

## Taxation of acquisition and sale of art works: auctions and private sales | Art tax law

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**Everything you always wanted to know about taxation of acquisition and sale of art works: auction and private sales**



## 1. General overview

### 1.1. Key elements

The acquisition and sale of art works, by legal entities or natural persons, are done either during public auction sales, or during private sales by mutual agreement. There are therefore two categories : public and private sales.

Article L. 321-2 et seq. of the French commercial code provides that voluntary sales of furniture at public auctions may be organised and conducted :

- either by professional operators acting as agents of the owner of the piece of furniture, in order to best knock it down, practising as sole practitioners or under the form of companies of voluntary sales of furniture at public auctions (“*sociétés de ventes volontaires de meubles aux enchères publiques*”);
- or by notaries and bailiffs who comply with training criteria set by regulations

who act as agents to the owner of the piece of furniture or his representative.

During a private sale by mutual agreement, the art work can be bought directly to the artist or through a third party, who can be an art gallery, a broker, a dealer or one of the sales operators above-mentioned, provided that, in this last case, as set out in article L. 321-5 of the French commercial code, the operator has first informed in writing the seller of the option to conduct a voluntary sale at public auctions.

The acquisition and sale of art works raise many questions under tax law, and have moreover a wide tax effect, notably in terms of VAT to be paid by the buyer, as well as artist resale right and capital gain tax to be borne by the seller.

French tax authorities also incentivise legal entities which are tax residents in France, subject to corporation tax or not, to take up art sponsorship (“*mécénat*”), by investing in art and by acquiring art works.

### 1.2. Texts

#### 1.2.1. Codified texts

- French tax code, art. 150 VI to art. 150 VM
- French tax code, art. 238 bis AB
- French tax code, art. 238 bis-0 A CGI
- French tax code, art. 278-0 bis
- French tax code, art. 278 septies
- French tax code, art. L. 122-8 and L. 334-1

### 1.2.2. Non-codified texts

- BOI-TVA-SECT-90-60, 12 Sept. 2012 : “TVA – Régimes sectoriels – Biens d’occasion, œuvres d’art, objets de collection ou d’antiquité – opérations effectuées entre deux états-membres”
- BOI-TVA-SECT-90-50, 12 Sept. 2012 : “TVA – Régimes sectoriels – Biens d’occasion, œuvres d’art, objets de collection et d’antiquité – Ventes aux enchères publiques”
- BOI-RPPM-PVBMC-10, 1<sup>er</sup> Apr. 2014 : “RPPM – Plus-values sur biens meubles et taxes forfaitaires sur les objets précieux – cession de biens meubles”

### 1.2.3. European directives

- EU Council, Dir. 94/5/EC, 14 Feb. 1994 (7th European directive)
- PE and EU Council, Dir. 2001/84/EC, 27 Sept. 2001

## 1.3. LexisNexis library

### 1.3.1. Practical forms

### 1.3.2. JurisClasseur booklets

- JCl. Fiscal Chiffres d’affaires, Booklet 2060-4 : “Régimes particuliers. – Biens d’occasion, objets d’art, de collection ou d’antiquité. – Définitions. – Principes d’imposition”
- JCl. Propriété littéraire et artistique, Booklet 1262 : “Droits des auteurs. – Droits patrimoniaux. Droit de suite (art. L. 122-8 French intellectual property code)”

### 1.3.3. Reviews

- Annabelle Gauberti, “Fiscalité des œuvres d’art : une arme à double tranchant”: RFP 2013, study 13
- P. Schiele et E. Talec, “La taxe sur les oeuvres d’art : une législation elliptique qui nécessitait une «consolidation législative»”: Dr. fisc. 2006, n° 26, study 49

## 2. Preparation

### 2.1. Prior information

Counsel will act to advise either the buyer or the seller in relation to the conditions of execution of the acquisition or sale of art works, antiques and cultural assets, but also and especially in relation to the tax

consequences of such transaction.

### **2.1.1. When the practitioner advises the seller**

In this case, the following questions should be asked :

- Is the seller a natural person or a legal entity? Is the seller a tax resident in France, within another member-state of the European Union (EU), or outside the EU?
- Is the seller the artist who has created the art work? Is this seller-artist subject to VAT?
- Will the sale be private or public?
- Who will organise the sale? An agent? The seller directly?
- In which country will the sale occur?
- Where is the art work that will be sold? In France? The EU? Outside the EU? In a free port?
- In a private sale, who is the buyer? Is it a natural person or a legal entity? Is this buyer a tax resident in France, in another member-state of the EU, outside the EU?
- What is the sale value of the art work?

### **2.1.2. When the practitioner advises the buyer**

In this case, the following questions should be asked:

- Is the buyer a natural person or a legal entity? Is he a tax resident in France, in another member-state of the EU, outside the EU?
- Will the acquisition be private or public?
- Who will organise the sale? The artist or the collector directly? An agent, such as an intermediary, a “*société de ventes publiques aux enchères*“?
- In which country will the acquisition occur? In France, in the EU, outside the EU?
- Where is the artwork which will be sold? In France? In the EU? Outside the EU? In a free port?
- In case of a private sale, who is the seller? Is it a natural person or a legal entity? Is it the artist, author of the art work? Is this seller a tax resident in France, in another member-state of the EU, outside the EU? Is this seller-artist subject to VAT?
- If the buyer is a legal entity, is it subject to corporation tax or income tax?
- What is the price of the art work?

## **2.2. List of solutions and decision criteria**

From the information gathered, counsel must inform and advise his client about the tax effects deriving from the acquisition or sale of the art work(s), and in particular explain the pros and cons of such transaction.

Moreover, it is advisable to let clients know about the option to organise the transaction on a particular geographical territory, in order to maximise the tax regime applicable to such transaction.

### **2.2.1. VAT**

#### **2.2.1.1. For transactions done on the French market**

The sale of an original art work by the author or his beneficiaries is subject to a VAT rate of 5.5%, pursuant to the provisions of article 278-0 *bis* of the French tax code. All other sales (by third parties, such as collectors, galleries, brokers, etc.) are subject to the standard VAT rate of 20%.

#### **2.2.1.2. For sales done in the EU**

The 7<sup>th</sup> European directive (*Cons. EU, dir. 94/5/EC, 14 Feb. 1994*) relating to the particular regime applicable to VAT on art works, collecting items and antiques, is based on two principles:

- taxation of the beneficiary margin (i.e. the sale price minus the buying price, or, for auction house companies, the hammer price including premiums minus the net amount paid to the seller) is the standard VAT regime for these types of goods;
- in intra-community trade, applicable VAT is that of the country where the delivery is made (« TVA pays de départ »).

Article 278-0 *bis* of the French tax code provides that intra-community acquisitions of art works, collecting items or antiques, performed by a natural person or a legal entity either subject, or not subject, to VAT; who imported the goods on the territory of another member-state of the EU, are subject to a reduced VAT rate of 5.5% on the beneficiary margin.

The same article provides that the intra-community acquisitions of art works, collecting items or antiques, which have been delivered in another member-state by natural persons or legal entities subject to VAT but other than resellers subject to VAT, are also subject to a reduced VAT rate of 5.5% on the beneficiary margin.

A reseller subject to VAT refers to all natural persons or legal entities subject to VAT whose business consist in trading said goods: second-hand goods dealers, art galleries, antique dealers, bric-a-brac traders, “*sociétés de ventes volontaires de meubles aux enchères publiques*”.

All other intra-community acquisitions of art works, collecting items or antiques are subject to the standard VAT rate of 20% on the beneficiary margin.

Of course, intra-community acquisitions of art works which are delivered with no beneficiary margin are exempt from VAT.

#### **2.2.1.3. For sales done outside the EU (and therefore outside France)**

No VAT in France is due.

### **2.2.2. Wealth tax**

In addition to VAT, it is worth checking whether the buyer of an art work may become subject to the French wealth tax, following such purchase.

To date, and despite many aborted bills leaning in this direction, art works are not included in the basis of the wealth tax. Article 885 I of the French tax code provides that antiques, art works or collecting items

are not included in the basis of the wealth tax.

Therefore, a recent buyer of an art work, tax resident in France, does not have to disclose such art work or the sums of money used to pay for such art work, to the tax authorities. Such buyer could not be prosecuted by the tax authorities to pay the wealth tax on the basis of this new acquisition.

### **2.2.3. Artist resale right**

Pursuant to the provisions of Article L. 122-8 of the French intellectual property code, artist resale right allows the author of fine art works, resident in a member-state of the European Union or a state part of the European Economic Area, to receive a percentage which goes from 0.5% to 4% of the sale price of an art work (sold either in a private or public sale), when an art market professional intervenes as a seller, buyer or intermediary. On the death of the artist, the artist resale right is passed on to his beneficiaries during a period of 70 years after his death.

Artist resale right being a right to share the profit in any sale, it is the seller who bears such artist resale right, as follows:

- 4% up to 50,000 euros ;
- 3% between 50,000.01 and 200,000 euros ;
- 1% between 200,000.01 and 350,000 euros ;
- 0,5% between 350,000.01 and 500,000 euros ;
- 0,25% above 500,000.01 euros.

The basis of such profit sharing is «*exclusive of tax, the hammer price in case of public sale and, for other sales, the sale price perceived by the seller*» pursuant to the provisions of article R. 122-5 of the French intellectual property code.

Artist resale right is not due when the sale price is lower than 750 euros.

Artist resale right cannot exceed 12,500 euros, which excludes any profit sharing pursuant to the artist resale right for the share of price above 2 million euros.

### **2.2.4. Capital gain tax**

Capital gain occurring further to the sale of art works is taxable income, under the income tax regime for natural persons and legal entities subject to income tax.

If the seller has written evidence of the date and price of purchase, he will be able to choose the standard regime for capital gain. The rate is 34.5% (inclusive of social security deductions) with a 5% discount per year beyond the second year. There is therefore a full exemption after 22 years of ownership.

If the seller cannot justify either the price or date of purchase, or if he requests it, the tax flat-rate regime applies. Pursuant to the provisions of article 150 VI et seq. of the French tax code, sales of art works and collecting items are subject to a flat-rate tax.

This flat-rate tax is 6% of the selling price, for the sale of art works and collecting items. This tax is due at the time of the sale.

The capital gain tax is paid by the seller of the art work. This tax is due, under their liability, by the intermediary who is tax resident in France and who participates in the sale or, in case no intermediary is involved, by the buyer when such buyer is subject to VAT and tax resident in France; in other cases, capital gain tax is due by the seller.

However, sales of art works or collecting items are exempted from capital gain tax when the sale price of the art work is not above 5,000 euros or when the seller of an art work outside the territory of the member-states of the EU, does not have his tax residence in France.

Article 219 of the French tax code provides that if the seller of an art work is a legal entity subject to corporation tax, capital gain tax derives from a special regime, according to which:

- if the art work was owned for less than 2 years, capital gain tax is the same than taxes on the company's benefit: 33.33%, with a first ladder of 15% up to the cap of 38,120 euros for companies with a turnover below 7,630,000 euros, a shareholding capital fully paid up and held for at least 75% by natural persons or legal entities owned by natural persons;
- if the art work was owned for at least 2 years, and was not amortised: 15%.

### **2.2.5. Deductions from corporation tax or income tax paid by legal entities**

Article 238 *bis* AB of the French tax code provides that legal entities subject in France to corporation tax or income tax can deduct from their operating result a sum equal to the buying price of original art works made by living artists, during a period of 5 years, provided that:

- these works are set out in a fixed asset account;
- the deduction done for each fiscal year does not exceed a tax discount equal to 60% of the amount of the buying price, with a cap of 5 for one thousand of the turnover, less the total of the payments set out in article 238 *bis* of the French tax code;
- the legal entity exhibits in a location accessible to the public or its employees, but not in its offices, the acquired art work during the period corresponding to the fiscal year of the acquisition as well as the 4 following years.

This tax incentive to art sponsorship ("*mécénat d'entreprise*") focuses on legal entities which either have a commercial purpose or offer professional services.

Moreover, article 238 *bis*-0 A of the French tax code provides that legal entities subject to corporation tax on their real profit ("*bénéfice réel*") can benefit from a tax credit equal to 90% of the payments made to buy cultural assets presenting the features of national treasures, having been refused the delivery of an export certificate by the French administration and for which the French state made a purchase offer to the owner. This tax credit is also applicable to payments made for the purchase of cultural goods located in France or abroad which acquisition would present a major interest for the national estate from a historical, artistic or archeological standpoint. The tax credit applies on corporation tax due for the fiscal year during which the payments were accepted. This tax credit cannot be above 50% of the tax amount

due by the legal entity for this fiscal year.

### **3. Implementation**

Let's have a look at the tax regime for each case, before examining the tax return declaration formalities and the payment of tax charges.

#### **3.1. Tax regime**

Each case below is studied taking into account, as a starting point, the fact that the sale transaction of the art work happens in France.

##### **3.1.1. In case of a transaction where both the buyer and the seller are tax residents in France**

If the art work acquisition is done directly between the buyer and the seller, without the intervention of an agent, it is necessary to check whether the seller is the artist author of the sold art work, or one of his beneficiaries.

If the seller is the artist author of the art work or one of his beneficiaries, subject to VAT, then the sale is subject to VAT at 5.5% and no artist resale right will be due by the buyer, following such transaction.

Otherwise, all other sales (done by third parties, such as collectors, gallerists, traders, etc.) are subject to the standard VAT rate of 20%. In case where those other sales trigger the involvement of a art market professional, as seller, buyer or intermediary, and where the artist is a resident in a member-state of the European Union or a state from the European Economic Area, the seller must pay the artist or his beneficiaries an artist resale right as soon as the sale price is above 750 euros.

The seller, tax resident in France, and subject to income tax, must pay capital gain tax, if there is any capital gain, to the French tax authorities, either by paying a flat-fee tax of 6% of the selling price, or, if this is preferable for him and if the seller has written evidence justifying the buying price and date of the sold art work, by paying tax through the standard capital gain tax regime. The rate is therefore 34.5% (including social security payments) with a 5% discount per year beyond the second year. There is therefore a full exemption of payment of capital gain tax after 22 years of ownership of the art work.

If the seller is a legal entity subject to corporation tax, capital gain tax from the special tax regime applies. If the legal entity owned the art work for less than 2 years, and that its shareholding capital has been fully paid up and is owned in full by either a natural person or a legal entity subject to income tax, then that legal entity will be able to include the capital gain generated by the sale of the art work to its earnings. The first ladder, up to the cap of 38,120 euros, will be subject to 15% tax for legal entities having a turnover below 7,630,000 euros. Above 38,120 euros, the tax rate of 33.33% applies. If the art work was detained for at least 2 years, and was not amortised (i.e. the art work was not classified as a fixed asset by the legal entity), this rate of 15% applies.

If the buyer is a legal entity, French tax resident, it can deduct from its profit a sum equal to the purchase



price of any original art work produced by living artists, during a period of 5 years, provided that the conditions set out in article 238 *bis* AB of the French tax code are met.

### **3.1.2. In case of a transaction where either the seller or the buyer is tax resident in another member-state of the EU**

This case targets art work acquisitions taking place in France, by parties where at least one of them is a tax resident in another member-state of the EU than France. This or these parties resident in another member-state of the EU can be an intermediary (the reseller subject to VAT), the buyer or the seller.

Indeed, transactions performed outside France are not subject to French VAT, payable to French tax authorities.

If no beneficiary margin occurs, during the art work transaction happening in France, then the delivery will be exempted of VAT.

If a beneficiary margin occurs, and if the intra-community acquisition of art works, collecting items or antiques is performed by someone subject to VAT or a legal entity not subject to VAT, and if said works were imported in the territory of another member-state of the EU, then the transaction will be subject to a reduced VAT rate of 5.5% on the beneficiary margin.

If a beneficiary margin is realised, and that the intra-community acquisition of art works, collecting items and antiques was subject to a delivery in another member-state by other people subject to VAT than resellers subject to VAT, then that beneficiary margin will also be taxed at a reduced VAT rate of 5.5%.

All other intra-community acquisitions of art works, collecting items and antiques during which a beneficiary margin is realised, will be taxed at the standard VAT rate of 20% on the beneficiary margin.

Article R. 122-2 of the French intellectual property code provides that the sale, in any case, triggers the payment of artist resale right pursuant to article L. 122-8 of the French intellectual property code only if at least one of the following two conditions are met: « *1° the sale is performed on the French territory ; 2° the sale is subject to VAT* ». Therefore, when the intra-community transaction has occurred in France, artist resale right must be paid by the seller, within the conditions set out in paragraph 3.1.1 above.

Capital gain tax is due in France if the seller is a French tax resident since that tax is borne by the seller of the art work. It is due, under their liability, by the intermediary who is a tax resident in France, and who participates in the transaction or, in case no intermediary gets involved, by the buyer when that buyer is subject to VAT and tax resident in France; in other cases, capital gain tax is due by the seller.

If the buyer is a legal entity tax resident in France, tax credits incentivising art sponsorship (“*mécénat*”) set out in article 238 *bis* AB of the French tax code apply, as explained in paragraph 3.1.1. above.

### **3.1.3. In case of transactions where either the seller or the buyer is tax resident outside the EU**

If the buyer is a legal entity tax resident outside the EU, no VAT is due by the seller.

If the buyer is a natural person tax resident outside the EU, VAT is due at the standard rate, by the seller subject to VAT.

As set out above in paragraph 3.1.2., artist resale right must be paid when the sale has been conducted in France, within the conditions set out in paragraph 3.1.1. above.

As set out above in paragraph 3.1.2., capital gain tax is due in France if the seller is a French tax resident. However, sales of art works or collecting items are exempted from capital gain tax when the seller of an art work outside the territory of the member-states of the EU does not have its tax residence in France. Therefore, if the sale was conducted outside the EU territory and the seller is a French tax resident, such seller must pay capital gain tax in France, to the French tax authorities.

Tax credits incentivising art sponsorship (“*mécénat*“) set out in article 238 *bis* AB of the French tax code apply to the buyer if the latter is a legal entity tax resident in France.

## **3.2. Tax return declaration formalities and payment of tax charges**

### **3.2.1 VAT**

VAT is paid during the occurrence of the sale of the art work, by the buyer.

Both the seller and the buyer, if they are subject to VAT and tax residents in France, have the obligation to declare such VAT (as revenue for the seller and as expense for the buyer) during the filling out of the CA3 declaration (monthly or quarterly) to their respective tax center (“*centre des impôts des entreprises*“).

### **3.2.2. Artist resale right**

Artist resale right, paid on the sale price, is borne by the seller. However, the liability of the payment of such artist resale right lies with the «*professional who intervenes during the sale*». In case of a public auction sale, article R. 122-9 of the French intellectual property code explicitly allocates the liability of the payment of artist resale right to the art market professional, who is either a “*société de ventes volontaires*” or the judicial auctioneer. In other cases, it is the art market professional intervening in the sale who bears such liability.

Article R. 122-10 of the French intellectual property code looks at two cases, relating to the obligations of this professional. If the professional responsible for the payment of the artist resale right is contacted for payment by the beneficiary of the artist resale right, the professional must pay such sum within 4 months. If the professional is not contacted by the beneficiary of the artist resale right for payment, he must inform, within 3 months from the end of the civil quarter during which the sale has occurred, one of the collecting societies registered on the list maintained by the French ministry of culture, setting out the sale date, name of the author and, if applicable, information relating to the beneficiary of the artist resale right.

### **3.2.3 Capital gain tax**

### **3.2.3.1. French tax resident subject to income tax**

The seller of an art work, French tax resident subject to income tax, becomes liable to capital gain tax due under income tax, at the occurrence of the sale.

However, this tax will only be paid after the seller has informed French tax authorities, by filling out and sending his income tax annual declaration form, of the existence of such capital gain, and after French tax authorities will have sent the seller his income tax notice, setting out the sum to be paid in relation to the capital gain tax.

### **3.2.3.2. French tax resident subject to corporation tax**

The seller of an art work, French tax resident subject to corporation tax, becomes liable to capital gain tax due under corporation tax, when the sale occurs.

However, this capital gain tax will only be paid after the seller has informed the French tax authorities, through the filling out and sending of its annual corporation tax declaration form, of the existence of such capital gain.

### **3.2.3.3. Deductions from corporation tax and income tax for legal entities**

Legal entities tax resident in France can deduct from their operating result an amount equal to the purchase price of original art works produced by living artists, during a 5 year' period, if certain conditions set out in paragraph 2.2.3. above are met.

In relation to legal entities subject to income tax, they must enclose a special declaration form n°2069-M-SD to their operating result declaration form for the fiscal year during which the expenses triggering the tax credit were made, pursuant to article 238 *bis* AB of the French tax code.

In relation to self-employed individuals (“*entreprises individuelles*”), and independently from the “*entreprise individuelle*” sending the special declaration form n° 2069-M-SD, natural persons who benefit from the tax credit must set out, on their income tax declaration forms, the amount of the tax credit set out on the special declaration form and enclose to their income tax declaration form, when they benefit from tax credits from tax sponsorship (“*mécénat*”) non attributed to previous tax years, a follow-up statement of their tax credit.

In relation to legal entities subject to corporation tax, legal entities not belonging to a tax group within the meaning of article 233 A of the French tax code, as well as parent companies of such groups, must fill out and send a special declaration form and, whenever they benefit from tax credits of the same nature not attributed to corporation tax on the previous fiscal years, a follow-up statement of such tax credits (form n°2069-MS1-SD) to the accountant in charge of the payment of corporation tax. Moreover, parent companies of a tax group must enclose, with all these documents, a copy of the special declaration forms for their subsidiaries.

In relation to legal entities subject to corporation tax, the special declaration form is no longer enclosed to the net profit declaration form, except for special declaration forms subscribed by legal entities members

of a tax group but without the status of parent company, which must annex the special declaration form to their operating result declaration form and send a copy to their parent company. The parent company will send a copy of such special declaration form, along with the statement of payment of corporation tax, to the accountant in charge of the payment of corporation tax.

The tax credit defined at article 238 bis AG of the French tax code is set off against either the income or corporation tax owed by the tax payer. As far as corporation tax is concerned, tax credit is set off against the tax balance.

However, whenever the amount of tax credit is higher than the amount of tax to pay, the unattributed balance can be used for the payment of tax during the next 5 fiscal years after the fiscal year during which the tax credit was granted.

These provisions apply both for legal entities liable for income tax or corporation tax.

## 4. Tools

### Check-list

- Inform the client of the tax rules applicable to the different cases of business transactions on art works;
- Ensure that the acquisition or sale is structured in a manner which is tax advantageous for the client;
- Ensure that the client complies with his tax obligations to declare and inform the French tax authorities, if need be;
- Ensure that the client settles, within the allocated timeframe, all tax due by himself, on the sale or purchase of art works, to the French tax authorities;
- Ensure that the client, legal entity, makes the most of the advantageous tax regime, relating to tax credits and tax incentives to art sponsorship (“*mécénat*”) and art works’ acquisition.

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