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TAX NEWSFLASH

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One year after the implementation of the "Priority Question of Constitutionality": analysis and perspectives from a tax viewpoint

Since March 1, 2010, persons subject to legal proceedings have the possibility to apply to the Conseil constitutionnel to obtain its opinion on a legislative provision that they consider violates the rights and freedoms guaranteed by the French Constitution.

Taxpayers and their legal counsels have not hesitated to use this new procedure which, when successful, can be quite formidable. Unsurprisingly, tax provisions are by far the most concerned as they represent almost 2/3 of the questions submitted with respect to administrative law, after only 6 months of application.

The first anniversary of the entry into force of the priority question of constitutionality ("PQC") seems to be a good time to conduct a first review of this procedure with respect to tax issues. Although it is not, and will undoubtedly not trigger a real tax revolution, it is of some interest and warrants our attention.

How do you raise a PQC?

Presented in the form of a substantiated written statement that is separate from the pleadings on the merits, a PQC may be raised before the administrative courts, but also for the first time before the appeal courts or the highest courts. A dual-filter procedure was created to ensure that only the most relevant questions are referred to the Conseil constitutionnel. The court to which a PQC is submitted must refer it immediately to the highest court (usually the Conseil d'Etat or the Cour de cassation in the case of the wealth tax or registration fees for example) so long as three criteria are met: (i) the challenged provision is applicable to the case at hand, (ii) it has not already been held constitutional, (iii) the question must be new or of a serious nature.

The Conseil d'Etat has a period of three months to refer the question to the Conseil constitutionnel. Before it does so, it will act as a second filter by verifying the three criteria stated above. Once the question has been referred, the Conseil constitutionnel will have three months to render its decision. The procedure is therefore relatively fast.

Once the Conseil constitutionnel has rendered its decision, it is not appealable. Its decisions therefore apply both to taxpayers and the public authorities or to all administrative and judicial authorities. Any provision held unconstitutional is repealed as of the publication of the Conseil constitutionnel's decision. The Conseil constitutionnel can nevertheless provide for the repeal to take effect at a later date, particularly if there are high financial or budgetary considerations at stake.

For the past, the Conseil constitutionnel is required to determine, for each case, the manner and the extent to which the effects generated by the provision may be challenged. The Conseil constitutionnel may, inter alia, limit the effects of the declaration "to pending cases", which it has indeed done in practice. We do not yet have enough hindsight with respect to this definition, but it would seem in this case that the decision of unconstitutionality could then be asserted only by taxpayers who are sufficiently informed to have filed at least one claim prior to the Conseil constitutionnel's decision.

In any case, the decision of non-conformity implies that the taxpayer which raised the question shall be exempted from the taxation, regardless of whether the repeal is postponed or not.

One of the first interesting cases of non-conformity as regards tax law

The most noteworthy decision in practice was rendered on December 10, 2010 (PQC no. 2010-78, Imnoma) with respect to the constitutionality of the "validation" tax laws whose effect is to validate a taxation rule for a period prior to the rule's entry into force. Exceptional by nature, these laws are only admitted if they meet a "compelling reason of general interest" (such as compliance with the principle of equality between taxpayers).

In the context, the rectifying Finance Act for 2004 was passed after a reversal of the Conseil d'Etat's case law, not only to legalise a tax base law (principle of the inviolability of the opening balance sheet) as of January 1, 2005 but also to validate the taxes levied before this date on the basis of this re-established rule but only when this was in the administration's favour. This retroactive and asymmetric validation gave rise to numerous attempts to challenge it, none of which were successful.

At the origin of the Imnoma case, the taxpayer challenged the adjustments that the administration had levied on it by asserting, before the publication of the rectifying Finance Act for 2004, the decision rendered by the Conseil d'Etat providing for this taxation rule to be dropped (CE, Ass., July 7, 2004, no. 230169, SARL Ghesquières Equipement). To dismiss the taxpayer's claim, the Paris Administrative Court based its decision on the rectifying Finance Act for 2004 in force on the date of the decision which retroactively validated the application of this rule. The taxpayer raised a PQC before the Paris Court of Appeals by asserting nothing less than a violation of the principles of equality before the law and before taxes, of the non-retroactivity of laws, of the rights of the defence and equality of arms and the right to an effective judicial remedy.

The Conseil constitutionnel eventually founded its decision on the equilibrium between the rights of the parties to legal proceedings (in other words, the equality of arms) in order to censure the validation law regarding the inviolability of the opening balance sheet. The first effect of such a decision is the repeal of the censured law. However, it is only a theoretical impact as a validation law only has an effect on the past. However, the Conseil constitutionnel specified that the repeal of the censured provisions of the rectifying Finance Act for 2004 could be asserted in pending cases as of December 10, 2010 where the outcome depends on the application of the provisions.

The real question that remains is thus to determine the practical impact of this decision. If we go by the principle that, from now on, all retroactive and asymmetric tax laws will be censured by the Conseil constitutionnel, it is still difficult to

anticipate what the possible applications will be. Can we draw the conclusion that all tax law provisions that are asymmetric for other reasons than retroactivity should also be censured? Can we see in this the beginnings of a reflection on aligning the time periods for a taxpayer's claims and those given to the administration for the exercise of its claw-back right? The question deserves some thought.
The PQC procedure should be monitored closely over the coming months because relevant tax questions are still being referred to the Conseil constitutionnel and the courts will have to deal with the first applications of the declarations of unconstitutionality. We shall particularly look forward to the decision on the question regarding the court's modulation powers with respect to tax penalties.

Sonia Bonnabry

Of Counsel