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A: Taxation of royalties for  
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## Summary and conclusions

This report provides a comprehensive analysis of the French tax framework applicable to royalties and gains derived from the use and transfer of intellectual property rights (“IP”) and other protected intangible rights, including name, image and likeness rights (“NIL”), collectively referred to as “IP/PR”.

This report first outlines how French civil law classifies various categories of intangible assets and the transactions involving them. It then analyses the French tax consequences attached to licences, transfers, bundled transactions and mixed contracts involving IP/PR. This report also studies how such rules apply to cross-border transactions according to French domestic law and France’s tax treaties. The analysis highlights the increasing convergence of French practices with OECD standards, particularly with regard to the definition of royalties, their differentiation from service fees, and the allocation of income across intricate contractual structures. In a final part, this report describes the tax considerations applicable to various cases that depict the principles developed in the previous sections.

### *Domestic law principles for taxation of domestic IP/PR transactions*

After presenting the legal background of IP/PR, in part two, this report studies domestic transactions involving IP/PR and how French law distinguishes between licensing arrangements, which generate royalty income, and transfers of intangible assets, which give rise to capital gains. The classification is based on the substance of the rights granted rather than on the contractual terms, which directly govern the tax treatment applicable to both the transferor and the transferee.

Royalties are usually taxed as they come in, with one-off and non-contingent payments being recognised right away. Other forms of payment, such as upfront or milestone payments, require a review of the contract terms to determine if they reward discontinuous performance, ongoing access, or a service provided at a certain point in time. In principle, payments made under licensing agreements are deductible for the licensee, provided they are not excessive, do not form part of the acquisition cost of an intangible asset and are not the result of abnormal management. If the license itself constitutes a transferable

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and permanent source of profit, the licensee may capitalise the royalties and amortise the corresponding asset.

This part also details the French IP Box regime. This regime consists of the application of a 10% tax rate to net income derived from patents, innovative software and some industrial rights. Eligibility is restricted to qualifying fixed assets and depends on the taxpayer's own R&D efforts.

### *Domestic law principles for the taxation of cross-border IP/PR transactions*

In a third part, this report analyses the French domestic tax rules that govern cross-border transfers and licenses of IP/PR. It provides an overview of the principles that determine the source of income and the nexus that allows France to tax such income, as well as the special regimes applicable to international transactions. Under French law, royalties and payments related to the acquisition or use of IP/PR are considered to originate from a French source and are subject to withholding tax if the debtor is resident in France or carries out the activities giving rise to the payment in France, regardless of the location of the recipient.

France levies withholding tax on French-source royalties and related payments. These levies involve reporting obligations that are subject to strict penalties. Payments made to entities that benefit from preferential tax regimes or are located in non-cooperative jurisdictions are subject to anti-abuse rules. Moreover, as long as stringent requirements on beneficial ownership, efficient management, and anti-abuse measures are fulfilled, intra-EU payments between affiliated entities may be exempted from withholding tax under the Interest and Royalty Directive.

### *Application of IP/PR-related treaty provisions to royalties*

This section explains how royalty income from cross-border IP/PR transactions is taxed under French tax treaties. The focus is on the definition of royalties, their scope, the nexus for source taxation and treaty-based limitations or exemptions. While most of France's extensive treaty network follows the OECD Model, several treaties – particularly those with developing countries – reflect UN Model features or retain earlier OECD concepts. Consequently, some treaties still classify income or gains from equipment leasing or use or productivity-based payments as royalties, which diverges from current OECD recommendations. Furthermore, some treaties, such as the French-US one, extend the royalty concept to transfers of intangible assets where remuneration depends on future exploitation.

French tax treaties uniformly cover payments for copyrights (sometimes expressly including software), trademarks, patents and know-how, with domestic law being used to interpret any undefined terms. Depending on the terms of the treaties, payments for accumulated industrial or commercial experience qualify as royalties where the remuneration reflects a transfer of substantive, confidential know-how rather than services.

Treaties generally permit France to levy royalties at reduced or zero rates of withholding tax, with common caps of 5%, 10% or 15%. However, many recent treaties provide for full exemption. Some treaties include most-favoured-nation clauses or special provisions for artistic royalties. Anti-abuse measures, such as beneficial ownership requirements, limitation of benefits clauses, and targeted anti-abuse rules, restrict access to the benefits provided by tax treaties in cases of abusive arrangements.

Finally, mixed contracts involving both know-how and services must be analysed in

accordance with OECD principles. Only the portion attributable to genuine know-how qualifies as royalties, unless the “ancillary rule” applies. Consistently, depending on the French tax treaties terms, courts and doctrine hold that technical assistance, maintenance or standard professional services do not constitute royalty payments unless they involve a true transfer of operational know-how.

*Limitation on the deduction of payments for IP/PR transfers paid to non-resident*

Section five details the limitations that France places on the deduction of royalties and IP/PR-related payments made to non-residents. France relies on several anti-avoidance rules. Article 155 A targets payments to foreign entities lacking substance for services provided in France. Article 209 B (CFC rules) applies French tax to the profits of foreign subsidiaries located in jurisdictions that offer them a privileged tax regime. Article 57 allows for adjustments to be made to transfer pricing, including that relating to hard-to-value intangibles. The abnormal management act doctrine can also lead to a tax reassessment in the event of excessive or insufficient royalties. It should also be noted that since tax treaties override domestic rules, many of them include anti-abuse provisions.

## Part one: Introduction and legal background

### 1.1. How different types of transferable IP/PR are protected under non-tax law

French intellectual property law is based on a variety of systems that protect technical, aesthetic, or informational creations, which generally involve filing an application with the National Institute of Industrial Property (INPI).

The patent protects technical innovations that are novel, involve an inventive step, and are susceptible to industrial application. Issued by the INPI, it confers an exclusive right of exploitation for twenty years from the date of filing, subject to the payment of annual fees.<sup>3</sup> European patents, issued by the European Patent Office (EPO), have the same effect as a French patent and confer the same rights. The patent holder may bring an infringement action for any unauthorised use of the patented product or process.

Copyright protects any original work that reflects its author’s personal imprint, regardless of genre or form.<sup>4</sup> Originality is assessed on a case-by-case basis and is independent of artistic merit or complexity. However, ideas themselves are not protected. The intangible ownership of a work remains separate from the physical medium that embodies it.<sup>5</sup>

In France, it is possible to benefit from a cumulative protection both by copyright and by a registered design or model. A design or model may be registered with the INPI to protect the overall appearance of any industrial or artisanal product resulting from its contours, colours, shapes, textures, as well as the material from which it is made or its decoration.<sup>6</sup>

Only distinctive signs may be registered as trademarks with the INPI.<sup>7</sup> Distinctiveness

<sup>3</sup> Intellectual Property Code, art. L. 611-2 and sub.

<sup>4</sup> Intellectual Property Code, art. L. 112-1.

<sup>5</sup> Intellectual Property Code, art. L. 111-1.

<sup>6</sup> Intellectual Property Code, art. L. 511-1

<sup>7</sup> Intellectual Property Code, art. L. 711-1 and sub.

is assessed on the filing date in relation to the designated goods or services. A trademark that has not been put to genuine use for five years may be revoked, and its owner cannot initiate infringement proceedings, particularly against a later mark.

The notion of trade secrets, as set out in Directive (EU) 2016/943 and transposed into French law, protects technical or business information that is secret, has commercial value and is subject to reasonable confidentiality measures. This usually includes customer or supplier data, business plans and market strategies. The regime provides companies with enhanced tools to prevent the unlawful acquisition or misuse of their know-how. Courts may grant provisional and protective measures, such as prohibiting use or disclosure or ordering seizures, and may issue injunctions or award damages. Final judgements may also be published.

In France, every individual has an exclusive right over their likeness and may oppose any capture or disclosure of their image without prior consent, unless this is justified by an overriding public interest relating to freedom of expression. Image rights can be transferred in accordance with the French “contractual freedom” principles.<sup>8</sup>

## **1.2. Types of transactions involving the transfer of IP/PR**

### *1.2.1. Transfers of the use of IP/PR where the transferor retains some meaningful right to use the IP/PR*

In non-tax law, a license is granted when the holder of an exclusive intellectual property right permits a third party to carry out actions that both parties agree fall within the scope of that exclusive right.<sup>9</sup> In the absence of a clear exclusivity clause, the licensor may retain substantial rights and continue to exploit the asset or grant multiple licenses. A prohibition on the licensor’s own exploitation only results from an expressly agreed exclusivity, interpreted in concreto.

Accordingly, granting a right of use limited to a specific country while retaining significant exploitation rights for the licensor is treated as a license rather than a transfer. Ownership remains with the licensor, who may negotiate exclusivity clauses, as well as active and passive sales restrictions, in compliance with competition law.<sup>10</sup>

Similarly, the licence regime governed by articles 1709 et seq. of the Civil Code allows the granted rights to be “exclusive or non-exclusive”, enabling the licensor to engage in parallel exploitation and define its conditions, including sublicensing and limits on transferability by the licensee. Therefore, the agreement remains a licence even when the granted asset is restricted to a specific field of use.

Consistent with this principle, a transfer of the use of IP/PR rights for a limited period where the licensor retains meaningful rights of use also legally qualifies as a license.

<sup>8</sup> Civil Code, art. 9.

<sup>9</sup> Intellectual Property Code, arts. L. 714-1 (trademark), L. 613-8 (patent), L. 513-2 (design or model).

<sup>10</sup> Versailles Administrative Court of Appeal, 25 June 2013, No. 11VE03516, SAS BAYER.

1.2.2. *Transfers of the ownership of IP/PR where the transferor gives up all rights for future use of IP/PR*

Under non-tax law, the distinction between the transfer of an IP/PR and the grant of a right to use that IP/PR (i.e. a license) depends on whether ownership is transferred. According to article 1583 of the Civil Code, a sale is finalised once the parties have agreed on the asset and the price, at which point ownership is transferred automatically.

- Impact of contingent consideration for a transfer of the ownership of IP/PR

For a transfer of ownership to be valid, the price must be “determined or determinable” as defined in article 1591 of the Civil Code. This condition is met if the contract provides a comprehensive and objective pricing formula, even if some of the consideration is contingent on future outcomes. Formulas that are precise, such as those that rely on accounting indicators, capped earn-outs, expert determination mechanisms or arbitration, are valid so long as they do not depend on future agreement or the unilateral will of a party.<sup>11</sup> Conversely, vague references or mere price ceilings may result in the contract being deemed invalid due to the price being indeterminate.<sup>12</sup>

- Impact of contractual rights of reversion (i.e., a contractual clause which allows rights to IP/PR to revert to the licensor upon a specified occurrence)

A clause providing for the reversal of the transfer of an intangible asset to the transferor may be characterised as either a suspensive condition, which defers the transfer, or a resolutive condition, which allows the transfer to occur immediately but be undone retroactively.

With a suspensive condition, ownership, risk transfer and tax consequences only arise when the condition is fulfilled.

By contrast, a resolutive condition does not prevent the initial transfer. The sale is finalised at completion in accordance with article 1591 of the Civil Code, and it is only the subsequent occurrence of the condition that triggers reciprocal return. Therefore, the resolutive provision has no effect on the transfer of ownership on the date of transfer as long as it is not fulfilled.<sup>13</sup> Parties must allocate risk contractually for the interim period, as default statutory rules apply only in the absence of an agreement.

It should be noted that neither type of clause alters the legal classification of a transaction as a transfer of ownership.

<sup>11</sup> Court of cassation, commercial chamber, 21 September 2022, No. 20-16.994; Court of cassation, commercial chamber, 25 September 2012, No. 11-23.319 and Court of cassation, commercial chamber, 6 November 2012, No. 11-26.582.

<sup>12</sup> Court of cassation, commercial chamber, 21 September 2022, No. 20-16.994.

<sup>13</sup> Conseil d'Etat, 6 December 1978, No. 5871; Conseil d'Etat, 6 February 1981, No. 22189; Conseil d'Etat, 30 November 1990, No. 80567.

- Impact of rights of transferor to sue for infringement

The holder of the IP/PR right may bring infringement actions.<sup>14</sup> Licensees may also bring infringement actions subject to certain conditions. Following a transfer, enforceability depends on the proper registration of the transfer in the relevant national patent, trademark and design registers. Typically, the transferee may only sue for infringements occurring after publication of the transfer, while the transferor retains the right to sue for earlier infringements. However, parties may agree to a retroactive effect from the filing date, which would enable the transferee to recover damages for acts occurring before the transfer.<sup>15</sup>

Since ownership is a prerequisite for bringing an action (it should be noted, however, that under certain specific conditions set out in articles L.615-2, L.716-4-2, and L.521-2 of the Intellectual Property Code, licensees may also bring infringement actions), a clause reserving the right to sue to the transferor after the transfer would have limited or no practical effect because the transfer deprives the transferor of the capacity to sue, which is an essential condition for bringing a civil action in France,<sup>16</sup> as he would no longer be the holder of the right.

Therefore, such a clause must be precisely drafted with regard to its material and temporal scope and must be aligned with registration formalities to avoid being unenforceable.

If the clause deprives the transferee of an essential part of its ownership right, the clause may be deemed invalid, potentially leading to the transaction being reclassified as a licence, depending on the overall structure of the contract.

### 1.3. Determining whether transactions involve transfers of rights to IP/PR or something else

#### 1.3.1. *Transfers of tangible property/inventory with rights to retransfer or otherwise use embedded IP rights (e.g., patent, copyright or trademark)*

In the context of a single, combined contract, the legal classification depends on the essential obligation, that is, the obligation that reflects the contract's primary purpose, as defined by statute or the contract's underlying rationale.<sup>17</sup> For instance, if an agreement involves the transfer of an industrial prototype alongside rights to use the intangible elements necessary for its exploitation, such as know-how, technical files or manufacturing methods, the main purpose of such an agreement remains the transfer of the tangible prototype. From a non-tax perspective, such an agreement would be characterised as a sale of a tangible asset, with the right to use the embedded know-how being considered merely an accessory with no autonomous legal regime of its own.

However, the various components of a single contract may be subject to distinct legal regimes if they can be isolated without jeopardising the unity of the transaction. An example

<sup>14</sup> Intellectual Property Code, arts. L. 615-2 (for patents), L.716-4-2 (for trademarks) and L. 521-2 (for designs and models).

<sup>15</sup> CJEU, 4 February 2016, C-163/15, M. H. c/ Breiding Vertriebsgesellschaft mbH, CJEU, 22 June 2016, C-419/15, Thomas Philipps GmbH & Co KG c/ Grüne Welle Vertriebs GmbH.

<sup>16</sup> Civil Procedure Code, art. 30.

<sup>17</sup> Commercial law Memento, para. 10059 (Francis Lefebvre, 2025).

of this would be a contract for the sale of an automated production line that also involves the transfer of proprietary software essential to its operation. In this case, depending on the agreement's terms, the software transfer would follow its own legal rules (i.e. a transfer of software).

The parties may also provide a contractual qualification, which does not bind the courts but creates a presumption.<sup>18</sup>

### 1.3.2. *Transfers of software with limited rights to copy but no resale rights*

Where a transaction provides permanent access to software “without any right to make copies or resell”, it is characterised as a sale of a copy under positive law, i.e. a transfer of ownership of the tangible or digital copy of the software.<sup>19</sup> For example, it corresponds to the distribution of a software copy by a software publisher/copyright holder. In such a case, IP/PR (reproduction, communication, adaptation, etc.) are not transferred. Prohibitions on making copies beyond what is strictly necessary for legitimate use, such as reproduction for technical reasons, essential modifications or creating a backup copy, remain lawful.<sup>20</sup> However, the first making available of the copy within the EU/EEA by the software publisher/copyright holder will exhaust the distribution right attached to that specific copy.<sup>21</sup> This renders any contractual clauses that prohibit the resale of that copy and its associated license unenforceable.<sup>22</sup>

Conversely, where the transaction limits the duration of the user's rights (e.g. subscription-based access or recurring payments granting only temporary use), the agreement is treated as a lease/license or other non-proprietary usage agreement. Ownership of the copy remains with the provider, and the prohibition on resale applies for the specified duration.<sup>23</sup>

### 1.3.3. *Transfers of know-how provided in the form of technical services*

A transfer of know-how in the form of technical services may involve:

- experts assisting a client in optimising the configuration and performance of software supplied by a provider;
- training local engineers to implement a new production line or complex IT system;
- supplying specialised design or calculation methods for constructing complex structures or products.

In contract law, the core obligation in a transfer of know-how is the “obligation to communicate” and teach the know-how, rather than the grant of an exclusive right. This aligns the arrangement with a services contract, as a know-how “licence” is understood to

<sup>18</sup> Court of cassation, commercial chamber, 2 February 1988, No. 86-16.879.

<sup>19</sup> Court of cassation, commercial chamber, 6 March 2024, Nos. 22-22.651; 22-18.818 and 22-23.657.

<sup>20</sup> Intellectual Property Code, art. L. 122-6 and L.122-6-1.

<sup>21</sup> Intellectual Property Code, art. L. 122-6, 3<sup>o</sup>.

<sup>22</sup> CJEU, 3 July 2012, C-128/11, *UsedSoft* and Court of cassation, commercial chamber, 6 March 2024, Nos. 22-22.651; 22-18.818 and 22-23.657.

<sup>23</sup> *Droit des affaires* 2025, para. 87 (Editions Législatives, 2025).

mean communication and assistance rather than the transfer of any intellectual property rights, since no proprietary title exists over know-how itself.<sup>24</sup>

Technical services involved in know-how transfers generally comprise technical assistance, training, documentation, practical demonstrations (“show-how”), and sometimes the provision of the necessary tools for implementation.

Therefore, the transfer of know-how in the form of ‘technical services’ is not legally considered to be a transfer of IP/PR. Rather, it is a business contract involving the structured communication of confidential, substantial and specific information, accompanied by technical assistance and training. This contract is protected by confidentiality and non-use obligations.

#### *1.3.4. Use of NIL as part of performing services*

Legally, even when included in a service agreement, authorisation to use NIL rights is treated as an image-rights license, as the individual retains control over this personality right. Such agreements are governed by general contract law and article 9 of the Civil Code, as well as “contractual freedom” principles. They must define clear limits on duration, scope and media.

Therefore, for example, in a social media management contract involving the creation of visual content and the use of NIL rights for specific products, or in marketing services requiring the use of a person’s NIL rights, authorisation constitutes a NIL rights license, which is distinct from the service component of the contract.

## **Part two: Domestic law principles for taxation of purely domestic IP/PR transfers**

### **2.1. Characterising transactions for tax purposes**

IP/PR transfers encompass various transactions: transfers and handover, licenses and sub-licenses. Licenses and sub-licenses generate royalty income, whereas transfers and handover generate capital gains.

For a legal entity, a transfer refers to any operation that removes an intangible asset from a company’s balance sheet and usually involves a change of ownership.

For an individual, a transfer refers to a transaction involving the removal of an asset’s ownership, along with all the associated property rights (right to exploit, licence, bring infringement proceedings, etc.), from the transferor’s estate to that of the transferee.

An intangible asset license giving rise to royalty income and expense is an agreement whereby the owner of an intellectual property right authorises another person, known as the licensee, to use all or part of that right under the terms and conditions set out in the contract (for a specified period and territory) in consideration for a fee.

A sub-license is a transaction in which the owner of a license for an intangible asset grants a third party the right to use all or part of that asset in return for royalties. Unlike

<sup>24</sup> P. LE TOURNEAU, *Contrats du numérique 2025/2026*, para. 116.13 and 116.14 (Dalloz, 2025).

an intangible asset sub-licence, the transfer of a copy of such an asset does not entail transferring the rights to commercially exploit it. In French domestic law, there is no real distinction between royalties and remuneration for services for corporate tax purposes (except in cross-border situations where tax treaties apply). It is only for the purposes of applying the French IP Box regime that there is a specific definition of eligible royalties limited to the licensing or sublicensing of certain specific intangible assets (see section 2.3.2).

## **2.2. Timing of income recognition**

### *2.2.1. Lump sum and non-contingent payments*

In the case of “ordinary law” royalties, the principle is to tax them as the amounts are received by the payee, with deferred income to be recognised at the balance sheet date (percentage-of-completion method for accounting and tax purposes). Hence, lump sum payments and noncontingent payments are taxed as they are received.

### *2.2.2. Upfront and milestone payments*

Regarding upfront or milestone payments, which compensate for the right to use IP assets exclusively for a given period of time with a third party at different stages of product development and potentially based upon certain events or achievements, there are three possible qualifications:

- They constitute remuneration for discontinued services with successive deadlines, provided that they relate to (1) phases of performance separated by time, (2) payments separated by time, and (3) are spread over several financial years. In such cases, royalties are taxed on a staggered basis using the percentage of completion method for accounting and tax purposes.
- They remunerate an ongoing service consisting of exclusive access to research results. In such cases, royalties are taxed on a staggered basis.
- They constitute consideration for services under the general rules of law; the service being provided as soon as the contract is concluded or the event giving rise to payment of the upfront or milestone occurs (considering their non-refundable nature). This results in immediate taxation of royalties for the year in which the event occurs.

Only an analysis of the contractual clauses of agreements providing for such payments can allow for the determination of the tax treatment of these payments. Payment terms do not influence the classification of the contract (e.g. the existence of instalments is only an indication of discontinuous performance).

In some cases, adjustments of the taxable income may be required if the taxation is immediate or if taxation is staggered.

### 2.3. Tax treatment applicable to types of income from IP/PR transfers

#### 2.3.1. *The ordinary tax treatment of royalties and gains derived from IP transfers*

Income derived from the transfer, licensing and sub-licensing of intellectual property rights and similar rights is taxable under the general rules of law.

For companies subject to corporate income tax, income derived from the transfer, licensing and sub-licensing of intellectual property rights and similar rights falling under the standard tax regime is subject to the standard corporate income tax rate (i.e. 25 %).

For entities taxed under the personal income tax regime (i.e. legally “see-through entities” whose partners are subject to personal progressive income tax and thus taxed directly in proportion to their share in the company’s capital), income from licenses or sub-licenses is subject to progressive income tax and social security contributions. Gains related to the transfer of intangible assets qualify as short- or long-term capital gains or losses, taxed at a fixed rate only if the transferred assets constitute fixed assets.<sup>25</sup> Otherwise, the income is taxed under the ordinary progressive income tax scale.

Royalties paid in consideration for the grant of intellectual property rights are, as a rule, deductible when determining taxable profits, provided that they do not form part of the acquisition cost of an intangible asset and that they meet the general conditions for deduction of expenses.

#### 2.3.2. *The IP box regime*<sup>26</sup>

The new optional French IP Box regime applying to financial years ending on or after 31 December 2019, allows for the application of a 10% reduced tax rate to net profit from sales, licenses or sub-licenses of eligible intangible assets (whether the involved company is subject to personal income tax or corporate income tax).

This regime applies both to companies subject to CIT and to French partnerships subject to personal income tax (for the latter, only the share of eligible net income corresponding to the rights of partners subject to corporate income tax or individual partners who are personally, continuously, and directly involved in the company’s activities<sup>27</sup> will be eligible for the reduced tax rate of 10%).

It should be noted that individuals are not eligible for this specific regime, although article 93 quater of the FGTC provides that net income (after deducting R&D expenses and expenses incurred in developing the asset or managing the licensing) received by an inventor who is a natural person and his or her heirs in respect of the transfer or licensing of a copyrighted software program, a patentable invention, or an intangible asset that meets

<sup>25</sup> A fixed asset here is defined as an asset in the accounting meaning (an identifiable item, controlled by the company, that will generate future economic benefits) intended for long-term use in the company’s business and not for resale within the ordinary course of business, and which does not qualify as inventory – see BOI-BIC-CHG-20-10-10, para. 1, 13 October 2014.

<sup>26</sup> General Tax Code, art. 238.

<sup>27</sup> See art. 156, I, 1° bis of the General Tax Code for a definition of the notion of “individual partners who are personally, continuously, and directly involved in the company’s activities”.

the conditions of the IP Box regime,<sup>28</sup> are subject to a specific reduced tax rate of 10%, increased by social security contributions

The scope of eligible income is limited to transfers, licenses, and sub-licenses of qualifying intangible fixed assets – namely patents, utility certificates, supplementary protection certificates, plant variety certificates, industrial manufacturing processes, and copyright-protected software.<sup>29</sup> Income derived from non-qualifying intangibles, such as trademarks, know-how, designs or general copyrights, falls outside the scope of the regime. These assets must be fixed assets or eligible to qualify as fixed assets.<sup>30</sup>

The tax base for the reduced rate is determined in two steps: the net income is calculated, and then an annual liability ratio referred to as the “Nexus ratio” is applied to the net income.

This net income is equal to the difference between the income earned during the financial year from eligible intangible assets and the R&D expenses directly related to those assets and incurred, directly or indirectly, by the company.

The Nexus ratio links the benefit of the regime to the amount of R&D expenses incurred in France, excluding those incurred by related companies. It measures the company's own R&D effort in relation to that outsourced to other entities in the same group in France or abroad (outsourcing expenses for R&D carried out by related entities<sup>31</sup> and expenses incurred for the acquisition of eligible intangible assets are excluded from the numerator of this ratio). This ratio is incremental and, therefore, takes into account R&D expenses that have contributed to the development of the eligible asset since its inception.

## 2.4. Treatment of payments by the transferee of IP/PR

### 2.4.1. Royalties

Royalties paid in connection with the licensing of a patent, formula or process, or for the use of a trademark, are deductible from taxable income.<sup>32</sup> Moreover, a royalty paid to the licensor in respect of a patent license may be classified as a deductible operating expense (as opposed to being classified as a fixed asset – see below), provided that this license qualifies as an operating license and that the royalty does not amount to consideration for the transfer of the patent.<sup>33</sup>

In order to qualify as deductible expenses, the royalties must not arise from an abnormal act of management, must not be excessive in amount, and must not form part of the cost price of inventory items.

The recognition of a fixed asset on the balance sheet is a prerogative of ownership. However, royalties paid under patent or trademark license agreements may, in certain circumstances, be regarded as forming part of the acquisition cost of an intangible asset and, as such, may not be deductible. The French Conseil d'Etat held that a licensee must recognise the rights arising from the license agreement as fixed assets if these

<sup>28</sup> General Tax Code, art. 238, I, 1°, 2° or 4°.

<sup>29</sup> BOI-BIC-BASE-110-10, 3 May 2023.

<sup>30</sup> BOI-BIC-BASE-110-20, para. 1, 3 May 2023.

<sup>31</sup> See art. 39, 12 of the General Tax Code for a definition of related companies.

<sup>32</sup> BOI-BIC-CHG-40-20-10, para. 10, 10 June 2013.

<sup>33</sup> BOI-BIC-CHG-40-20-10, para. 10, 10 June 2013.

rights constitute a regular source of profit, have sufficient permanence and could be transferred.<sup>34</sup>

Thus, if these three conditions are not met, the payments are treated as deductible expenses under the conditions of general rules of law.

Finally, a licensing contract relating to intangible assets is treated as an intangible asset, and its cost price may be amortised.<sup>35</sup>

### 2.4.2. *Payments for the transfer of IP/PR*

IP/PR transfer costs are systematically capitalised, provided they meet the capitalisation criteria under general rules of law.<sup>36</sup>

- The asset must be identifiable, i.e., either separable from the entity's activities or resulting from a legal or contractual right, even if that right is not transferable or separable;
- The asset must have a positive economic value, reflected in the future economic benefits expected to flow to the entity, regardless of whether the entity holds legal ownership;
- The asset must be under the control of the entity;
- It can be valued with sufficient reliability.

With regard to software, the Administration accepts that companies may include in their deductible expenses the acquisition costs of software with a unit value excluding VAT not exceeding €500.<sup>37</sup>

### 2.4.3. *Amortisation of IP/PR*

As soon as the asset is capitalised, it must be amortised over its estimated useful economic life, as determined by industry practice or justified by circumstances specific to the company, which must then substantiate these circumstances.<sup>38</sup>

There are specific amortisation rules for certain categories of intangible assets.

For tax purposes, the authorities allow patents to be amortised over five years, provided that the same amortisation period is used for accounting purposes.<sup>39</sup>

Also, when the intangible asset is acquired through annual royalties, the annual amortisation may be equal to the royalties paid for the year, provided that the patent is recorded as a fixed asset for the estimated value of the royalties.<sup>40</sup> In this case, it is amortised according to the number of annual instalments provided for in the contract.

<sup>34</sup> Conseil d'Etat, 21 August 1996, No. 154488, SA Sife.

<sup>35</sup> Conseil d'Etat 10 October 1960, No. 45183.

<sup>36</sup> BOI-BIC-CHG-20-10-10, para. 1, 13 October 2014.

<sup>37</sup> BOI-BIC-CHG-20-30-10 para. 40, 1 March 2017.

<sup>38</sup> Conseil d'Etat, 3 February 1989, No. 58260.

<sup>39</sup> BOI-BIC-AMT-10-20 para. 12, 31 December 2012.

<sup>40</sup> BOI-BIC-BASE-40-20-20-10 para. 190, 12 September 2012 and BOI-BIC-AMT-10-30-30-10 para 350 et seq., 8 September 2014.

## 2.5. Treatment of transactions with bundled IP/PR

In a purely domestic context and excluding the application of the IP Box regime, the transfer of patents and similar rights combined with resale rights is treated the same as a patent transfer (see 2.3 and 2.4). The same applies to transfers of software or similar IP when combined with the provision of related services and to transfers of rights to use NIL rights when combined with the provision of related services.

However, for the purposes of applying the IP Box regime, with regard to transfers of eligible assets, the R&D income and expenses relating to such eligible assets must be separated from the income and expenses arising from the provision of related services. In this context, the share of income and/or expenses that is eligible for the IP Box regime can be separated from other income and/or expenses. This can be done by referring to the terms of the transfer, license or sub-license agreements. If these are unavailable, a reasonable estimate of the value of the services can be used by means of a transfer pricing analysis. This analysis can use internal or external comparables to determine the portion of income relating to the eligible asset, as well as the payments representing compensation for ancillary services or rights.

## Part three: Domestic law principles for the taxation of cross-border transactions

### 3.1. Source of income from payments in IP/PR transfer transactions

#### 3.1.1. Source rules applicable to non-resident taxpayers

Under domestic law, article 164 B, II, b and c of the FGTC provides that royalties, payments related to the acquisition of IP/PR and to services provided or used in France (including services related to IP/PR) are of French source when the debtor is resident or established in France.

Article 182 B of the FGTC, which provides for domestic withholding tax applicable in particular to royalties (see section 3.2) and payments related to services provided or used in France (including services related to IP/PR) further states that the source of income arising from the use or transfer of IP/PR is determined primarily by reference to the debtor's activity and the place of payment.

Royalties, remuneration of services and gain on sale of an IP/PR income are also considered to originate from France when the debtor (the person incurring the payment) performs the activity related to the payment of this income in France, even if the debtor is neither resident nor established in France.

Case law considers that the term “debtor” refers to the person who actually pays the sums, even if that person acts only as an intermediary and is not the final debtor.<sup>41</sup>

<sup>41</sup> Regarding income of a different nature but subject to the same source rules: Paris Administrative Court of Appeal, 11 June 1996, No. 93-9063; Paris Administrative Court of Appeal, 14 March 2006, No. 00-6777, SARL Metropolitan Models; Versailles Administrative Court of Appeal, 23 Oct. 2012, No. 10VE02223; Versailles Administrative Court of Appeal, 15 November 2022, Nos. 21VE00439-21VE00440, Minister v. Performing Right Society Ltd.

### *3.1.2. Source rules applicable to resident taxpayers and permanent establishment*

In the case of a transfer or license of IP/PR, article 209, I of the FGTC provides that the place where the business is carried out determines the jurisdiction of corporate income taxation. Accordingly, the French administrative doctrine<sup>42</sup> considers that income derived from the transfer or license of IP/PR abroad by a French company is inseparable from the French business activity and therefore taxable in France, unless the IP/PR are allocated to a foreign permanent establishment of the company, provided such registration is justified by the establishment's activity.<sup>43</sup> The French Conseil d'Etat has confirmed this principle.<sup>44</sup>

The Conseil d'Etat has likewise held that a capital gain realised by a French company on the sale of patents abroad is taxable in France, where the company does not have any permanent establishment through which it could have exploited the patents itself in the foreign country.<sup>45</sup>

For individuals and entities subject to personal income tax, since such tax is levied on a worldwide basis pursuant to article 4 A of the FGTC, royalties or gains on the sale derived from the transfer or license of IP/PR by a French tax resident are taxable in France.

### **3.2. Nexus for taxation of income from cross-border IP/PR transfer transactions**

#### *3.2.1. Nexus rules applicable to payments to resident taxpayers and French permanent establishments of non-resident taxpayers*

For corporate income tax purposes, income derived from the transfer or license of IP/PR abroad by a French company is inseparable from its French activity and therefore taxable in France, unless the rights are recorded as assets of a foreign permanent establishment. The same applies in the case of a French permanent establishment of a non-resident taxpayer.

The place of incorporation in the company's bylaws generally determines whether its head office is located in France. Where the statutory head office is fictitious, the effective place of business prevails (i.e. the place where the company's management, administrative, and control functions are principally carried out).<sup>46</sup>

Both the Conseil d'Etat and the French administrative doctrine identify three key criteria for determining whether a business is habitually conducted abroad and is therefore not taxable in France:

- A permanent and autonomous establishment abroad;
- Representatives abroad acting as true agents conducting business on behalf of the company;
- Operations conducted abroad constituting a complete business cycle distinguishable from operations carried out in France.<sup>47</sup>

<sup>42</sup> BOI-IS-CHAMP-60-10-20 para. 230, 12 September 2012.

<sup>43</sup> BOI-IS-CHAMP-60-10-20 para. 230, 12 September 2012.

<sup>44</sup> Conseil d'Etat, 3 November 1947, No. 77656; Conseil d'Etat, 6 April 1949, No. 95254.

<sup>45</sup> Conseil d'Etat, 3 February 1933, Nos. 21898 and 21899.

<sup>46</sup> BOI-IS-CHAMP-60-10-20, para. 1, 12 September 2012.

<sup>47</sup> BOI-IS-CHAMP-60-10-10, para. 60, 27 June 2014.

For personal income tax purposes, royalties or capital gains arising from the transfer or licensing of IP/PR by a French tax resident are taxable in France. According to article 4 B of the FGTC, individuals are considered French tax residents if they have their household, main place of residence, main professional activity, or centre of economic interests in France.<sup>48</sup>

### 3.2.2. *Nexus rules applicable to payments to non-resident taxpayers*

Royalties and acquisition payments for IP/PR are deemed to originate in France if the debtor conducts activities related to the payment in France, even if not domiciled or established there.

Pursuant to article 182 B of the FGTC, such payments are subject to withholding tax in France if the recipient is liable for personal or corporate income tax and does not have a permanent professional installation in France.<sup>49</sup>

The Conseil d'Etat ruled that withholding tax was applicable to royalties paid to a US corporation, since, as a commercial entity, this corporation falls within the scope of corporate income tax for the purposes of article 182 B.<sup>50</sup> Article 182 B's scope refers to corporate income tax's substantive scope rather than its territorial scope. Withholding tax applies even where the recipient is not effectively taxable in France.

Article 182 B of the FGTC establishes a withholding tax on royalties and related income. The taxable income is the gross amount of the sums paid. The standard rate equals the corporate income tax rate (25%) or 15% for artistic or sporting performances in France.

Withholding tax under article 182 B is not discharging; it functions as a prepayment of income tax. Beneficiaries subject to French income tax or corporate tax may credit the withholding against their ultimate tax liability in France. When the withholding tax exceeds the final tax payable, refunds are possible.

Two exceptions should be noted:

- Under article 235 quater of the FGTC, loss-making companies (or permanent establishment) located in the EU, Iceland or Norway, may obtain a temporary refund of withholding taxes upon request. This gives rise to a deferred tax liability until profitability is restored.
- Under article 235 quinquies of the FGTC, foreign opaque entities established in the EU, Norway, Iceland or Liechtenstein may, upon request, obtain a refund corresponding to the difference between withholding tax paid and tax computed on a net basis, after deduction of related expenses.

Article 182 B also covers payments for services performed in France, including research, technical assistance, prospecting, or the use of rented equipment located in France, as well as transfers of technical information or studies exploited in France.

Payers must comply with extensive reporting, including quarterly withholding tax return (form 2494-SD), annual declarations for royalties exceeding €2,400 per beneficiary

<sup>48</sup> BOI-PAT-IFI-10-20-20, para. 50, 8 June 2019.

<sup>49</sup> BOI-IR-DOMIC-10-20-20-50, para. 40, 29 June 2022.

<sup>50</sup> Conseil d'Etat, 25 May 2007, No. 288288, GIE Compagnie industrielle des Polyéthylènes de Normandie.

(DAS2), and specific copyright reports. Non-compliance can trigger significant penalties, reaching 50% of the unreported amounts in the DAS2.

### **3.3. Special rules that characterise or otherwise treat cross-border transactions differently than purely domestic transactions**

#### *3.3.1. Payments to entities established in Non-Cooperative States or Territories*

For payments made in connection with the exploitation or transfer of IP/PR to a recipient established in a Non-Cooperative State or Territory (NCST), as listed by ministerial order pursuant to article 238-o A of the FGTC,<sup>51</sup> the applicable withholding tax rate is increased to 75%.<sup>52</sup>

This punitive rate does not apply if the debtor demonstrates that the transaction is genuine and is not intended to shift profits. The burden of proof lies with the debtor.

This punitive withholding tax is a final payment of income tax and does not entitle the taxpayer to a refund of any excess payments.

Currently, 14 NCSTs are listed, namely: Anguilla, Antigua and Barbuda, the Turks and Caicos Islands, Vanuatu, Fiji, Guam, the US Virgin Islands, Palau, Panama, Russia, Samoa, American Samoa, and Trinidad and Tobago.

#### *3.3.2. Payments to entities established in States with privileged tax regime*

Article 238 A of the FGTC establishes a presumption of non-deductibility in France for payments to foreign recipients benefitting from a privileged tax regime in their State (payments to accounts located in such jurisdictions are also covered). The burden of proof lies with the taxpayer, who must demonstrate both the reality of the transaction and the arm's length nature of the remuneration.<sup>53</sup>

The non-deductible sums are reintegrated in the taxable income and, provided certain criteria are satisfied,<sup>54</sup> regarded as distributed profits and subject to withholding.

Article 238 A of the FGTC deems a person to benefit from a privileged tax regime if they are subject to a tax burden more than 40% lower than that which would have applied in France.

Additionally, royalties paid to entities established in NCSTs under article 238-o A of the FGTC<sup>55</sup> are deductible only if the debtor demonstrates that the expenses relate to genuine transactions, are not excessive, and primarily serve purposes other than locating such payments in NCST.

<sup>51</sup> Arrêté No. ECOE2500299A, 18 April 2025, issued pursuant to the second para. of art. 238-o A, 1 of the General Tax Code.

<sup>52</sup> General Tax Code, art. 182 B, III.

<sup>53</sup> BOI-BIC-CHG-80-20, para. 90, 2 September 2015.

<sup>54</sup> General Tax Code, arts. 109, 1, 1° ; 109, 1, 2° and 110.

<sup>55</sup> Anguilla, Antigua and Barbuda, the Turks and Caicos Islands, Vanuatu, Fiji, Guam, the US Virgin Islands, Palau, Panama, Russia, Samoa, American Samoa, and Trinidad and Tobago.

### 3.3.3. *Exemption of intra-group royalties*

Article 182 B bis of the FGTC, transposing Directive 2003/49/EC (the “Interest and Royalties Directive”), provides for a withholding tax exemption on royalties paid between associated companies established within the EU.

The royalties covered are those defined by article 2 of the Directive 2003/49/EC: “payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work, including cinematograph films and software, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience. This exemption does not apply to the transfer of rights. Case law has also excluded remuneration for services.<sup>56</sup>

To qualify, royalties must be paid between associated companies. A company is deemed associated with another where (i) one company directly holds at least 25% of the other; or (ii) both are “sister” entities directly held at a minimum of 25% by the same parent company. In all cases, the qualifying shareholding must be maintained for at least two consecutive years, or, failing that, be subject to a formal commitment to hold the shares for the required period.

The debtor of the royalties must be a corporate entity (such as an SA, SAS, SCA, SARL or EPIC).

The recipient must prove that it is the beneficial owner of the royalties, that its place of effective management is in the EU, that it has one of the eligible corporate forms, that it is subject to a corporate income tax equivalent in its state of effective management and that it is an associated company of the debtor.

The exemption is denied where the recipient is directly or indirectly controlled by residents of non-EU States through arrangements intended to benefit from the exemption under article 182 B bis.

Likewise, the exemption does not apply where the royalties exceed the amount that would have been agreed upon in the absence of associated relationships.

## **Part four: Application of IP/PR-related treaty provisions to royalties**

### **4.1. Treaties covering royalty income**

In the French tax treaty network (over 120 tax treaties), nearly all contain provisions on royalties. The sole exception is the tax treaty concluded with Monaco,<sup>57</sup> which does not include a dedicated article but refers indirectly to royalty taxation and deductibility.

### **4.2. Wording of treaty provisions covering royalty income**

Most French tax treaties are based on the OECD Model. However, treaties concluded by France with developing countries generally follow the UN Model, which addresses the

<sup>56</sup> Versailles Administrative Court of Appeal, 9 July 2019, No. 16VE02825, SA Damolin Etrechy.

<sup>57</sup> France-Monaco tax treaty (1963).

specific challenges these states face by providing simple, reliable, and efficient mechanisms for the collection of withholding taxes.

Some tax treaties entered into by France deviate from the current definition of royalties set out in the latest OECD and UN models.

Thus, rental income derived from the use of industrial, commercial, or scientific equipment is classified as royalties under the tax treaties concluded between France and Canada,<sup>58</sup> Chile,<sup>59</sup> Greece<sup>60</sup> and Italy.<sup>61</sup> This approach aligns with the former paragraph 2 of article 12 of the 1977 version of the OECD Model Tax Treaty, which defined royalties as including payments for the use of, or the right to use, industrial, commercial, or scientific equipment.

Nonetheless, the OECD Model Tax treaty excluded any reference to equipment leasing from the article on royalties from 1992 onwards, as the OECD concluded that such rental payments constituted consideration for a financial transaction that should not be subject to withholding tax regarding the low margins typically involved.<sup>62</sup> However, the tax treaties concluded between France and Albania,<sup>63</sup> Japan<sup>64</sup> and Spain<sup>65</sup> and based on the OECD Model, concluded after 1992, continue to include income derived from the leasing of industrial, commercial, or scientific equipment within the definition of royalties. The French-Uzbek tax treaty<sup>66</sup> stipulates that rental income shall be considered as royalties only to the extent that there is a transfer of know-how.

Some tax treaties also characterise income from the transfer of some intangible assets as royalties, even though the OECD comments explain that a payment made in consideration for the transfer of full ownership of an asset should not be regarded as remuneration “for the use of, or the right to use” such asset, and therefore cannot be treated as a royalty.<sup>67</sup> For example, the France–US tax treaty includes the following in its definition of royalties: “gains derived from the alienation of any such right or property described in this paragraph that are contingent on the productivity, use or further alienation thereof.”<sup>68</sup>

The France–Mexico tax treaty<sup>69</sup> adopts a simplified approach, not referring to the concept of “further alienation” but includes as royalties, gains derived from the transfer of eligible IP/PR, provided that the considerations for such transfer are based on the productivity or use of said property or rights.

Under both treaties, where industrial property rights are transferred for a fixed price, the gain would not be regarded as royalties but as a capital gain.

<sup>58</sup> Art. 12 *France-Canada Income and Capital Tax treaty* (1975).

<sup>59</sup> Art. 12 *France-Chile Income and Capital Tax treaty* (2004).

<sup>60</sup> Art. 12 *France-Greece Income Tax treaty* (2022).

<sup>61</sup> Art. 12 *France-Italy Income and Capital Tax treaty* (1989).

<sup>62</sup> B. Gouthière, *Les Impôts dans les affaires internationales*, para. 20080, (Francis Lefèbvre, 2022).

<sup>63</sup> Art. 12 *France-Albania Income and Capital Tax treaty* (2002).

<sup>64</sup> Art. 12 *France-Japan Income Tax treaty* (1995).

<sup>65</sup> Art. 12 *France-Spain Income and Capital Tax treaty* (1995).

<sup>66</sup> Art. 12 *France-Uzbekistan Income and Capital Tax treaty* (1996).

<sup>67</sup> OECD Model Tax Convention on Income and on Capital: Commentary on Article 12, para. 8.2 (21 November 2017).

<sup>68</sup> Art. 12 *France-United States Income and Capital Tax treaty* (1994).

<sup>69</sup> Art. 12 *France-Mexico Income Tax treaty* (1991).

### 4.3. Scope of royalty articles

The scope of the article on royalties derived from tax treaties is consistent with the scope of the OECD and UN Model tax treaties (whose definition of royalties is very similar to that of the OECD).

#### 4.3.1. Copyrights and neighbouring rights

French tax treaties typically cover remuneration of any kind for the use or concession of the use of a copyright or neighbouring right on literary, artistic, or scientific work, including cinematographic movies.<sup>70</sup> This concept is not defined as such by the OECD Model Convention. It is therefore necessary to refer to the meaning of these terms as defined by domestic law.<sup>71</sup>

In France, copyright only covers the rights that the author has over their own work, as the French Intellectual Property Code states that copyright applies to “*the author of an intellectual work*”<sup>72</sup> and that intellectual property, as defined in article L. 111-1, is “*independent of the ownership of the material object*.”<sup>73</sup>

France has chosen to include an express reference to software in its new treaties (such as the France-US tax treaty)<sup>74</sup> as the OECD recommended adopting a revised version of paragraph 2 of article 2 of the treaty model that would either omit any reference to the nature of the copyright involved or, alternatively, expressly mention software.<sup>75</sup>

In some tax treaties, such as the France-Uzbekistan one,<sup>76</sup> French administrative doctrine includes software within the definition of copyrights, while the treaty itself does not refer to software in its article on royalties.<sup>77</sup>

#### 4.3.2. Trademarks

French tax treaties also cover income derived from the use or licensing of a trademark. As the OECD Model does not define trademarks, domestic law applies.

In France, a trademark is an intangible asset that becomes part of the owner’s assets upon registration, effective from the filing date, for a renewable period of ten years.<sup>78</sup> The Paris Administrative Court of Appeal<sup>79</sup> ruled that trademarks that are registered by a company for long-term exploitation constitute an intangible fixed asset. According to the French Intellectual Property Code,<sup>80</sup> a trademark is defined as “a sign that makes it

<sup>70</sup> OECD Model Tax Convention on Income and on Capital, art.12, para. 2 (21 Nov. 2017).

<sup>71</sup> Paris Administrative Court of Appeal, 23 March 1995, No. 92-12625, Société Publi-Union.

<sup>72</sup> Intellectual Property Code, art. L. 111-1.

<sup>73</sup> Intellectual Property Code, art. L. 111-3.

<sup>74</sup> Art. 12 France-United States Income and Capital Tax treaty (1994).

<sup>75</sup> OECD Model Tax Convention on Income and on Capital: Commentary on Article 12, para. 13.1 (21 November 2017).

<sup>76</sup> Art. 12 France-Uzbekistan Income and Capital Tax treaty (1996).

<sup>77</sup> BOI-INT-CVB-UZB-20, para. 210, 4 November 2016.

<sup>78</sup> Intellectual Property Code, art. L. 712-1.

<sup>79</sup> Paris Administrative Court of Appeal, 1 February 1994, Nos. 92-1218 and 92-955, Gesfi International.

<sup>80</sup> Intellectual Property Code, art. L. 711-1, L. 711-2 and L. 711-3.

possible to clearly distinguish the goods and services of one undertaking from those of its competitors. It may consist of a word, name, slogan, letters, numbers, logo, image or video. A trademark may also be a combination of these various elements.”

#### 4.3.3. *Patents*

Remuneration derived from the use or the licensing of a patent is also covered by French tax treaties. Under domestic law, a patent grants, upon registration, exclusive rights to exploit an invention in France for up to twenty years.<sup>81</sup> Innovations must satisfy conditions of novelty, inventiveness, and industrial application. Works that are already protected by copyright and designs that are covered by other forms of protection are not patentable.<sup>82</sup>

Under French domestic law, the creator of a design has the exclusive right to exploit, sell or authorise the sale of that design, provided certain conditions set out in the Intellectual Property Code are met. This is without prejudice to any rights arising under copyright law. These creators can therefore benefit from dual protection under copyright law and through their exclusive exploitation rights.

#### 4.3.4. *Information concerning industrial, commercial or scientific experience*

Consistent with the OECD Model, French treaties also cover payments for industrial, commercial, or scientific know-how, provided the remuneration reflects a transfer of knowledge rather than services.

The French Administrative doctrine about the former IP Box regime (article 39 terdecies of the FGTC) states, based on the European regulation's definition of know-how licenses,<sup>83</sup> that know-how is a “set of technical information that is secret, substantial, and identified in any appropriate manner”<sup>84</sup> and that it encompasses manufacturing processes, know-how and accumulated experience. This experience is reflected in confidential knowledge, such as studies, reports, plans, drawings, market trends, pricing studies, market analyses, material specifications and supplier lists.

Case law<sup>85</sup> provided an example of accumulated experience, stating that amounts paid under a technical and commercial supervision agreement, regardless of the agreement's title, must be regarded as information relating to experience acquired in technical and commercial fields and thus, royalties under the France-US tax treaty.

### 4.4. **Nexus for source taxation of royalty income**

Under tax treaties concluded by France, it is standard practice that, in order to benefit from the treaty's withholding tax provisions, royalties must be regarded as having been paid to

<sup>81</sup> BOI-BNC-CHAMP-10-10-20-20, para. 160, 12 September 2012.

<sup>82</sup> *Intellectual Property Code*, art. L. 111-1 (copyrights) and art. L. 511-1 (designs and patterns).

<sup>83</sup> EC Council Regulation (EEC) No. 556/89, 30 November 1988, on know-how licenses, arts. 1-7, amended by EC Council Regulation (EEC) No. 151/93, 23 December 1992.

<sup>84</sup> BOI-BIC-PVMV-20-20-20, para. 400, 14 April 2014.

<sup>85</sup> Rouen Administrative Court of Appeal, 3 March 2011, No. 0902041, SAS Cuisine Solution Europe.

a resident of the other state.<sup>86</sup> The OECD comments define “payment” as “the fulfilment of the obligation to place funds at the disposal of the creditor in the manner required by contract or by custom.”<sup>87</sup> However, the France–US treaty specifies that royalties are deemed paid when they are first recorded as an expense.<sup>88</sup>

Tax treaties generally stipulate that if the beneficial owner conducts business in the source state through a permanent establishment, and if the asset generating the royalties is related to that establishment, the article relating to business profits (article 7 of the OECD Treaty Model) applies instead.

According to French administrative doctrine,<sup>89</sup> recording the asset on the permanent establishment’s balance sheet suffices to establish such a link, provided that the permanent establishment holds economic ownership of the asset.<sup>90</sup>

#### 4.4.1. *Specific anti-avoidance rules*

Certain French tax treaties include targeted anti-abuse provisions.

The France–Japan tax treaty, as amended on 11 January 2007,<sup>91</sup> introduced a clause that aims to deny beneficial ownership to individuals receiving royalties from a resident of the other state if the sole purpose of the arrangement is to obtain treaty benefits, thereby specifically targeting conduit structures.<sup>92</sup>

The France–Azerbaijan tax treaty<sup>93</sup> excludes from the treaty advantages cases where rights were created or transferred mainly to exploit treaty provisions. This provision will be superseded by the Multilateral Instrument’s general anti-abuse rule once it comes into effect with regard to this treaty.

#### 4.4.2. *Limitation of benefits clauses*

Certain French tax treaties include limitation of benefits clauses targeting royalties.

For instance, article 30 of the France–US tax treaty<sup>94</sup> contains such a clause that prevents residents of third states from using conduit arrangements to improperly obtain treaty benefits.<sup>95</sup> The article requires recipients to meet specific “qualified resident” tests

<sup>86</sup> OECD Model Tax Convention on Income and on Capital, art.12 (21 November 2017).

<sup>87</sup> OECD Model Tax Convention on Income and on Capital: Commentary on Article 12, para. 8.3 (21 November 2017).

<sup>88</sup> Art. 12, 6, d France-United States Income and Capital Tax treaty (1994).

<sup>89</sup> B. Gouthière, *Les Impôts dans les affaires internationales*, para. 21010, (Francis Lefebvre, 2022).

<sup>90</sup> OECD Model Tax Convention on Income and on Capital: Commentary on Article 12, para. 21.1 (21 November 2017).

<sup>91</sup> Art. 12 France-Japan Income Tax treaty (1995).

<sup>92</sup> Prior to its amendment by the Multilateral Instrument, the France–Japan tax treaty contained an additional anti-abuse clause addressing, in general terms, situations aimed at reducing withholding taxes where the principal purpose could be inferred from the parties’ intent. This provision was not exclusive of other forms of abuse. It has since been removed following the incorporation of the general anti-abuse rule introduced by the Multilateral Instrument.

<sup>93</sup> Art. 12 France-Azerbaijan Income and Capital Tax treaty (2001).

<sup>94</sup> Art. 12 France-United States Income and Capital Tax treaty (1994).

<sup>95</sup> French National Assembly, Bill Annex, 22 December 2005, authorising the approval of the protocol to the tax treaty between the Government of the French Republic and the Government of the United States of America for the avoidance of double taxation and the prevention of fiscal evasion and fraud.

based on factors such as listing status, ownership, or effective management.<sup>96</sup>

The tax treaty between France and Japan also contains a similar limitation of benefits clause<sup>97</sup> that limits treaty benefits to natural persons, public entities, companies listed on a regulated market in either State and companies that are at least 50% owned by persons who are eligible for treaty benefits.<sup>98</sup>

The France-Cyprus tax treaty<sup>99</sup> includes a similar clause regarding royalties that denies treaty benefits to resident companies predominantly foreign-owned and subject to low taxation in their residence state.

## 4.5. Withholding taxation of royalties

### 4.5.1. Withholding tax rates

French tax treaties provide for either an exemption from domestic withholding tax or a reduced rate. Typically, the withholding tax rates are capped at 5% (as in treaties between France and Albania,<sup>100</sup> Spain,<sup>101</sup> Greece<sup>102</sup> or Switzerland),<sup>103</sup> 10% (as in treaties with Bangladesh,<sup>104</sup> the Republic of Korea,<sup>105</sup> Ghana<sup>106</sup> and Romania),<sup>107</sup> or 15% (as in treaties with Bolivia<sup>108</sup> or the Republic of Congo).<sup>109</sup>

The current trend is generally towards exemption from withholding tax, as set out in treaties concluded by France with Germany,<sup>110</sup> Japan,<sup>111</sup> United Kingdom,<sup>112</sup> South Africa<sup>113</sup> and Sri Lanka.<sup>114</sup>

Some treaties also stipulate different rates depending on the income category. For instance, the France–Brazil<sup>115</sup> tax treaty sets the following rates: 10% for copyright, 25% for trademark royalties and 15% for all other cases.

Certain treaties, in particular the France–Lebanon tax treaty,<sup>116</sup> do not limit the maximum withholding tax rate applicable to royalties. This results in the application of the domestic withholding tax rate in the source state.

<sup>96</sup> BOI-INT-CVB-USA-10-30, para. 40, 16 September 2013.

<sup>97</sup> Art. 22 A *France-Japan Income Tax treaty* (1995).

<sup>98</sup> BOI-INT-CVB-USA-10-30, para. 40, 16 September 2013.

<sup>99</sup> Art. 13 *France-Cyprus Income and Capital Tax treaty* (1981).

<sup>100</sup> Art. 12 *France-Albania Income and Capital Tax treaty* (2002).

<sup>101</sup> Art. 12 *France-Spain Income and Capital Tax treaty* (1995).

<sup>102</sup> Art. 12 *France-Greece Income Tax treaty* (2022).

<sup>103</sup> Art. 13 *France-Switzerland Income and Capital Tax treaty* (1966).

<sup>104</sup> Art. 12 *France-Bangladesh Income Tax treaty* (1987).

<sup>105</sup> Art. 12 *France-Korea, Republic of* (1979).

<sup>106</sup> Art. 12 *France-Ghana Income and Capital Tax treaty* (1993).

<sup>107</sup> Art. 12 *France-Romania Income and Capital Tax treaty* (1974).

<sup>108</sup> Art. 12 *France-Bolivia Income and Capital Tax treaty* (1994).

<sup>109</sup> Art. 12 *France-Congo Income, Inheritance and Transfer Tax treaty* (1987).

<sup>110</sup> Art. 15 *France-Germany Income and Capital Tax treaty* (1959).

<sup>111</sup> Art. 12 *France-Japan Income Tax treaty* (1995).

<sup>112</sup> Art. 12 *France-United Kingdom Income and Capital Tax treaty* (2008).

<sup>113</sup> Art. 12 *France-South Africa Income and Capital Tax treaty* (1993).

<sup>114</sup> Art. 12 *France-Sri Lanka Income Tax treaty* (1981).

<sup>115</sup> Art. 12 *France-Brazil Income Tax treaty* (1971).

<sup>116</sup> Art. 17 *France-Lebanon Income and Inheritance Tax treaty* (1962).

#### 4.5.2. *Most-favoured-nation clause*

Some French tax treaties include a clause that allows the application of a lower withholding tax rate than that stipulated in the treaty. This applies when the other contracting state has granted lower withholding rates to other states in its own tax treaties, with which France may be considered to be in competition.

For instance, after a tax treaty was signed between Libya and the United Kingdom in 2008, royalties from Libya or France were only taxable in the state of residence.<sup>117</sup>

#### 4.5.3. *Taxation of royalties paid to artists*

To promote cultural interaction, some tax treaties offer specific exemptions or reduced withholding tax rates on royalties for the use or licensing of copyrighted literary, artistic or scientific works.

Under the France–Algeria treaty,<sup>118</sup> a 5% withholding tax is applied to copyright royalties, except for those relating to cinematographic films, rather than the standard 10%. Similar specific reduced rates exist in treaties concluded with Brazil,<sup>119</sup> Morocco,<sup>120</sup> Tunisia<sup>121</sup> and Thailand.<sup>122</sup>

Furthermore, some treaties, including those with Canada,<sup>123</sup> the United States,<sup>124</sup> Israel<sup>125</sup> and Sri Lanka,<sup>126</sup> offer complete exemptions for specific copyright royalties, particularly those related to cultural films. However, conversely, to protect tax revenues, some treaties, such as those with Spain,<sup>127</sup> Italy,<sup>128</sup> and Mexico,<sup>129</sup> exclude cinematographic film royalties from these exemptions.

### 4.6. **Technical assistance and technical services**

In the case of “mixed” contracts involving both the transfer of know-how, which qualifies the consideration as royalties, and the provision of technical assistance, for which the remuneration does not qualify as royalties, France strictly follows the OECD recommendations. In such cases, the total consideration must be broken down according to services covered by the agreement or apportioned on a reasonable basis using appropriate

<sup>117</sup> BOI-INT-CVB-LBY, para. 20, 4 November 2016.

<sup>118</sup> Art. 12 *France-Algeria Income, Capital and Inheritance Tax treaty* (1999).

<sup>119</sup> Art. 12 *France-Brazil Income Tax treaty* (1971).

<sup>120</sup> Art. 16 *France-Morocco Tax treaty* (1970).

<sup>121</sup> Art. 19 *France-Tunisia Tax treaty* (1973).

<sup>122</sup> Art. 12 *France-Thailand Income Tax treaty* (1974).

<sup>123</sup> Art. 12 *France-Canada Income and Capital Tax treaty* (1975).

<sup>124</sup> Art. 12 *France-United States Income and Capital Tax treaty* (1994).

<sup>125</sup> Art. 12 *France-Israel Income and Capital Tax treaty* (1995).

<sup>126</sup> Art. 12 *France-Sri Lanka Income Tax treaty* (1981).

<sup>127</sup> Art. 12 *France-Spain Income and Capital Tax treaty* (1995).

<sup>128</sup> Art. 12 *France-Italy Income and Capital Tax treaty* (1989).

<sup>129</sup> Art. 12 *France-Mexico Income Tax treaty* (1991).

allocation keys to determine the amounts that qualify as royalties, which are subject to withholding tax.<sup>130</sup>

However, if a service is the main part of a mixed contract, the “ancillary rule” applies. This means that the tax treatment of the main service applies to the other ancillary services covered by the agreement.<sup>131</sup>

For instance, in relation to software maintenance services performed in Brazil, Spain, Morocco and Thailand – consisting of technical assistance to users and the regular provision of software updates – the Conseil d’Etat held<sup>132</sup> that such services did not constitute royalties under the relevant tax treaties. These services could not be regarded as ancillary to the licensing of software rights, for which royalties were paid.<sup>133</sup> In this case, as the license could be purchased independently of the maintenance, which was billed separately, the maintenance could not be considered intrinsic to the right to use the software.<sup>134</sup>

Furthermore, practice and doctrine agree that payments for commercial assistance under a franchise agreement are not royalties under OECD model conventions, unless such assistance is minimal compared to the grant of trademark rights.<sup>135</sup>

#### 4.7. Royalties and service fees

According to the OECD tax treaty model comments, the scope of the notion of services is defined negatively, where treaties contain a dedicated article on royalties with a narrow definition that does not encompass “the provision of information concerning industrial, commercial, or scientific experience”. In such cases, even services involving the transfer of know-how cannot be treated as royalties under the applicable treaty.

Conversely, where a broad definition of royalties applies, it is necessary to establish whether there has been a transfer of pre-existing know-how (i.e. the recipient has learned from the provider how to use the acquired information independently, without the provider’s involvement in its application or use)<sup>136</sup> in order to determine whether the payment qualifies as a royalty. This generally relates to non-public industrial, commercial or scientific information based on acquired experience with practical applications in business operations, which may confer an economic advantage if disclosed.<sup>137</sup>

Thus, the tax authorities have endorsed the OECD’s interpretation that services based on the provider’s standard professional expertise used to perform work for the recipient do not generate royalties.<sup>138</sup> The Administration<sup>139</sup> states that payments made for access to

<sup>130</sup> OECD Model Tax Convention on Income and on Capital: Commentary on Article 12, para. 11.6 (21 November 2017).

<sup>131</sup> OECD Model Tax Convention on Income and on Capital: Commentary on Article 12, para. 11.6 (21 November 2017).

<sup>132</sup> Conseil d’Etat, 18 June 2021, No. 433319, Sopra Steria Group.

<sup>133</sup> The public rapporteur considered that this classification was not self-evident, given that the right of use was neither exclusive nor transferable, was limited to the client’s own needs, and did not entail any transfer of the software’s intellectual property to the licensee.

<sup>134</sup> The maintenance services could not be considered as royalties, insofar as the maintenance agreement merely allowed the client to benefit from the provider’s standard professional know-how.

<sup>135</sup> B. Gouthière, *Les Impôts dans les affaires internationales*, para. 23030, (Francis Lefebvre, 2022).

<sup>136</sup> OECD Model Tax Convention on Income and on Capital: Commentary on Article 12, para. 11.1 (21 November 2017).

<sup>137</sup> OECD Model Tax Convention on Income and on Capital: Commentary on Article 12, para. 11 (21 November 2017).

<sup>138</sup> OECD Model Tax Convention on Income and on Capital: Commentary on Article 12, para. 11.2 (21 November 2017).

<sup>139</sup> Ministerial Reply No. 45139: Official Journal of the French National Assembly, 4 June 1984, p. 2624, BOCKEL J.-M.

particular knowledge or experience that has not been publicly disclosed, where the licensor does not intervene in its application or guarantee the outcome, qualify as royalties for the purposes of the relevant tax treaty. Conversely, amounts paid under a service contract in which one party performs work for the other using its standard professional knowledge do not constitute royalties.

Additionally, according to case law,<sup>140</sup> payments made in exchange for the transfer of confidential information relating to acquired experience do not constitute royalties if such information did not confer the necessary IP/PR for developing a specific product, and if the confidentiality clause solely protects a trade secret.

A ruling by the Versailles Administrative Court of Appeal<sup>141</sup> also establishes that a “transfer” of know-how (and thus classification as royalties under a “broad” treaty definition) only occurs if one “learns how to do”. In other words, the recipients must be able to use the know-how themselves, rather than merely benefit from it.

#### 4.8. Licenses and sales of goods

In France, the concepts of sales of goods and royalties are clearly defined separately, with no overlap between the two. These distinctions, which are based on whether ownership rights are transferred, help to avoid significant classification issues (see section 2.4 on the transferee taxation).

### Part five: Limitations on the deduction for IP/PR transfers paid to non-residents

#### 5.1. Related party vs. non-related party rules

##### 5.1.1. *Article 155 A of the FGTC: royalties paid to foreign entities for services provided in France*

Article 155 A of the FGTC ensures that income derived from services or commercial exploitation related to intellectual property (image, name or voice rights, copyrights, neighbouring rights, and industrial or commercial property rights) by an individual or an entity (notably acting in the sport or artistic field) that is resident or established in France, is taxable in France even if the remuneration is paid to a foreign entity. The provision primarily targets arrangements where the foreign recipient, controlled by the French taxpayer, lacks substantial commercial activity or is located in a jurisdiction where it benefits from a privileged tax regime.<sup>142</sup> This provision also applies to non-residents for services provided in France or for rights exploited there.

<sup>140</sup> Paris Administrative Court of Appeal, 13 April 2005, No. 00PA02801, Parke-Davis SCA.

<sup>141</sup> Versailles Administrative Court of Appeal, 4 June 2019, Nos. 17VE01685 and 17VE02481, Sopra Steria Group.

<sup>142</sup> As defined by art. 238 A of the General Tax Code (see section 3.3).

*5.1.2. Article 209 B of the FGTC: royalties received by foreign subsidiaries or permanent establishments located in a low-tax jurisdiction*

Article 209 B of the FGTC establishes a controlled foreign company (“CFC”) rule. Where a French company subject to corporate income tax either (i) operates a business abroad or (ii) directly or indirectly holds more than 50% of the shares, voting rights, or financial interests in a foreign legal entity subject to a preferential tax regime,<sup>143</sup> the profits of that business or entity are taxable in France.

This regime does not apply to EU entities unless the structure is an artificial arrangement, nor to non-EU entities where genuine business purposes and substantial activities can be demonstrated. An anti-abuse rule reduces the control threshold to 5% where the foreign entity is majority-owned by French companies or by companies controlled by the French entity or dependent on the French entity.<sup>144</sup>

*5.1.4. The abnormal management act theory*

In the context of an IP/PR licensing arrangement, the French tax authorities may contest the level of royalties on the basis of the abnormal management act theory, as defined by the Conseil d’Etat.<sup>145</sup> An act is considered abnormal if a company impoverishes itself deliberately and for reasons that are not in its own interest. In such cases, the Administration can reassess the company and reintegrate the part of the remuneration regarded as abnormal into its taxable result. If the remuneration is excessive, the paying company will be reassessed. On the contrary, if the remuneration is considered too low, the beneficiary will be reassessed.

Although the administration does not generally question business decisions, it is responsible for identifying and proving any abnormalities.

This principle applies to the waiver and, in case of royalties, is regarded as insufficient. However, a royalty waiver may be considered normal if it is intended to safeguard the existence or value of licensed assets that are essential to the company’s activities.<sup>146</sup>

**5.2. Discussion of the rules applicable to treaty recipients vs. non-treaty country recipients**

In France, international tax treaties take precedence over domestic tax law pursuant to article 55 of the French Constitution. In the event of a conflict, the provisions of the treaty prevail over national rules. However, courts must first verify that the disputed tax has been validly established under domestic law before assessing whether the treaty prevents its application.<sup>147</sup> The Conseil d’Etat has clarified that treaties are subsidiary: they cannot, alone, form the basis for taxation in France. Therefore, a treaty does not invalidate, but merely renders inapplicable, conflicting domestic rules.

Thus, with regard to the above-mentioned mechanisms and the one referred to in section

<sup>143</sup> As defined by art. 238 A of the General Tax Code (see section 3.3).

<sup>144</sup> Within the meaning of art. 57 of the General Tax Code.

<sup>145</sup> Conseil d’Etat, 21 December 2018, No. 402006, Société Croë Suisse.

<sup>146</sup> Conseil d’Etat, 10 February 2016, No. 371258, SA Hôtels et Casino de Deauville.

<sup>147</sup> Conseil d’Etat, 28 June 2002, No. 232276, Sté Schneider Electric.

3.3.1 (article 238 A of the CGI on payments to entities established in States with privileged tax regimes), limiting the deductibility of royalties and payments made in connection with IP/PR transfers, it is necessary to examine whether the applicable convention contains an express provision allowing their application. If not, these domestic mechanisms may only be implemented if their application does not contradict the tax treaty. Thus, these mechanisms can only be applied to the extent that the agreement expressly permits or does not preclude their application.<sup>148</sup>

French treaties generally contain specific or general anti-abuse clauses<sup>149</sup> that achieve a similar effect.

Furthermore, in certain circumstances, domestic law provisions also lead to the non-application of tax treaties. Thus, article 155 A of the FGTC<sup>150</sup> is similar to that provided for in article 17 of the OECD Model Tax Convention, which deals with artists and athletes.

In this context, the Conseil d'Etat has held that article 155 A remains applicable notwithstanding treaty provisions, since it establishes a presumption that remuneration paid to a foreign entity is in fact taxable in France if the service is performed in France or the intellectual property is exploited in France. As a result, the anti-abuse rule applies directly to the French resident taxpayer. This reasoning is consistent with administrative doctrine, which considers that tax treaties do not preclude the application of Article 155 A.<sup>151</sup>

## Part six: Case studies

### 6.1. Exclusive license to manufacture and sell patented products globally

In a purely French context:

- For the licensor, if this license includes the granting of the use of a patent for consideration to enable the licensee to manufacture these products, then an objective allocation key should be used to determine the portion of the remuneration corresponding to patent licensing royalties. If the licensor is a company, this “royalty” portion may then be subject to the IP Box regime (provided that the various criteria of the regime are met) and thus be taxed at the reduced rate of 10%, while the other remuneration will be subject to the standard applicable tax rate (in the case of a natural person, again subject to compliance with the applicable criteria, the latter may qualify for the individual inventor regime and this portion of the net income will be taxed at a rate of 10%). If no such option is selected, or if the use of patents is granted for free under this license, then the entire remuneration will be subject to the standard corporate income tax or personal income tax rate, as applicable.
- If the licensee is a company, it may either deduct the remuneration from that license as an expense or record it as an asset if the licensed rights constitute a regular source of profit, have sufficient permanence and could be transferred.

<sup>148</sup> Conseil d'Etat, 11 July 1991, No. 57391, Lummus.

<sup>149</sup> *OECD Model Tax Convention on Income and on Capital*, art.29 (21 November 2017).

<sup>150</sup> See section 5.1.1.

<sup>151</sup> Instr., 5 October 1982, BODGI 5 K-1-82 para. 24.

In a cross-border context, if it is agreed in the license agreement that the use of patents needed to manufacture products is granted for free, then naturally the remuneration will be considered as payment for manufacturing and distribution services and will therefore be taxable only in the beneficiary's country in accordance with the tax treaty's article on business profits.

Conversely, if there is no free grant of patent rights, the treatment of remuneration for such a license depends mainly on the wording of the license agreement:

- In principle, the total amount of remuneration provided for should be broken down according to the different services, and each of these categories of remuneration should be subject to its own tax treaty regime (article 7 on business profits or 12 on royalties of the model tax treaty);
- However, if the remuneration for the grant of the use of the patent is not the main purpose of the agreement because its terms suggest that the main purpose of the agreement is the manufacturing and distribution of the various patented products, then all remuneration received in the context of this agreement will be regarded as business profits within the meaning of article 7 of the OECD Model Tax treaty, taxable only in the beneficiary's country.

## **6.2. License of accounting software to be customised and used in licensee's business accounting systems**

If the licensor is a company, the software qualifies as "innovative" under the criteria used for the French Research Tax Credit benefit from the French IP Box regime for the taxation of such income (since there is no definition of innovative software for the IP Box regime purposes, practice therefore refers to the criteria used in the context of the CIR to define that notion), which is treated as royalties for domestic tax purposes.

If the licensor is a natural person, subject to compliance with the applicable criteria, the latter may qualify for the individual inventor regime, and the net income derived from that license will be taxed at a rate of 10%.

The licensee may either deduct the royalties as expenses or capitalise them as an intangible asset and benefit from an exceptional twelve-month tax amortisation.

In a cross-border context, if the applicable tax treaty expressly includes software (as in the France-US tax treaty) or know-how within its definition of royalties, the payment will fall under the royalties article and may be subject to withholding tax. Indeed, as the licensee is entitled to modify or adapt the source code of the software, this constitutes a transfer of know-how, typically treated as royalty income. Otherwise, the payment will be treated as business profits taxable only in the recipient's State of residence.

It should be noted that if the licensor is located in an NCST,<sup>152</sup> the royalty would be subject, depending on the anti-abuse provision of the applicable tax treaty, to a 75% withholding tax, and the deduction of these royalties by the licensee could be denied. This deduction would also be denied if the licensor is established in a State with a privileged tax regime within the meaning of article 238 A of the FCTC (see paragraphs 3.3.1 and 3.3.2).

<sup>152</sup> Anguilla, Antigua and Barbuda, the Turks and Caicos Islands, Vanuatu, Fiji, Guam, the US Virgin Islands, Palau, Panama, Russia, Samoa, American Samoa, and Trinidad and Tobago.

### 6.3. License of trademark to use on manufactured products distributed around the world

In this case, for the licensor, income derived from the license would be taxed at the normal CIT or personal income tax rate (depending on its status) as the IP Box regime does not apply to royalties from trademark licenses.

If the trademark rights arising from the license agreement constitute a regular source of profit, have sufficient permanence and could be transferred, the licensee that distributes products using this trademark may record the license as an asset and amortise the trademark rights, provided that the license agreement provides for a certain duration of the license. If the licensed trademark does not meet the criteria required for it to be recorded as an asset, the royalties can be deducted as expenses.

In a cross-border context, the payment will fall under the royalties article and may be subject to withholding tax. If the licensor is located in an NCST,<sup>153</sup> the royalty would be subject, depending on the anti-abuse provision of the applicable tax treaty, to a 75% withholding tax, and the deduction of these royalties by the licensee could be denied. This deduction would also be denied if the licensor is established in a State with a privileged tax regime within the meaning of article 238 A of the FGTC (see paragraphs 3.3.1 and 3.3.2).

### 6.4. License of right to use pro athlete's NIL on products sold globally

In a purely French context, this situation does not raise particular comments; the licensor would be taxed at the normal CIT or personal income tax rate, and the licensee would be able to deduct the royalties or record the license as an asset if the rights arising from the license agreement constitute a regular source of profit, have sufficient permanence and could be transferred.

In a cross-border context, if the NIL rights are licensed to a French entity and exploited in France while the royalties are paid to a non-French entity or a non-resident individual, pursuant to article 155 A of the FGTC, these payments would still be taxed in France if:

- The athlete directly or indirectly has control over the entity receiving this remuneration;
- Or the athlete does not establish that this entity predominantly carries out an industrial or commercial activity other than that giving rise to the payment of these sums;
- Or the entity/individual is resident or established in a foreign country where it is subject to a preferential tax regime within the meaning of article 238 A (see 3.2.2).

Naturally, these provisions cannot apply if the tax treaty prevents their application by granting the right to tax exclusively to the beneficiary's country of residence.

However, several situations may arise with regard to athletes' NILs and the above-mentioned anti-abuse regime:

- NIL rights are referred to in the tax treaty as income corresponding to services that are not independent from professional notoriety (in accordance with a reservation made

<sup>153</sup> Anguilla, Antigua and Barbuda, the Turks and Caicos Islands, Vanuatu, Fiji, Guam, the US Virgin Islands, Palau, Panama, Russia, Samoa, American Samoa, and Trinidad and Tobago.

by France in the OECD comments on article 17 of the OECD Model Tax Treaty).<sup>154</sup> In this case, remuneration derived from NIL rights is treated under the applicable tax treaty as income from artists or athletes taxable in the source country. Hence, if the provision of the applicable tax treaty dedicated to artists and athletes does not preclude the above-mentioned anti-abuse measure, then this income will be taxed in France.

- If NIL rights are not expressly covered by the tax treaty's article dedicated to artists and athletes, in accordance with OECD comments,<sup>155</sup> insofar as the exploitation of NIL rights is global and therefore most likely not connected to a specific sporting event in France, this income cannot be classified under the applicable treaty as artists' or athletes' income, but as business profits under article 7 of the model tax treaty and therefore taxed exclusively in the beneficiary's country. Indeed, in view of the tax treaty definitions of royalties, it appears that such rights cannot be considered as royalties.

### **6.5. License of cloud computing capacity for data storage and analysis with licensee ability to download analysis on its own server**

In a strictly French context, this transaction should be regarded as a provision of services and not as a transfer of a copy. Therefore, the licensor will be taxed at the normal CIT or personal income tax rate, (depending on its status). From the licensee's point of view, if it is a company, it may deduct the remuneration from that license as an expense. In this case, it seems that such a license could not be transferred by the licensee; hence, it will not be able to record it as an asset.

In an international context, it appears that this license actually only confers a right of access/use to a hosted service without transferring intellectual property rights or confidential information such as know-how, insofar as the ability to download data analyses would not constitute such a transfer, the remuneration for this license would be treated as business profits within the meaning of article 7 of the OECD Model Tax Treaty and would therefore be taxable only in the beneficiary's country.

However, it should be noted that certain tax treaties drafted in accordance with the UN Model refer to automated digital services (article 12 B), i.e., services provided via the internet or an electronic network that require minimal human intervention by the service provider and do not qualify as "royalties" or "remuneration for technical services" within the meaning of the treaty. Thus, cloud computing services could be considered to fall within the scope of these automated digital services, and therefore, in this case, that license could give rise to a withholding tax.

In that last case, if the licensor is located in an NCST,<sup>156</sup> the royalty would be subject, depending on the anti-abuse provision of the applicable tax treaty, to a 75% withholding tax, and the deduction of these royalties by the licensee could be denied. This deduction would also be denied if the licensor is established in a State with a privileged tax regime within the meaning of article 238 A of the FGTC.

<sup>154</sup> *OECD Model Tax Convention on Income and on Capital: Commentary on Article 17*, para. 18 (21 November 2017).

<sup>155</sup> *OECD Model Tax Convention on Income and on Capital: Commentary on Article 17*, para. 9 (21 November 2017).

<sup>156</sup> Anguilla, Antigua and Barbuda, the Turks and Caicos Islands, Vanuatu, Fiji, Guam, the U.S. Virgin Islands, Palau, Panama, Russia, Samoa, American Samoa, and Trinidad and Tobago.



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