SALMON-LEGAGNEUR & ASSOCIÉS
AVOCATS À LA COUR

TAX ALERT
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Recent news regarding the tax treatment of the financial expenses of the companies (*articles 212 & 212 bis of FTC*) in particular of the real estate sector

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The draft official guidelines regarding the new limitation rule for deduction of financial expenses according to the "tax" EBITDA[1] is available for public review until September 30, 2019[2].

- **The draft guidelines confirm (notably) the definition of the financial expenses subject to the limitation rule, including notably the expenses related to the interest rate swaps or currency swaps (but symmetrically the related incomes)**
- **The draft guidelines give several precisions, notably on the impossibility to use for the appreciation of thin-capitalization situation the share capital instead of Net equity, which was a favorable tolerance often used in practice.**

The Supreme Court recognizes the possibility to **take into account bond yield** in order to support the conformity to the "market rate" of the interest rate applied to an intragroup loan[3].

- **The Supreme Court however precises that (i) the reference to bond market can be done only when the bond financing is a realistic alternative to the intragroup financing and that (ii) the enterprise cannot refer only to the rate it would have paid for a bond loan instead of an intragroup loan (due to the difference of nature & financing conditions not similar).**

The tax authorities precise in a public ruling that notional interest deducted by a lender (pursuant to the deduction of fictitious interest provided under Belgian law) are not assimilated to a rebate on the received interest retained for appreciating the minimum taxation condition applicable to a related lender, considering the absence of correlation between the financial incomes generated by the related loan and the notional interest expenses assessed on the Net equity and not on a receivable recorded in the assets[4].

- **This case illustrates the fact it is taken into account for the limitation, of the interest subject to the minimum taxation but not to the global taxation of the related lender.**
- **Conclusion would be different in case of tax deduction of an expense assessed on a receivable recorded in the assets.**

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[1] Reviewed in our alert dated January 3, 2019 further to the Finance Bill for 2019 n°*2018-1317 dated December 28, 2018*
[2] *BOI-IS-BASE-35-40-10-20190731*
[3] *French Supreme Court - Decision n° 429426, 429428 dated July 10, 2019*
[4] *BOI-RES-000041-20190904*