INTRODUCTION

Dear readers,

We welcome you to read the Private Clients October 2018 newsletter.

We hope you will enjoy reading it and welcome questions and feedback.

Kind regards,

Michael Asplund
Head of Mazars Private Clients Services

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FRANCE

You are a settlor, a trustee or a beneficiary of a trust (or similar instruments) and you wish to move to France?

Overview of the main issues to consider (before moving)

French civil law does not know the concept of trust. However, French law recognizes foreign trusts if:
- it is legally valid in the State of establishment, and
- it doesn’t violate French "ordre public", (e.g. disinheritance).

Special tax legislation introduced in 2011 recognizes effects of foreign established trusts (and similar instruments) and aims at taxing assets held or transferred through a trust as well as income realized within / deriving from a trust.

There can be several tax consequences regarding income tax, wealth tax and inheritance / gift tax for French tax residents and/or when French assets are involved.

Regarding income tax: only “proceeds” received by a French tax resident designated as beneficiary are subject to French income tax (progressive rates up to 45% + 17.2% of social contributions, flat taxation of 30% may be available).

Hence, non-distributed proceeds are in general not subject to income tax but anti-avoidance (CFC) rules may apply, in which case income may be “deemed” distributed upon realization.

Therefore, individuals planning to move to France should make arrangements (eg. withdraw from the trust) prior to moving.

Regarding wealth tax: as of January 1st 2018, France reduced the scope of its wealth tax to immovable properties.

In principle, only the settlor is liable to French wealth tax with regards to assets of the trust. Hence, if the settlor moves to France, he is taxable if the fair market value of worldwide immovable properties and rights minus related liabilities on January 1st of each year exceeds 1.3 m€.

This being said, new residents may benefit, under certain conditions, from a 5-year exemption of wealth tax on their non-French assets, then following the same regime as non-residents of France holding French assets.

In specific cases, a special tax of 1.5% on the trust's assets may be applicable in lieu of wealth tax.

Regarding inheritance and gift tax: transfers of assets through a trust to the benefit of a French tax resident may be liable to French inheritance or gift tax depending on the conditions of the transfer.

It is important to note that the death of the settlor may trigger taxation in France, whether assets are immediately transferred to the beneficiary or remain in the trust.

Such taxation arises if:
- The settlor is French tax resident at the time of his death (worldwide assets), or
- The beneficiary is French tax resident at the time of death of the settlor, provided the beneficiary was a tax resident for at least six out of the ten years preceding the time of death (worldwide assets);
- The trust holds French assets.

French inheritance / gift tax rates are progressive, with a top rate of 45% on the portion exceeding 1.8m€. A common issue with trusts is that the transfer cannot be assimilated to a French gift or inheritance situation, for example, because the allocation of assets amongst beneficiaries is not clearly defined in the deed. In such scenarios, the inheritance / gift tax rate is a flat rate of 45% or even 60%.

How can Mazars help?

To avoid adverse consequences from a French tax perspective, it's crucial to analyze, before moving to France, how withdrawals from trusts / the use of trust funds are treated under French tax law. Also, a review of the trust deed is necessary to avoid the 45% or 60% flat tax in case of death of the settlor (initial or subsequent). For more information please contact: Mike Hoffmann, mike.hoffmann@avocats-mazars.com; +33 3 88 24 74 57.
NETHERLANDS

THE IMPORTANCE OF A MARRIAGE CONTRACT IN INTERNATIONAL CONTEXT

The world is becoming more and more international. It is therefore not strange that many marriages nowadays contain an international component. Couples with different nationalities get married, they move from one country to another, have properties in multiple countries, et cetera. But, do you ever think about the consequences of the modern ‘international marriage’?

One of the first questions is whether the property of spouses becomes common property upon marriage or stays private. This question is addressed by matrimonial property law and is a very particular area of expertise. Generally speaking, matrimonial property law is different for every country and can even vary within countries (e.g. regions or states). Some countries have a comprehensive community of property between spouses as a general rule, if the spouses did not draw up a marriage contract. Other countries may exonerate certain assets (such as what is acquired by gift or inheritance) from the community of property between spouses. There are also countries which have very little rules regarding the matrimonial property regime between spouses, and which leave the division of the marital property up to the courts when the marriage ends in divorce.

When it comes to international marriages, a proper marriage contract is essential.

It is commonly known that spouses can – under certain conditions – in their marriage contract designate which law should be applicable to their matrimonial property regime. A choice of law regarding the matrimonial property regime is strongly recommended in international marriages, especially when spouses move from one country to another, have different nationalities or assets in various countries. Without a choice of law, the applicable matrimonial property law might not correspond with the intentions of the spouses and a true hotchpotch of legal rules could exist. For example, after an emigration from country A to country B, the matrimonial property regime could automatically be governed by the laws of country B for post-emigration property, whereas the pre-emigration property could still be governed by the laws of country A.

Besides the applicable matrimonial property law, other important aspects to consider in this respect are a choice of law regarding the divorce procedure and/or alimony between spouses. This can best be demonstrated with an example:

André and Sophie got married in country A. Sophie is a citizen of country A and André is a citizen of country B. They have a marriage contract, including a choice for the law of country A to be applicable to their matrimonial property regime. However, the marriage contract does not contain a choice of law regarding a possible divorce procedure (forum choice). André and Sophie then move to country B and after some time they decide to divorce. Because they lack a common nationality, and do not reside in county A anymore, they can no longer file for divorce in country A. Since they both reside in country B, they could start the divorce procedure there. This might not be preferable in this case, as the laws of country A (still) apply to their matrimonial property regime and they might still have assets in country A. It is needless to say that, the courts in country B are not specialized in interpreting marriage contracts to which the matrimonial property law of country A applies.

Alimony is another aspect that requires specific attention in international situations. Some countries will grant alimony rights to spouses, whereas other countries will not. Moreover it is in certain countries possible for spouses to exclude alimony rights, while other countries might consider such a provision void. Generally speaking the question where the spouses reside and where the divorce is filled, will affect which law applies to the alimony between spouses.
Therefore it might be advisable to include a choice of law regarding alimony or forum choice in the marriage contract. The following example gives an illustration of the relevance:

Frank and Jacqueline got married in country X, without making a marriage contract. Country X does not give any alimony rights to spouses in case of a divorce. After some years they move to country B and file for divorce. Country B does know alimony rights between spouses in case of divorce. If they file for divorce in country B it is highly likely that a judge in country B will grant alimony rights to one of the spouses.

Some of the discussed issues concerning international marriages can be overcome by paying attention to a more elaborate choice of law and forum choice in the marriage contract. Nonetheless there are certain requirements for these choices and each country might assess a choice differently. Various treaties and regulations regarding these matters are in force.

Because of this, we note that it is a complex area of expertise and in this contribution we described some only a few aspects and limited to an European point of view. When we look to the European Union, a new regulation will enter into force in the beginning of 2019. Although this regulation will simplify some aspects within the European Union, the situations that we discussed in this contribution will remain relevant and require special attention.

How can Mazars help

The Dutch Mazars Private Clients team can assist you with (international) questions regarding your marriage and marriage contract. For more information please contact: Bianca de Kroon, bianca.dekroon@mazars.nl, +31882771001.
SWEDEN

Taxation of carried interest and closely held companies in Sweden

The Swedish Supreme Administrative Court recently delivered a judgment regarding the taxation of individuals who receive carried interest, the judgment will have great impact for shareholders who receive carried interest.

Taxation of Closely Held Companies

Because of the difference in tax rate between salary (progressive tax rate) and capital gain (flat tax rate) in Sweden, owners of closely held companies prefer dividends before salary to minimize tax payments.

To avoid this income offset, regulations are in place for closely held companies where four or less shareholders own 50 percent or more. Active shareholders count as one shareholder. An active shareholder is a natural person who gain income for the company. This means that the rules are applicable for partnerships, i.e. law firms or audit firms that could house hundreds of active owners.

The rules are not applicable when inactive shareholders own 30 percent or more, since there are no incentives for active shareholders to convert salary to dividends in those companies. There has also been caselaw where the regulations are viewed as inapplicable since the company’s income are derived from assets that gain value by themselves, i.e. shares or real estate which can result in great profits without involvement from shareholders.

The Concept of Carried Interest

Carried interest was believed to be one of the exceptions, since the funds owners were not active in the funds, and the carried interest they received were derived from shares.

The company structures in the carried interest cases are usually quite complex and can for educational reasons in this article be simplified to the following picture. The Shareholders own shares in the yellow Advisory Company (AC), and the blue General Partner (GP) who control the funds where carried interest is generated.

The GP manages and establishes the Fund. The GP invests 2 percent of the funds equity, The External Investors (EI) invest 98 percent. The EI will thereafter receive a dividend proportional to their share of the fund. However, if the fund generates a dividend greater than 8 percent, the dividend above 8 percent is divided with 20 percent to the GP. This “bonus” dividend is called carried interest. It is considered an incentive for the GP to do good investments and a compensation for the risk and costs that establishing a fund involves.

The shareholders therefore presented the carried interest as capital gain in their personal Income Tax Returns for the years 2007 - 2011.
The Judgement from The Supreme Administrative Court

The main question for The Court was whether a shareholder could be deemed as an active shareholder in the GP, without working in that company. According to The Swedish Tax Agency, the reason for this would be that carried interest is derived from the shareholders full time employment in AC and the advice they communicate to the GP.

The Supreme Administrative Court states in short terms that an earlier case from 2013 was applicable, and that individuals are active shareholders in the GP. In the earlier case the inactive shareholders brother worked as a consultant, the remuneration went to the brothers’ company.

The brother was therefore active in the company where he was not employed, and the shareholder was therefore an active shareholder because they were related. The case differs on many points from the carried interest corporate groups, for example regarding headcount and business operations, which makes the Swedish regulation problematic.

This caselaw however makes the special tax regulation for closely held companies applicable on carried interest cases and therefore convert capital gains with a flat tax rate of 30 percent to salary with a progressive tax rate of around 57 percent for most of these incomes.

The exact incomes in the carried interest cases are confidential, but various sources mention that the recent judgment increases the individuals tax liability for those years to at least a billion SEK.

How can Mazars help

The Swedish regulation is tricky, and the consequences can be devastating for individuals if the tax regulation for closely held companies or carried interest is misunderstood. Mazars Sweden can help you to further explain this regulation or evaluate the effects the regulation can have for your company. For more information please contact: Jenny Stenesjö Währman, jenny.stenesjo@mazars.se, +46 8 5620 3808.
Expansion of the UK capital gains tax regime to non-UK residents

The scope of UK capital gains tax ("CGT") is for the most part territorially limited to the UK. In fact, until relatively recently non-UK residents were not liable to UK CGT at all, even if they had disposed of UK assets. Since then, various changes have been made to bring the disposal of UK property by non-UK residents within the scope of CGT (separate rules apply for corporation tax).

The first change: ATED-related CGT from 6 April 2013

The annual tax on enveloped dwellings ("ATED"), imposed an annual charge on "non-natural" persons such as companies which held UK residential properties worth £2m or more, with relief available for bona fide property letting and development businesses. An annual ATED return was also required, even if available relief meant the ATED charge was nil. In addition, ATED-related CGT applied at 28% on disposals of such properties by the non-natural person, even if non-resident. The threshold for ATED properties was reduced to £500,000 from 2016, bringing even more properties within its scope.

More changes from 6 April 2015 with the introduction of NRCGT

A more significant change for non-UK resident individuals was the introduction of the Non-Resident CGT ("NRCGT") regime in 2015. The regime applied an 18% or 28% CGT charge to capital gains on disposal of UK residential property accruing on or after 6 April 2015. Another key change of the regime was the requirement to file a NRCGT return within 30 days of the chargeable event even if there was no CGT liability or the vendor already filed annual UK tax returns.

Wider awareness of the NRCGT regime among affected non-residents seems to have been somewhat patchy. The last few weeks have seen a slew of cases concerning late filing of NRCGT returns coming through to be settled at First Tier Tribunal, challenging the levying by HMRC of late filing penalties of £1,300 in some cases.

Most of these have presented arguments for having a "reasonable excuse" based on not having been aware of the requirement for such a return when there was either no CGT due or UK tax returns were already being filed. Some of these cases have been won by the taxpayer, some by HMRC.

And now… even more changes coming from 6 April 2019

Draft legislation has recently been published which will replace the ATED CGT and NRCGT regimes with one overall regime for UK land and property: charging CGT or corporation tax on gains from UK land and property made by non-residents and accruing from 2019. The scope of the new regime will be the broadest yet, as it includes any UK land and property (not just residential), and also indirect disposals. The NRCGT principles will broadly remain in place with UK residential property gains accruing from 2015 remaining taxable. The consultation on the draft legislation remained open until 31 August 2018 so further amendments could still be added.

How can Mazars help?

In the last five years alone the taxation of UK property has seen significant change (with stamp duties and inheritance tax impacted as well as CGT). What started with scope limited to certain UK residential property holdings will soon have potential implications for any non-resident UK property owner. Mazars UK can assist non-UK residents who own UK properties and might be impacted by these changes. For more information please contact:
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