

The new *Bulletin Officiel des Finances Publiques-Impôts* (BOFPI) website has now published the long expected *Bulletin* (formally named *Instruction*) regarding the new tax regime and reporting obligations applicable to trusts resulting from Art. 14 of law 2011-900 (LFR 2011) and decree 2012-1050 of 14 September 2012.<sup>1</sup>

The Bulletin clarifies the position in the event of a plurality of deemed settlors, submitting to tax further unequal distribution which is frequent in case of discretionary trusts.

Hopefully, at least the position is now settled from a political perspective and the rules have been set up for the next five years. Uncertainties remain, however, in particular with regard to the extent of the trustee's liability for the prélèvement.

The entry posted on 16/10/2012 actually includes three separate *Bulletins*:

- BOI-DJC-TRUST: General provisions-Definition of the trust
- BOI-ENR-DMTG-30: Transfer duties (gift/inheritance tax)
- BOI-PAT-ISF-30-20-30: wealth tax (ISF)

### **BOI-DJC-TRUST: definitions**

#### *Trusts*

The *Bulletin* confirms the wide definition of the notion of trust of art 792-O bis CGI inspired by the Hague Convention of 1<sup>st</sup> July 1985 (not ratified by France) and that all entities corresponding to the definition may be within the scope of the law even if not referred to as "trust".<sup>2</sup> This seems to include wills and estates.

#### *Constituant*

The *Bulletin* confirms that under art. 792-O bis CGI, the *Constituant* is "the individual who has transferred the assets into the trust directly or through any other legal entity acting as a professional or not".<sup>3</sup>

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<sup>1</sup> Available on: <http://bofip.impots.gouv.fr>

<sup>2</sup> §40

<sup>3</sup> §80

## *Bénéficiaire*

The *Bénéficiaire* is defined as “any recipient of the trust income or capital during the trust’s existence or on its liquidation”.<sup>4</sup>

## *Administrateur*

There is no further definition of the notion of *Administrateur* which would seem to include not only the trustees, but also the executors or administrators of wills and estates.

## **BOI-ENR-DMTG-30: Transfer duties (Gift/Inheritance tax)**

### *Territoriality*

The *Bulletin* confirms the territoriality rules.<sup>5</sup> The regime applies wherever settlor, beneficiary or assets are situated in France. As for the beneficiary, the *Bulletin* confirms that he/she should have been resident of France for six out of the last ten years to be within the scope of the law (art. 750 ter CGI) and that territoriality rules are subject to double tax treaties.<sup>6</sup>

### Gift/inheritance tax

The *Bulletin* clarifies the fact that the new regime applies to lifetime gifts and successions as from 29 July 2011 and that previous administrative doctrine and case law applies to transfers through a trust before that date.<sup>7</sup>

The *Bulletin* confirms that where the transfer can be regarded as a lifetime gift or a succession, gift/inheritance tax applies at the usual rates and exemptions (such as between spouses or civil partners).<sup>8</sup>

As for other transfers:

- If a determined share is transferred to an identified beneficiary, again gift/inheritance tax applies at the normal rate.<sup>9</sup>
- If a global share is due to the settlor’s descendants, inheritance tax applies at the rate of 45 per cent (maximum rate in direct line)<sup>10</sup>
- As for any other transfer, the *Bulletin* confirms that this corresponds to situations whereby the assets remain in the trust (accumulation trust) or where an undetermined share is due to beneficiaries who are not the settlor’s descendants (the *Bulletin* gives the example of an irrevocable discretionary trust). Here the tax applies at the rate of 60 per cent (maximum rate of gift/inheritance tax) with no reference to any possible exemption (such as between spouses/civil partners).<sup>11</sup>

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<sup>4</sup> §110

<sup>5</sup> §30

<sup>6</sup> §40

<sup>7</sup> §1

<sup>8</sup> §90

<sup>9</sup> §110

<sup>10</sup> §120

<sup>11</sup> §130

### *Further distribution/winding up*

The *Bulletin* here confirms that as for any further distribution, the transfer will not be subject to further taxation unless the transferee happens to be a different beneficiary or received more than his individual share in case of various beneficiaries. In that case, gift tax may apply between the original various beneficiaries and the transferee (see below).<sup>12</sup>

### *Income tax*

The *Bulletin* confirms that trust income is only taxable on distribution (under Art. 120 CGI) but does not give any indication as for the combination of this with Art. 123 bis CGI applicable where the trust is based in a privileged tax jurisdiction.

## **BOI-PAT-ISF-30-20-30: ISF/prélèvement**

### *Territoriality*

The *Bulletin* confirms the general territoriality rules and exemptions applicable to ISF (including exemption of foreign assets for the first five years of residence). Territoriality is subject to double tax treaties.<sup>13</sup>

### *Settlor's liability*

The trust assets are deemed to form part of the settlor's (or deemed settlor's) wealth for ISF purposes regardless of the nature of the trust (irrevocable trusts included).

The *Bulletin* clarifies that in the presence of several deemed settlors and in the absence of provisions in this respect in the trust deed, the trust assets are deemed to belong to the deemed settlors by equal shares.<sup>14</sup>

### *Taxable base*

The *Bulletin* confirms the exemption of financial assets held by non residents unless these represent more than 10 per cent of the share capital or correspond to a "property predominant" company.<sup>15</sup>

### *Prélèvement*

The *Bulletin* confirms that settlors (or deemed settlors) are liable for the *prélèvement* which is "liquidated" and paid by the trustee.<sup>16</sup> This apparently implies that the trustee is only responsible for the administration of the tax, i.e. collecting the relevant amount from the settlor/deemed settlor.

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<sup>12</sup> §160

<sup>13</sup> §130

<sup>14</sup> §70

<sup>15</sup> §110

<sup>16</sup> §240

However, the *Bulletin* indicates that for the purpose of payment of the *prélèvement*, settlors, beneficiaries and trustees are jointly liable.<sup>17</sup>

How the trustee can ensure that the settlor has complied with his ISF obligations when he has lost contact with him since the original settlement, the *Bulletin* does not say.

However, the indication that the “beneficiary” referred to in Art. 990 J corresponds to the deemed settlor is a welcome clarification. Art. 990 J indeed referred to beneficiaries as defined by Article 792-O bis which includes all beneficiaries.

## Reporting obligations

The *Bulletin* confirms the existence of two separate reporting obligations and the applicable deadlines:

- Ongoing reporting obligation of Art. 344 G sexies Annexe III CGI: report within a month of any constitution modifications or extinction or by 31 December 2012 for any such event before 31 July 2011.<sup>18</sup>
- Annual declaration for ISF or *prélèvement* assessment of Art. 344 G septies Annexe III CGI: declaration by 15 June (30 September for 2012). The *Bulletin* however indicates that the deadline is postponed to 31 August where the settlor (or deemed settlor) is a non-resident corresponding to the general ISF diary.<sup>19</sup>

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<sup>17</sup> §250

<sup>18</sup> §310

<sup>19</sup> §370