opaque entity. In this regard, two criteria could be retained: the tax regime applicable to the entity in the country where it was incorporated or the legal resemblance with Luxembourg companies/partnerships. Under Luxembourg law, it is generally considered that the focus should be on the legal characteristics of the foreign entity (corporate purpose, partners' liability, possibility or not to freely transfer the partnership shares in particular) in order to determine whether this entity should be considered transparent or opaque.

If the French SCI is not liable for corporate income tax (IS) in France, there is a strong likelihood for it to be considered as a tax transparent partnership. The transparency of the SCI means that, from a Luxembourg tax standpoint, the shareholder should be considered as holding directly the real estate assets of the SCI situated in France.

Taxation of capital gains in the event of tax transparency

It is possible to consider that the capital gains realized at the level of the partner or of the SCI do not fall within the scope of application of article 19(2) of the France-Luxembourg tax treaty. Thus, capital gains could in particular be realized at the time of the sale by the SCI of real estate assets, at the time of the sale of partnership shares in the SCI, at the time of the free revaluation of the real estate assets held by the SCI or at the time of the conversion of the SCI. In these four case scenarios, everything leads us to believe that these capital gains could, in principle, be exempted from income tax in Luxembourg, in the right of the shareholder.

"The holding of French real estate assets by a Luxembourg resident through a French SCI offers interesting perspectives in Luxembourg."

Exercise of the option for IS of the SCI

The Luxembourg direct tax authority has developed a unique interpretation of the France-Luxembourg tax treaty. According to the latter, it would seem that the exercise of the option for IS by a French SCI could ipso facto make it opaque from a Luxembourg tax standpoint. The main impact of this interpretation would be to break down the walls of the general principle related to the body of evidence upheld by the Luxembourg doctrine (see above). Thus the SCI having opted for IS should be treated like a capital company. Any and all capital gains realized by the tax payer at the time of sale of the partnership shares held in the SCI having opted for IS and considered as opaque from a Luxembourg tax standpoint should, in principle, be taxable in Luxembourg. In this case, the Luxembourg tax payer would benefit from a tax credit related to the tax settled in France. However, it is possible that no unrealized capital gains may be discovered at the time of such transaction, in particular if the sale takes place, for instance, immediately further to a revaluation of the assets. It should however be noted that the rules applicable in the matter are potentially liable to change in the near future further to the renegotiation, underway, of the France-Luxembourg tax treaty. ■

The Sppicav: an outsourcing vehicle preserving undeniable benefits

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Evolutions of the legal and tax legislation has maintained a major part of the advantages of the Sppicav

Contrarily to common belief, the end of the reduced rate regime for capital gains under article 210 E of the Tax Code (TC) on 31 December 2011 did not necessarily lead to the demise of outsourcing operations, as many enterprises will be undoubtedly induced within the next few months and years to sell certain real estate assets in order to raise liquidities in order, in particular, to reduce indebtedness or to finance their development in a context of scarcer banking resources. In this context, it appears important to us to recall the benefits, both from a legal and a tax standpoint, of the OPCI, in the form of a Sppicav (*société de placement à prépondérance immobilière à capital variable* or predominantly real estate investment companies with a variable share capital), as an outsourcing vehicle. From a legal standpoint, we would observe, first of all that, in a context of high volatility of stock exchange markets, the Sppicav proves to have considerable benefits in relation to the SIIC: being an unlisted vehicle, it is not subject to the contingencies of the Stock Market. Other advantage in relation to the SIIC, the Sppicav is suited to "club deal" transactions between a restricted number of investors and is not exposed to shareholder dispersion requirements applicable to the SIIC. It is therefore particularly well suited for the purpose of setting up, between outsourcing enterprises and investors, a partnership in which the outsourcing enterprise can continue to remain a stakeholder in the organisation and the management of the outsourced assets via in particular a holding interest in the capital of the Sppicav. We would recall moreover that ordinance no. 2011-915 of 1st August 2011 "related to undertakings for collective investment in transferable securities and to the modernisation of the legal framework of asset management" transposing the UCITS IV directive, made some welcome relaxations to the OPCI regime, in particular the possibility for a Sppicav to be incorporated in the form of a *société par actions simplifiée* (SAS or simplified joint stock company) whereas before only the form of the *société anonyme* (SA or private limited company) was conceivable, and the confirmation, at the legislative level, of the dedicated OPCI status (subscription of partnership shares or of shares reserved to 20 investors maximum or to a category of investors defined in the prospectus). These new rules provide significant security to the structuring of dedicated Sppicavs, representing the major fraction of OPCIs, through (i) the recognition by law of the OPCI dedicated to a specific category of investors (which only appeared before in the sole statutes of the AMF) as well as (ii) the possibility to extend to ten years, instead of three years before, the lock-in period of the partnership shares of the OPCI with simplified modus operandi (RFA or *à règles de fonctionnement allégées*). In addition, the possibility to chose the corporate form of the SAS will most certainly also have a beneficial effect, as it will enable in particular to reduce down to a single partner the number of founding members of a Sppicav instead of seven for an SA, which in practice caused a certain amount of difficulty for certain Sppicav RFAs created by small groups. Another significant advantage, the governance of the Sppicav can be determined freely by its bylaws (possibility to only have one chairman or on the contrary to create one or more collegiate management and/or supervisory bodies). Ultimately and subject of course to the positions that might be assumed by the AMF, these new rules should enable a "bespoke" governance to be organised, whilst simplifying the legal formalism of the Sppicav and thus, to continue to encourage the use of this corporate property outsourcing and professionalization vehicle. From a regulatory standpoint, the Sppicav, as an undertaking for collective investment, is subject to review by the AMF, which is a guarantee of security and transparency for investors. In this regard, the choice of the management company will often be key to the operation's success. Particular care must therefore be taken in the management and contractualisation of the relations with the management company, as well as in the definition of the activity programme which is submitted to AMF approval.

From a financial standpoint, it should also be noted that the Sppicav can, where it is incorporated in the simplified form with increased leverage, called the "RFA EL", resort to leverage even where the AMF should in practice limit the indebtedness ratio to 50 %. The possibility for the Spiccav to use leverage coupled to the legal requirement which is imposed on it to have to distribute a significant fraction of its income and capital gains constitutes an extremely appreciable element of improvement of the financial return for investors.

From a tax standpoint, the end of the article 210 E regime will of course deprive the Sppicav of a significant comparative advantage in relation to purchasers which could not claim the benefit of this regime: the tax cost related, for the outsourcing enterprise, to the capital gains on transferred assets will now be identical, whether the purchaser is a Sppicav or another operator. This might *per se* make the completion of certain transactions more difficult, but for those transactions that necessarily have to take place, the Sppicav will keep its appeal, for investors, including, as the case may be, for the outsourcing enterprise itself.

"The rules applicable in 2012 to the Sppicav should enable to continue encouraging the use of this corporate property outsourcing and professionalization vehicle."

The main advantages of the Sppicav are indeed maintained: total exemption of corporate income tax (in consideration of distribution obligations equivalent to those of the SIIC), absence of punitive measures in the event of exit from the regime (contrarily to the SIIC), exemption from transfer duties on the sales of securities of the Sppicav for minority shareholders (less than 10 % or 20 % depending on the case).

Since 2011, the regime of taxation of dividends has most certainly been toughened for shareholders who are natural persons: the securities of a Sppicav are no longer eligible for share save plans (PEA) and the dividends no longer benefit from the 40 % relief. Nevertheless, this toughening does not in general concern Sppicavs with a simplified modus operandi. In any event, the overall tax burden (at the accrued level of the Sppicav and of its shareholders) on the profits realized and distributed will remain less significant for a Sppicav than for a company subject to the standard regime. Any strategies for the outsourcing or for the creation of a real estate portfolio conducted by enterprises must therefore continue to place the Sppicav at the heart of the thought process. In an unstable context regarding the evolution of real estate taxation, it is moreover legitimate to expect that the public authorities will preserve the sustainability of the Sppicav regime, which presents the advantage of being adaptable to different types of situation and investor (individuals and major groups alike) and remains unquestionably a relevant vehicle for the purpose of improving the management and structuring of real estate investments. One could even hope for the Sppicav to one day extend its role and become an option for SIICs which delist, if the legislator or the tax authorities should come to accept the tax neutrality of the transition from the SIIC regime to the Sppicav regime, on account of the strong proximity of these two regimes. ■

The interest that lies in keeping your tax returns for annual tax on offices in the Ile-de-France region

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Keeping the returns filed for the purpose of the annual tax on offices in the Ile-de-France region presents an interest which goes well beyond just this tax. Indeed the *Conseil d'Etat*, in a ruling dated 30 July 2010[5], asserted in particular that in the event of the creation of floor areas liable for the tax on the creation of office use premises in the Ile-de-France region, without a planning permit, and thus in violation with planning rules, the Authorities' debt collection action expired on 31 December of the sixth year following that of the completion of the works or of the fittings installed without any authorisation, in application of article L. 186 of the Tax Procedure Code. This therefore implies the necessity to provide proof of the period, or the date, of the completion of the works or of the fittings in question. Among those items which are likely to be evidential, or at least to be conducive to the establishment of the date at which such works led to such creation or conversion, the returns filed in respect of the annual tax on offices in the Ile-de-France region are not to be overlooked. Accordingly, the conservation of the returns filed for the purposes of the annual tax, over a period covering, at least, the limitation period mentioned in article L. 186 of the Tax Procedure Code, would be worthwhile having regard to a possible later recovery procedure in respect of the office tax. Whereas, the limitation period for the debt collection action of the Authorities in matters of annual tax on offices being inferior to that mentioned in article L. 186 of the Tax Procedure Code, these returns are not, having regard to the current practice of enterprises in matters of archiving, necessarily kept over a sufficient period, i.e. more than six years. Now, on account of their interest, not having regard to the annual tax, but to that of the tax on creation of office space, it will be important to keep at least the seven last returns filed, in order to defend oneself in the event of a debt collection action, in particular on the occasion of works carried out on the existing premises used as offices without this intended use having been authorised. One could even consider, to be able to have the most reliable track record possible of evolutions affecting the building over time, to keep them beyond such period. ■

[5] CE, 30 July 2010, "*Ministre de l'Ecologie, du Développement et de l'Aménagement durable, v. Société Unibail Holding*", application no. 312204

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