

**Planet Case, French Supreme Administrative Court, 20 May 2022**

In view of the following procedure:

Planet requested the Marseille administrative court to order the discharge, in duties and penalties, of the withholding taxes charged to it for the years 2011 to 2014. By judgment No. 1605447, 1605448, 1705980 of May 18, 2018, the Marseille administrative court granted its request.

By judgment No. 18MA04302 of July 15, 2020, the Marseille administrative court of appeal allowed the appeal of the Minister of Action and Public Accounts against this judgment and returned the amounts in dispute to Planet.

By an appeal and a supplementary brief, registered on September 15 and December 15, 2020 at the litigation secretariat of the Council of State, Planet asks the Council of State:

1°) to annul this judgment;

2°) settling the case on the merits, to dismiss the Minister's appeal;

3°) to order the State to pay the sum of 5,000 euros under Article L. 761-1 of the Code of Administrative Justice.

Having regard to the other documents in the case file;

Having regard to:

- the convention of 30 November 1979 between France and New Zealand for the avoidance of double taxation and the prevention of tax evasion in matters of income tax;
- the General Tax Code and the Book of Tax Procedures;
- the Code of Administrative Justice;

Having heard in public session:

- the report of Mr A. de Sainte Lorette, Master of Requests,
- the conclusions of Ms Céline Guibé, public rapporteur;

The floor having been given, after the conclusions, to SCP Buk Lament - Robillot, lawyer for Planet;

Considering the following:

1. It is clear from the documents in the case submitted to the trial judges that Planet, which carries out a business of distributing sports programmes to fitness clubs, was subject to withholding tax reminders on amounts classified as royalties paid to Les Mills Belgium SPRL and Les Mills Euromed Limited, established in Belgium and Malta respectively, for the financial years ending 2011 to 2014 in return for the sub-distribution of group fitness programmes developed by Les Mills International LTD, established in New Zealand. Planet is appealing in cassation against the judgment of 15 July 2020 by which the Marseille Administrative Court of Appeal, on appeal by the Minister for Action and Public Accounts, annulled the judgment of 18 May 2018 of the Marseille Administrative Court insofar as it had discharged it from these reminders and reinstated these taxes.

2. Although a bilateral convention concluded for the avoidance of double taxation may, under Article 55 of the Constitution, lead to the national tax law being set aside on a particular point, it cannot, in itself, directly serve as a legal basis for a decision on taxation. Consequently, it is for the tax judge, when dealing with a dispute relating to such a convention, to first consider the national tax law in order to determine whether, on that basis, the contested tax has been validly established and, if so, on the basis of what classification. It is then up to him, where appropriate, by comparing that classification with the provisions of the convention, to determine - on the basis of the arguments put forward before him or even, in the case of determining the scope of the law, *ex officio* - whether or not that convention precludes the application of the tax law.

3. Under the terms of Article 12 of the Convention of 30 November 1979 between France and New Zealand for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income: "1. Royalties arising in a State and paid to a resident of the other State may be taxed in that other State. / 2. However, such royalties may also be taxed in the State in which they arise and according to the laws of that State, but if the person receiving the royalties is the beneficial owner, the tax so charged may not exceed 10 per cent of the gross amount of the royalties. / 3. The term "royalties" as used in this Article means payments of any kind received as a consideration for the use of, or the right to use, a copyright in a literary, artistic or scientific work, including cinematographic films and works recorded for broadcast or television, a patent, a trademark of manufacture or trade, of a design or model, of a plan, of a secret formula or process, as well as for the use of or the concession to use industrial, commercial or scientific equipment and for information relating to experience acquired in the industrial, commercial or scientific field". Having regard to their purpose, and as they are clarified by the comments made by the Tax Committee of the Organisation for Economic Co-operation and Development (OECD) on Article 12 of the model convention established by this organisation published on 11 April 1977, and as it results from the same comments published respectively on 23 October 1997, 28 January 2003 and 15 July 2014 and most recently on 21 November 2017, the provisions of 2 of Article 12 of the Franco-New Zealand tax convention are applicable to royalties of French source whose beneficial owner resides in New Zealand, even if they have been paid to an intermediary established in a third State.

4. It is clear from the statements in the contested judgment that, in order to determine whether the sums in question constituted royalties, the court examined the classification of the sums paid by Planet to the Belgian company Les Mills Belgium SPRL in 2011 and to the Maltese company Les Mills Euromed Limited from 2012 to 2014, in the light of the provisions of the Franco-New Zealand tax convention of 30 November 1979 alone. By limiting itself, in order to rule that this convention was applicable to the dispute, to noting that the tax authorities maintained that the New Zealand company Les Mills International LTD should, pursuant to an agency agreement signed on 2 December 1998 between that company and Planet, be regarded as the beneficial owner of the disputed sums paid by the French company to the Belgian and Maltese companies, without itself ruling on its status as beneficial owner of those sums for the four years in dispute, the court erred in law.

5. It follows from the above that, without there being any need to examine the other grounds of appeal, Planet is entitled to request that the judgment it is contesting be set aside.

6. In the circumstances of the case, it is appropriate to order the State to pay the sum of EUR 3,000 to Planet under Article L. 761-1 of the Code of Administrative Justice.

DECIDES:

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Article 1: The judgment of 15 July 2020 of the Marseille Administrative Court of Appeal is set aside.

Article 2: The case is referred back to the Marseille Administrative Court of Appeal.

Article 3: The State shall pay Planet the sum of EUR 3,000 under Article L. 761-1 of the Code of Administrative Justice.

Article 4: This decision shall be notified to Planet and to the Minister of the Economy, Finance and Recovery.

Deliberated at the end of the session of April 20, 2022, attended by: Ms. Christine Maugüé, Deputy President of the Litigation Section, presiding; Mr. Bertrand Dacosta, Mr. Frédéric Aladjidi, Chamber Presidents; Ms. Anne Egerszegi, Mr. Thomas Andrieu, Ms. Nathalie Escaut, Mr. Alexandre Lallet, Mr. François Weil, State Councilors and Mr. Matias de Sainte Lorette, Master of Requests-Rapporteur.

Delivered on May 20, 2022.