SALMON-LEGAGNEUR & ASSOCIÉS
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TAX ALERT
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First decision of the French Supreme Court [1] on the implementation of the limit of the intragroup interest rate:

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The Supreme Court reminds that a company can deduct interest on sums lent within its group at a higher rate than the safe harbor one[2] provided that it brings evidence that it could have obtained similar rate with an independent financing institution under similar conditions[3].

The company justified application of a rate at 8,2803% on the cash advances granted by companies of its group arguing that (i) the later had borrowed from a bank with a similar rate in the context of their LBO and (ii) considering the" intercreditor deed" with this bank, it could not grant any new security, situation preventing access to bank loans and thus to the possibility to bring evidence required to exceed the safe harbor rate. The company had also provided with extracts from financial reviews presenting averages of rates applied on LBO operations. The French tax administration had nevertheless admitted the tax deduction of intragroup interest up to the rate of 6.61% obtained by the company for a financing by the bank, at higher rate than the safe harbor rate.

The supreme court rejected all the arguments of the company and decided that the evidence could not be viewed as brought in hypothesis where a bank loan was not possible. It also stated that the rate had to be determined according to the characteristics of the loan (in present case a cash advance with no link with a loan in a LBO operation) and according to the characteristics of the company borrowing (and not those of its group).

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This decision consolidates the strict application of the law made by the 1st and 2nd degrees courts, by excluding the evidence as being brought in case where the evidence by a financing offer is impossible. Thus, intragroup interest rate higher than the safe harbor rate cannot be justified by reference to such impossibility but the risk of non-deduction can be considered as limited to the portion exceeding the rate of the bank financing of the company, if there is one.

Unfortunately this case law does not give to the Supreme Court the opportunity of appreciating evidence brought through supporting studies on the interest rate based on the case at stake, for which decisions as extension of the decision of the administrative court of Montreuil dated 30 March 2017[4] would be welcome.

[1] CE 18-3-2019 n° 411189, SNC Siblu
[2] Article 39, 1-3° of FTC
[3] Article 212, I of FTC
[4] N°1506904, Sté BSA