The Supreme Court withdraws from the « Lupa » case law

In a highly expected decision rendered by the Conseil d'État in plenary session on April 24th, 2019, the French administrative High Court reversed the previous position laid out in the Lupa case in 2016 (CE, plén. fisc., April 24th 2019, n°412503, Min. c/ Sté Fra SCI). In the Lupa case (CE, 8e et 3e s.-s., July 6th 2016, Ministre des finances c/ SARL Lupa Immobilière France, n°377904), the Court stated that the rules regarding the computation of the tax value set by the Quemener case law could be applied to a winding-up operation (*dissolution sans liquidation*, so-called "*TUP*") only if the TUP itself triggers a tax burden at the level of the beneficiary company, leading to the recognition of a counterintuitive legal double taxation.

The highly criticized Lupa decision challenged a market practice accepted by the French tax authorities in numerous instances (e.g. tax ruling n° 2007/54 (FE), December 11th, 2007, mentioned in the French tax authorities' guidelines (so-called "BOFiP"). Such practice consisted in neutralizing, through a TUP of the Propco entity, the latent capital gain existing on an asset, which was then transferred through a share deal. On this basis, French civil real estate companies (so-called "SCI") were commonly sold without any discount for latent capital gain tax.

In this new decision, the French administrative High Court (unexpectedly but fortunately) reversed its previous position by removing the condition of effective double taxation of the beneficiary entity, following its public rapporteur's conclusions.

This new position thus cancels the previous one, turning Lupa into an anecdotal decision. Therefore, the beneficiary company should yet again be able to neutralize the latent capital gains existing on the absorbed SCI's assets. As a result, the beneficiary company has to take into account the step-up profit (realized by the SCI) in order to determine the capital gains triggered by the cancellation of such SCI's shares, regardless of their value in the books of the beneficiary company (net book value or fair market value).

Comments and detailed analysis on this case will have to be closely followed, but this reversal is already expected to modify the tax discount practice in case of share deals on tax transparent entities, especially SCIs. In any event, the inclusion by the French tax authorities of this decision into its guidelines would be a positive signal indicating the likelihood of a positive outcome.

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