



1 - the impact of soft law at the national level (France)

1

A - guidance of the tax authorities : how tax law should be interpreted and applied, according to the tax administration

- faithful to the law : no specific impact
- adding to the law : asymmetric impact
 - no bidding effect for the tax payer (principle of tax legality - art. 14 of the Declaration of the Rights of Man and of the Citizen)
 - bidding effect for the tax administration (art. L.80 A of the TPC) : *«No increase in previous taxes shall be imposed if the cause of the increase pursued by the authorities is a dispute over the interpretation of the tax code by the good faith taxpayer and if it is demonstrated that the interpretation on which the initial decision was based, at the time, was formally allowed by the authority»*
 - the interpretation must be given before the tax is issued (no ambulatory effect)
 - doesn't apply to interpretation of tax procedure rules

2

B - rulings (including APA's) : legal opinion on the taxpayer's specific situation

- tax rescript procedure (art. L. 80 B of the TPC) : *"The guarantee laid down in the first sub-paragraph of Article L. 80 A is applicable (...) When the authorities have formally adopted a position on the assessment of a factual position with regard to a fiscal text (...)"*
 - totally binding for the administration
 - binding effect subject to the taxpayer's « good faith »
 - theoretically not binding for the taxpayer

3

C - the legality of « soft law » can be challenged before the tax litigation (action for annulment)

- imperative interpretation of tax law can be
 - challenged by the taxpayer, if less favorable than the law
 - challenged by « jealous » competitors, if more favorable than the law
- « negative » formal position taken by the administration about a factual situation in relation to tax law can be challenged when this position *"assuming that the taxpayer complies with it, would result in significant effects other than taxation"* (CE 2/12/2016 min vs. Export press).
- Non imperative / non individual opinion : may be subject to an appeal when it will have significant, in particular economic, effects or aims at significantly influencing the behaviour of taxpayers (list of « abusive tax scheme » published by the tax administration)

4



2 - the impact of the OECD commentaries on DTT's (France)

5

A – comments published prior to the adoption of the DTT

- useful to enlighten the intention of State Parties on a provision (when faithful to the model)
- kind of « preparatory work »
- tax judges may refer to commentaries when interpreting undefined terms of the DTT
- but no real legal binding effect (commentaries on the model are not part of the DTT)

6

- For instance :
 - conclusions of the advocate general :
 - Permanent establishment (CE 20/06/2003 min vs. Interhome AG)
 - Interest (CE 27/07/2001 Golay Buchel)
 - explicit reference in the decision :
 - Permanent establishment (for a newspaper office : CE 28/05/2014 min vs. Al Hayat publishing company)
 - Compatibility of a domestic thin capitalization provision (CE 31/07/2017 Thermo Electron Holdings – explicit reference in the decision)

7

B - comments published later than the adoption of the provisions

- Provisions of the DTT “*should not be interpreted by referring to the comments made by the fiscal committee of the OECD (...) since these comments are subsequent to the adoption of the provisions in question*” (CE 30/12/2003 Andritz)
- No ambulatory effect
- May remain a source on inspiration among others (CE 12/3/2014 Sté DGFP Zeta : taxation of exchange gains)

8



3 - the impact of the OECD transfer pricing guidelines (France)

9

A – Implementation of domestic tax law

- Art 57 of the GTC : « *To establish the income tax payable by enterprises which are dependent on or which control enterprises situated outside France, profits indirectly transferred to the latter, either by increasing or by reducing purchase or selling prices or by any other means shall be included in the results as shown in the accounts* » ... « *in the absence of specific evidence to support [such adjustment], taxable profits shall be determined by comparison with those of similar, normally operated enterprises* »
- No definition of what should be considered as « profits indirectly transferred », beyond the reference to the arm's length principle.
- The french tax administration follows the OECD tranfert pricing guidelines (BOI-INT-DG-20-40 n° 50)

10

- The Conseil d'Etat never directly refers to OECD transfert pricing guidelines (no binding effect).
- Guidelines are merely a source of inspiration (cf. conclusions of the advocate general) :
 - CE 09/11/2015 Sodirep : interest-free loan to a foreign branch
 - CE 21/09/2016 Sté Property Investment Holding France : concept of « shareholder activity »
 - CE 06/06/2018 GE Medical system : selection of the most appropriate point in the arm's length range
 - CE 19/09/2018 min vs. Philips France : adjustment of arm's length price to account for government interventions (subsidies).
- Inspiration may be found in other sources :
 - CE 10/07/2019 Wheelabrator : arm's length interest rates determination can be based on bond issuances (according to BEPS actions 8-10 public discussion draft).

11

B – Implementation of double tax treaties (art 9 and 25)

- OCDE commentaries regarding Article 9 paragraph 1 of the convention-model explicitly refer to the guidelines
- Referring to the guidelines may then be relevant – though they remain non legally binding – for applying article 9 when the treaty is signed after the guidelines were published
- No ambulatory effect
- So far, no relevant case law.

12