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The French judge increases the amount of research tax credit available to companies

The Research Tax Credit (“RTC”) is a tax incentive aimed at encouraging companies in their Research and Development efforts.

The RTC is calculated on the basis of the R&D expenses incurred by the company.

As such, a company may benefit from a tax credit corresponding to:

- 30 % of the eligible R&D expenses up to 100 million Euros;
- 5 % of the fraction of eligible R&D expenses in excess of 100 million Euros.

Remunerations paid to researchers and research technicians assigned to a research assignment are expenses eligible for the RTC.

A Decree⁽¹⁾ has specified that staff expenses retained to determine the amount of RTC include remunerations and incidentals, as well as social-related charges that correspond to mandatory charges.

The French Tax Authorities (“FTA”) refuse to consider the sums paid to employees under mandatory and optional profit-sharing plans as expenses eligible for the RTC.

According to the FTA:

- The sums paid under mandatory and optional profit-sharing plans are not deemed remuneration under French labor law. These sums, notably, are not subject to social-related contributions;
- In addition, they are not staff expenses but rather an allocation of the company’s earnings.

Several decisions handed down by trial judges contradict the position of the FTA on the above-mentioned elements and judges have ruled in favor of companies⁽²⁾ that had included the mandatory or optional profit-

sharing in the calculation of the RTC basis.

In one of these decisions, the Administrative Court of Appeals of Nantes held that mandatory and optional profit sharing constitute expenses incurred in relation to the employment of staff members.

Indeed, these sums paid in accordance with the provisions set forth in the French Labor Code constitute (i) for the company: expenses that are deductible from its taxable earnings, and (ii) for the researcher who receives such sums: an incidental remuneration. When the beneficiary does not qualify for a tax exemption on these sums, they are taxable as wages and salaries.

The FTA has initiated numerous litigation proceedings on this specific issue and will probably lodge an appeal before the *Conseil d'État* (French Administrative Supreme Court) to further develop its arguments and present its case. Yet, the position of the FTA is hardly defensible insofar as these sums are clearly paid to staff members in connection with their job.

[1] Codified in Article 49 septies I-b of Annex III of the French Tax Codes.

[2] Administrative Court of Rennes, April 19, 2012, n°0904640; SAS Diana Ingredients ; judgment upheld by the 1st Chamber of the Administrative Court of Appeals of Nantes, December 20, 2012, n°12NT01641; SAS Diana Ingredients. Administrative Court of Montreuil, July 5, 2012, n°1104497; Société Areva NP; appellate judgment expected in the summer.

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