



Tax regime of trusts in France

Article 14 of the rectified finance law on 2011

By

Professor Robert Anthony and Patrick Michaud, avocat

The article 14 of the modified finance act for 2011 created a new system taxation for the foreign trusts of which the beneficiaries or the settlors, being physical persons, are or were fiscal residents of France.

The correct application of these new regulations is based at first on the declaration/disclosure of trusts to the French tax authorities and it under the unique administrative and financial responsibility of the indicated trustee called appointed as the manager of the trust.

In the French tax law, the direct responsibility of a trustee is a new notion while it exists in a certain numbers of well known foreign jurisdictions.

I - The absence of fiscal definition of the trust in French law 2

II - The trust in the new fiscal law 3

1) A definition of trusts for the French tax system..... 3

1-A) The fiscal definition of the trust 3

1-B) Definition of the initial settlor (constituent) 3

1-C) Definition of the fiscal settlor 3

1-D) Definition of the beneficiary 4

2) The obligations of trusts by the trustee..... 4

2-A) Who has the responsibility to fill the declaration? The trustee 4

2-B) Which trusts should be disclosed? 4

2-C) What should be disclosed 5

2-D) Penalties in case of non disclosure 5

2-E) Responsibility for the fines 5

3) The taxation of the income of a trust 5

It is however advisable to note that the taxation of non distributed income would remain possible in particular if the trust is subjected to a privileged tax system obviously subject to any tax treaties (article 123 bis CGI)..... 5

4) The taxation of the assets of a trust 6

5) The tax regime on transfers by donation or inheritance from a trust... 6

5-A) The general principles 6

5-C) The chargeable rates for the inheritance taxes 6

a/ In case of a direct transfer by gift or inheritance	6
b/ If the gift or the transfer by death can't be established	7
c/ Where the trustee is subjected to the law of the non cooperating state	7
d/ If the settlor is established in France (Art. 792-0 bis)	8
e/ Summarized table.....	8
5-D) The rule of territoriality applies.....	8
5-E) The revision of the rules on the presumption of ownership	8
5-F) Who is responsible for the payment of the inheritance or gift taxes	9
6) The tax regime of the assets in a trust.....	9
6-A) The principle: the implication of the settlor to Wealth tax	9
6-B) Maintenance of the tax qualification on assets	9
6-C) The exception: the withholding tax on trusts	10
a/ The person legally responsible: an individual person	10
6-D) The fiscal basis of the French trust tax.....	10
a/ The rate of the French trust tax.....	11
b/ Exceptions relating to the French trust tax	11
c/ Pension trusts companies	11
d/ Charitable trusts or similar	11
e/ Trusts that regularly declare the Wealth tax.....	12
6-E) The accumulation with the tax of 3 %	12
III - Towards the development of assistance in the recovery of tax	12
IV - The date of implementation: not applicable for past trusts	13

The new fiscal legislation allows in fact to settle without retroactive consequences for any gifts and deaths previous to the publication of the law, to enable the intelligent and fiscally regular use of certain foreign trusts.

The trust is used frequently, in the Anglo-Saxon world, at first to pass on assets to future generations. This is often used in particular for parts of a family company, by ensuring the continuity in the family for several generations. A "Normal" legacy would in particular allow the heirs to destroy the family business.

But in the civil law the trust is not recognized and is even forbidden within the framework of the article 1130 of the civil code, promulgated by the law of February 7th, 1804, which bans the agreement on future estate issues.

A small number of French residents established trusts not resident in France in a purpose of tax evasion. They even acquired buildings in France by way of trusts. The objective of the French legislator is unveil the trust by subjecting the trustee to severe administrative and financial obligations.

I - The absence of fiscal definition of the trust in French law

In tax law, the trust has no equivalent definition and is subjected to the administrations interpretation and the praetorian case law.

The modalities of taxation, not defined by the administration varies according to the nature of the trust and according to the courts decisions .Up to now, there was no general rule.

II - The trust in the new fiscal law

The article 14 of the new law suggests answering the vagueness and the gaps of the current legal measures aimed at trusts from a fiscal aspect.

This article applies to trusts a specific treatment especially the inheritance taxes, French tax on capital (Wealth tax) There are provided specific declarative obligations to ensure the effectiveness of these measures.

This definition is only a fiscal definition which applies to all the taxes aimed in the General Code of the Taxes (CGI) I. The new article 792-0 bis CGI does therefore not have authority to apply to another domain than the French tax law.

1) *A definition of trusts for the French tax system*

1-A) The fiscal definition of the trust

The new law inserts into the CGI a new article 792-0 encore, defining trusts and the French tax law.

It defines in this new article, and for the application of the CGI in general (not only taxable events aimed by the new law) what is meant by trust:

“All the created legal rights by way of law of a State other one than France, by a person, which has the quality of a settlor, by act between living or on demise, to transfer the assets or the rights, under the control of an administrator, in the interest of one or of several beneficiaries or for the realization of a defined objective.”

Please note administrator is the trustee.

The definition defines the **article 2 of the convention of The Hague of July 1st, 1985 relative to the law applicable to the trust and to its recognition**, which was signed but not ratified by France.

This definition does not allow to create trusts in French law but simply enables the ability to approve the foreign trust structures within the French tax law.

1-B) Definition of the initial settlor (constituent)

The law defines, within the framework of the title IV of the CGI on the registration fees and identifies, the settlor of the trust as:

- the person who established it,
- when it was established by a person acting professionally or by a legal entity, the person who transferred the assets or rights there.

This last definition aims at allowing the administration to judge the basis of the creation of the trust to determine, if necessary, the identity of the real person behind the trust.

1-C) Definition of the fiscal settlor

Over and above, the text that defines a "fiscal settlor", other one than an initial settlor, to allow the application of law in the course of future transfers: the beneficiary of a trust from which the original settlor has died is fiscally assimilated as a settlor.

The definition of the word settlor is therefore very wide because it can include the ascendants of a current beneficiary.

1-D) Definition of the beneficiary

The beneficiary can be a person with or without a hereditary tie with the settlor or a legal person (entity, body, foundation, etc). The legislator establishes a definition following the nature of the taxation.

- For inheritance taxes and gifts

The beneficiary of the trust will be in practice an individual person, an heir or a dedicated beneficiary, but the text also plans the situation in which the beneficiary will not be a descendant but another physical or legal person. In this last case the rate of the taxation will be 60 % and as is it does not take into account by any relief given to individual persons based on the relationship of the beneficiary.

- For the capital tax and the new forfeit on trusts.

The law applies however only if the beneficiary is an individual person.

The new article 990 J CGI indeed plans “the individual persons constituting or profiting by way of a trust defined in the article 792-0 bis are subjected to a specific taxation to be determined”.

Only the physical persons constituting or profiting by way of a trust are subject to this taxation and not any other private or public entity or moral persons.

2) *The obligations of trusts by the trustee*

To allow the application of the new fiscal rules, a new article 1649 AB of the CGI imposes new filing and disclosure obligations relative to trusts.

2-A) **Who has the responsibility to fill the declaration? The trustee**

According to the article 792-0 bis the administrator of a trust of which either the settlor or the one at least beneficiaries have their tax residence/domicile in France, or which includes the assets or the rights which are situated there, will be obliged to ensure that the declarations obligations to the French administration are made.

2-B) **Which trusts should be disclosed?**

The following trusts necessitate to be declared:

- If the settlor is resident/domiciled in France.

- If a beneficiary is resident/domiciled in France.
- If an asset or rights are situated in France.

The legislation is applied where it is defined by the law and before any possible administrative amendments, this is extremely wide and therefore includes all trusts even charitable which have a tie with France at even though when they could be subjected to no taxation.

2-C) What should be disclosed

According to this legislation, the administrator of a trust amongst which the settlor or one at least of the beneficiaries has their tax residence/domicile in France, or which includes assets rights which are situated in France, will be obliged to disclose the trust to the tax authorities.

The statement concerns the following:

- The settlor, the modification or the dissolution of the trust.
- The contents of the period (that it is advisable to include the contractual rights of the trust and, if necessary, any complementary conditions relating to the functioning of the trust).
- The market value on January 1st of the year of specific of the assets and rights. The assets and rights that must be declared are the those relating to application the forfeit tax on trusts. (Object of the new article 990 J of the CGI).

A Government act will fix the application of the new legislation.

2-D) Penalties in case of non disclosure

The article 1736 IV bis CGI plans penalties for not respecting the new filing obligations.

This is a fine equal to € 10,000 or in the case or of larger amounts, 5% of the assets of the trust.

This is a very high level, corresponding to ten years of the tax forfeit and on top of this based on the all the assets of the trust, whether or not they are taxable to the Wealth tax or subject to the new undertaking of the article 990 J.

2-E) Responsibility for the fines

The article 1754 V New section of the CGI specifies that the fine will be due in joint and severally by the administrator that is the trustee and by the settlor and the beneficiaries of the trust.

3) The taxation of the income of a trust

The new text limits the taxation only to the distributed income. This allows the ability to exempt revenue reinvested in the trust. It means that the income of a trust is not taxable for income or company tax except if they are distributed .

It is however advisable to note that the taxation of non distributed income would remain possible in particular if the trust is subjected to a

privileged tax system obviously subject to any tax treaties (article 123 bis CGI).

4) The taxation of the assets of a trust

Both for inheritance and gift taxes, and for the French tax on capital (Wealth tax), the legislator looked for the weaknesses in the current system: except for taking into account any current principles and practice ; he asked the professional trust managers, that is the trustees, which the French law calls “the administrator” to reveal to the French treasury the existence of the trust as well as the identity of the settlor and beneficiaries.

How are the trustees going to react? The subject is delicate enough and it is a question of individual ethics and business principals.

In any case the message is clear; a list of trusts should be in preparation which could be identified by the French banking system called FICOBA and by EVAFISC.

5) The tax regime on transfers by donation or inheritance from a trust

The text states that the jurisdiction relating to the transmission of assets and rights constituting the trust, is interpreted under French tax law, as a gift or a transfer on demise.

5-A) The general principles

The new article 792-0 bis II defines the tax treatment of trusts for gifts and inheritance tax.

5-B) The event is the death of the constituent (the settlor)

In this case, the inheritance, including the assets initially placed in the trust, will be taxed on their market value at the date of the transmission, i.e the date of the death at a rate dependent on the relationship to the family, the settlor and the beneficiary.

5-C) The chargeable rates for the inheritance taxes

Several situations are considered:

a/ In case of a direct transfer by gift or inheritance

It is necessary to be clear that the direct transfer of properties assets or rights placed in a trust the follow rules applies:

- The net market value of the assets, and/or the rights at the date of the transmission are subjected to transfer taxes which are related to the family tie existing between the settlor and the beneficiary.
- The law concerning transfers and about its application to trusts , applies when the gift or the inheritance can be clearly established.

b/ If the gift or the transfer by death can't be established

The legislator plans an approach as much as possible by way of the common law, by considering the death of the settlor automatically makes or initiates the transfer. The assets, the rights placed in a trust, are passed on to the beneficiaries at the death of the settlor without being integrated into their inheritance although possibly staying in the trust after the death of the settlor, which are subject to inheritance taxes in the following conditions:

- If at the date of the death, the part of the assets, the rights which are due to a beneficiary is determined, this part are subjected to inheritance taxes according to the family tie between the settlor and the beneficiary.
- If, at the date of the death, a specific part of the assets, or the rights are totally due to descendants of the settlor, these are subjected to transfer taxes on death at the rate applicable to the highest threshold of table I annexed to the article 777 that is 45%.
- The third case, which is, in a way, the hypothesis "sweep clean theory" of taxation of the net assets of the trust on the day of the death of the settlor corresponds, in practice.
- Either on the hypothesis where there is no transmission and the properties assets stay in the trust on the death of the settlor.
- Or where there is transmission without a defined individual share (case 1) to beneficiaries others than descendants of the settlor (case 2).

The taxation rate for inheritance taxes where there are no family links (that is 60%) is then applied.

c/ Where the trustee is subjected to the law of the non cooperating state

The new law stipulates when the administrator of the trust is subjected to the law of a State or not cooperative territory in the sense of the article 238-0 A the rights of gift and inheritance taxes which are owed to the rate applicable is the last threshold of the table III annexed to the article 777 (that is 60%).

The article 238-0 A introduced by the article 22 of the law n°2009-1674 of December 30th, 2009 of finances rectified 2009 proposes a real innovation, namely the definition, in French law, States and the not cooperative territories (ETNC), that is those whose situation towards transparency and towards the information exchange in fiscality that was the object of an examination by the Organization for Economic Cooperation and Development and who, did not conclude with France an agreement of administrative assistance allowing the exchange of any piece of information.

French list of the none cooperative states for 2011 Established in April 14th, 2011, JO in April 29th, 2011, p. 7477		
Anguilla	Guatemala	Niue
Belize	Cook Islands	Panama
Brunei	Marshall Islands	Philippines
Costa Rica	Liberia	Oman
Dominique	Montserrat	Turques-et-Caïquos Islands
Grenada	Nauru	St Vincent and the Grenadines

ATTENTION: The text does not aim at the law of the place of residence of the trustee but at the law to which the trust is subjected to. The marginal rate applicable between non-relatives (that is 60%) applies, in every case, if the trustee is subjected to such a law of a State or a not cooperative territory:

d/ If the settlor is established in France (Art. 792-0 bis)

The text provides that the rate of 60% applies in **every case**, if the grantor is tax resident in France at the time of the creation of the trust **and** when the trust was established after May 11, 2011

e/ Summarized table

These rules are presented summarised below:

Position of assets at the death of the settlor			Taxation
Assets transferred	Defined share of a beneficiary	settling a gift or an inheritance	DMTG* by way of common law
		Not defining a gift or a inheritance	DMTG* by death by way of common law
	Related share: defined share of several descendants		45%
	Other cases		60%
Assets remaining in the trust			60%

* DMTG = ‘*Droits de Mutation à Titre Gratuit*’, duty due on free transfers.

5-D) The rule of territoriality applies

The text adapts to trusts the rules of territoriality applicable to the law of inheritance as defined by the article 750 ter of the CGI.

It is reminded that the DMTG (‘*Droits de Mutation à Titre Gratuit*’, duty due on free transfers) applies, subject to the fiscal conventions:

- On the French and foreign assets of the donors or when the deceased is domiciled/residence fiscally in France.
- On the French assets of the donors or the deceased being nonresident.
- On the French and foreign assets received by the heirs, the donees or the heirs resident /domiciled fiscally in France on condition that they were during at least six out of ten years preceding the one during which they receive the assets.

This measure outlines the application of the new rules of taxation of assets held in trusts or passed on according to modalities which cannot be likened to a gift or to a inheritance.

5-E) The revision of the rules on the presumption of ownership

The new law completes the article 752 CGI, so as to widen the presumption of assets or rights placed in a trust.

5-F) Who is responsible for the payment of the inheritance or gift taxes

In French tax law, the beneficiary of a succession or a gift is liable legally to pay, if necessary with joint and several liability with the heirs.

Concerning the taxation of a transfer by way of a trust, the legislator has modified the traditional principle in the French tax system by engaging the administrative and financial responsibility of the trustee in a large number of situations planned by new article 792-0 bis of the CGI.

The legislator put in the front line the filing obligation and financial responsibility of the trustee being the visible administrator of the trust and with whom is established a joint fiscal liability with the beneficiary established in France, in two situations. The administrator is established either in a non cooperative state or in a state not having concluded with France an agreement of mutual assistance in collection of taxes for example Switzerland as well as other numerous States.

6) The tax regime of the assets in a trust

The ownership of assets through a trust was ambiguous in French law at the level of the French taxes on capital (Wealth tax).

The legislator therefore proposes on one hand, to put a general principle of applicability into Wealth tax the assets and rights placed in a trust as well as create a forfeit taxation on trusts to be able to tax the assets which would not have been declared to the tax authorities in relationship to Wealth tax.

In both situations, the taxation is due only if the constituent is an individual person.

6-A) The principle: the implication of the settlor to Wealth tax

The new article 885 G ter CGI plans that the assets placed in a trust are included in the taxable asset for Wealth tax of the settlor (if an individual person) for their net market value on January 1st of each year of taxation.

The text creates an obligation to declare the trust by the trustee and, even in the case or the settor is not liable for wealth tax on the assets considering the taxable net value of the estate, this includes assets as well as rights that were placed in the trust.

Plainly in all situations, the administration will be informed about assets held by a trust and in addition the deemed to be beneficiaries and settlors.

An exception for charitable trusts or similar

These provisions do not apply:

- i) For irrevocable trust **and**
- ii) the exclusive beneficiaries are covered by Article 795 CGI **and**
- iii) whose director is subject to the law of a State or territory which has concluded with France a convention on administrative assistance to the fight against fraud and tax evasion.

6-B) Maintenance of the tax qualification on assets

The fiscal qualification on assets is maintained. i.e. are they taxable or not taxable?

In view of the rules of territoriality applicable to Wealth tax, where the assets are placed in a trust the settlor which is a French fiscal resident would be taxed wherever the assets are situated, as well as those situated in France and placed in a trust where the settlor is not a fiscal French resident¹.

6-C) The exception: the withholding tax on trusts

This new obligation on trusts rules in the new article 990 J CGI, is to impose “to recover” the assets or the rights not incorporated in the Wealth tax. For the French legislator, it is not a question of creating a complex definition as to assets placed in a trust, but of defining a overall tax, joint and severally due by the trustee, the settlor and the beneficiaries of the trust.

a/ The person legally responsible: an individual person

The new article 990 J CGI outlines:

The physical persons settlors or those benefiting by way of a trust defined in the article 792-0 bis CGI are subjected to a liability at the highest threshold of Wealth tax. **Only the physical persons settling or benefiting by way of a trust are liable to this obligation and not other private or public entities or moral persons.**

b/ The person de facto responsible for the French trust tax: the trustee

The article 990 J outlines that the liability of the obligation on trusts will be “physical persons, the settlors and the beneficiaries of a trust” which exempts the charitable trusts whose general objectives are not targeted.

In practice, real person liable will be the trustee because the text specifies:

- On one hand, the filing obligations are compulsory for the trustee which will have to declare “The consistency and the value of the assets, or rights placed in the trust”.
- On the other hand, the trustee will have to settle and pay the tax to the competent authorities for the trust at the latest on June 15th of every year and for the first time on June 15th, 2012.

In the case of not filing and paying the tax, the settlor and the beneficiaries, are jointly responsible for the payment of the tax except when the trust was regularly declared to the Wealth tax by the settlor either regularly declared by the trustee within the framework of its general obligations.

6-D) The fiscal basis of the French trust tax

The article 990 J of the CGI creates a specific tax covering the assets placed in trusts which have not been declared in conformance with the Wealth tax.

This tax is based on the market value on January 1st of every year:

- All the assets (situated in France and outside France), in the trust for settlors and French fiscal resident beneficiaries;
- And the assets placed in the trust (others than the financial investments in the sense of the threshold of the Wealth tax) situated in France as well as zero coupon bonds or similar capitalization products for settlors and beneficiaries non resident.

¹ With the exception of the financial assets, exempted by virtue of the article 885 L from the CGI.

It is therefore on the same basis as for the Wealth tax in conformity with assets or rights held through trusts, to which, however, will not apply the exemptions resulting from the nature of the assets such as works of art and the professional assets.

This taxing estates not having been declared for taxation to Wealth tax.

All physical persons should declare assets or the rights placed in trusts to the tax authorities within the framework of a declaration of Wealth tax because:

- On one hand, the exemption to Wealth tax is more limited, because of the exemption from the certain assets (the professional assets, works of art, etc);
- Whilst the rate of the Wealth tax is, never superior than the higher threshold that relates to trusts.

The new tax applies when these assets, undeclared, are "discovered" by the tax authorities. There would be considered as dissimulation of these assets.

a/ The rate of the French trust tax

The tax is equal to the maximum rate of wealth tax being 0.5 on January 1st, 2012.

b/ Exceptions relating to the French trust tax

The law provides several exceptions but as with a general condition:
A treaty with a Tax Information Exchange clause.

The administrator of the trust must be subjected to the law of a State or territory which has concluded with France a convention or administrative assistance against fraud and tax evasion.

The objective is clear; the trustee should be compelled to respond to inquiries made by the French tax authorities either as part of agreements to avoid double taxation with an information exchange clause is in the drafts of exchange of information.

c/ Pension trusts companies

The French trust tax does not apply "to trusts established to manage the rights for pensions acquired, in conformance with a professional activity, by the beneficiaries within the framework of a pension plan set up by a company or a company group". This exemption aims at trusts created by companies to benefit their management and employees and their former management and employees. However, the assets and rights could if appropriate, enter into an taxable event to Wealth tax for the interested parties.

d/ Charitable trusts or similar

The law excludes expressly the trusts whereby the exclusive beneficiaries are related to the provisions of the article 795 CGI.

The **French trust** tax do not apply:

- i) For irrevocable trust **and**
- ii) the exclusive beneficiaries are covered by Article 795 CGI **and**
- iii) whose director is subject to the law of a State or territory which has concluded with France a convention on administrative assistance to the fight against fraud and tax evasion.

This concerns bodies and charitable public institutions, mutual insurance companies and all other state-approved companies where the income of which is allocated in particular to benevolent assistance or charity.

e/ Trusts that regularly declare the Wealth tax

The new French trust tax will not be due in accordance with the rate which would have been enforced concerning the Wealth tax of a settlor, if it has been declared and not liable (see below) and therefore would not be taxable in the Wealth tax.

After all, this new tax on trusts gives an alternative taxation to Wealth tax, redressing the assets or the rights which would not regularly have been declared to the administration.

The taxation to Wealth tax of assets has not a withholding tax on trusts when it results from a spontaneous regular declaration of the concerned taxpayer. If this was not the case it would result with an assessment of tax on the initiative of the administration and a forfeit tax.

In a way, it is logical to fix a specific way method for this new taxation, it is important to realise that the tax on trusts will be more favorable by voluntary regular disclosure and payments of the Wealth tax, which results in the exemption from the new tax. The new tax thus aims very, first and foremost, at imposing more easily the assets undeclared and lodged abroad in trusts.

6-E) The accumulation with the tax of 3 %

The article 990 D CGI dictates that the legal entities: moral persons, bodies, trusts or comparable institutions which, directly or by interposed entity, possess one or several buildings situated in France or are holders of rights over these assets are liable to an annual tax equal to 3% of the market value of these buildings or rights except for legal exemptions.

The question is to know will this tax continue to be due in the case of a declaration of trust.

III - Towards the development of assistance in the recovery of tax

For the first time, the legislator makes reference to the treaty of assistance to recover tax and to make simpler effective measures against the fraud and tax evasion.

It is also a question and is possible to prepare a safety net against the least common application, by the Court of justice of the European Union of the freedom of movement of the capital the slightest control of which becomes an obstacle.

To have more effective assistance and to facilitate it in practice, important amendments were necessary, so that the abrogation of the directive 2008 / 55 / CE existing will be realised on January 1st, 2012 and replaced by the Directive 2010 / 24 / EU of the Council of March 16th, 2010.

So, the article 5§3 raises the exception of the bank secrecy between member states.

IV - The date of implementation: not applicable for past trusts

The law indicates that all the new legislation relating to the DMTG will apply to the gifts and for any demise from the publication of the law.

<p><i>Professor Robert Anthony</i> <i>Chartered Certified Accountant</i> <i>UK</i> <i>Principal Partner at Anthony & Cie</i> <u>info@antco.com</u> <u>www.antco.com</u></p>	<p><i>Patrick Michaud</i> <i>Tax lawyer at the Paris Bar</i> <i>Member of the Bar Council</i> <i>Former tax inspector</i> <u>rpatrickmichaud@orange.fr</u> <u>www.etudes-fiscales-internationales.com</u></p>
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