

# *The tax system of French Polynesia*

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*This paper gives an overview of the taxation regime applicable to French Polynesia. It discusses aspects of both indirect and direct taxation, and highlights the preponderance of indirect taxes in French Polynesia.*

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## I INTRODUCTION

The tax system of French Polynesia had its origins in the second half of the 19th century and more particularly in the 1870s during which period registration duties and direct taxes such as business licences were put in place. As can easily be imagined, what was involved was a tax system which was essentially influenced in its origins by the broad metropolitan principles which themselves flowed from the philosophy of the revolutionary legislators of 1789. The basis of the fiscal regime is found in the Declaration of the Rights of Man and of the Citizen of 1789 whose fundamental elements are the liability of citizens to be taxed and the principle of their consent to being taxed.<sup>1</sup>

In 1956 a new more functional arrangement of taxes was put in place. Those new structures are those that exist today:

- The Department of Customs and Indirect taxes;
- The Department of Lands and Registration and of the Conservator of Mortgages;
- The Department of Direct Taxes and Related charges.<sup>2</sup>

The status of internal self-government that the Territory acquired in 1984 gave full powers to the Territorial Assembly as far as fiscal matters were concerned, subject only to treaties signed with the State. Although it is too soon to draw any firm conclusions as to the development of a tax regime particular to the Territory which would depart from the main metropolitan principles, it is nevertheless possible to make some observations as to the nature of such a conclusion.<sup>3</sup> The local tax system is based as in metropolitan France on the declaration principle. That is to say the obligation is on tax payers to declare the likely taxable bases of their activity to the Administration. The

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1 Cozian *Droit Fiscal*.

2 See Y Regis "Les zones d'exception": Rapp Cons Econ et social s 1989 jo doc et rapport du ces. No 22, 26 July 1989. Decree 56-1227 of 3 December 1956 and number 57-479 of 4 April 1957 which established the list of state and territorial services.

3 See B Gille and Y-L Sage "The Territory of French Polynesia" in this volume.

corollary of this principle is the a posteriori control of the tax payer's declaration by the Government departments which are responsible for taxes.

The organisation established in French Polynesia is therefore an example of the declaratory system. This paper discusses the various tax structures which have been put in place. The collection of tax is not dealt with here.

## II THE DEPARTMENT OF CUSTOMS AND INDIRECT TAXES

This Department provides a fiscal service with an economic vocation. Indeed, the Department collects about 80% of all the income of the Territory and in liaison with other Departments such as those of Economic Affairs, Agriculture, and Rural Economy, plays a fundamental role in the protection of small and medium sized local industry.

Thus, the Customs Service has a protective role as far as foreign competition is concerned and favours local production to the detriment of other producers. This results in the application of taxes and duties which are a disincentive to importation. Duties and taxes in the form of ad valorem duties affect most goods on their entry into the Territory. That is to say they are calculated on the value of the goods which is the purchase cost plus insurance and transport. The main difference from metropolitan France lies in the application of the taxes on the entry of goods whose rate can go up to 100%. The Territorial Assembly is the body competent to set the tax rates subject only to the qualifications mentioned below.

Goods brought into the Territory to be re-exported as they are, or after processing, benefit from total or partial exemption regimes or from a suspension of duties such as under the transit regime, the warehousing system or the temporary admission system.<sup>4</sup>

The Customs Department is also involved in coastal protection principally in fishing matters. It has numerous powers of a coercive nature such as the right to inspect goods, the right to enter houses in the presence of a police officer and with a warrant from the "parquet" (Prosecutor), and it notably has the right of access to the documents necessary for establishing the tax.

Finally, the Customs Service levies numerous taxes other than import duty, for example the petrol tax, tobacco tax, the levy on imported beef, the reforestation levy. In the fiscal year 1990 these duties and taxes amounted to 37 million South Pacific francs.<sup>5</sup> It should be noted that there is no value added tax in French Polynesia though it has often been called for, both by legislators and by private enterprise.

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<sup>4</sup> See Y-L Sage "The Investment Law of French Polynesia" in this volume.

<sup>5</sup> The currency of the Territory of French Polynesia is the French Pacific Franc du Comptoir Français du Pacifique - its value is determined by a fixed relationship to the French franc: FF 5.5 = CFP 100.

### III THE DEPARTMENT OF LANDS AND REGISTRATION AND OF THE CONSERVATOR OF MORTGAGES

This Department is primarily responsible for collecting registration duties, stamp duties, land transfer tax, and the charges of the Conservator of Mortgages.

Requests for clarification and justification must state explicitly the matters to which they relate and allow the liable person 30 days to provide an answer. As a result of an investigation the administration advises the tax payer of the reasons for and the nature of the adjustments envisaged. The interested person then can comment or accept the result within a period of 30 days.

The tax administration also has the right to seize goods and documents.

Registration provides a public information service in the sense that the formality of registration amounts to the recording in a special register, held by the receiver and his agents, of the details of documents of transfer: sale, lease, grant of rights to a going concern; or the declaration of succession rights. The data can be consulted by any interested person.

The formality which is associated with the levying of a tax has the effect of giving a formal date for documents and providing a check on the material form of the documents in order to avoid forgeries and to provide elements of proof. Depending on the circumstances, formality is obligatory once a document has been prepared (notarised document, judicial decisions, sheriffs orders) or by virtue of the nature of the agreement contained in the document (the winding-up of a company, a document of partition, etc). In other cases formality is optional and depends on the wish of the parties (guarantees, recognition of debts, power of attorney). These documents are generally subject to a fixed duty (a tax at a lower level than that of proportional tax) and the value of the formality lies in giving the documents a formal date in the case of litigation.

Most documents are the subject of a double formality: first the document will be registered on receipt, then at a second stage it will be entered on the real property register held by the registry office (the records of the mortgage transfer). This work requires close attention to detail and an organisation which gives attention to the chronological order of events, since every incident can result in pecuniary loss for the Government (an incorrect ranking of mortgages, for example).

Other duties and taxes that are raised by this department are stamp duty (on passports, identity cards, permits), tax on insurance, a motor vehicle tax which varies depending on the age of the vehicle and its horsepower, and a tax on the added value items of individuals (sales of real property). A tax is also levied on dwellings.

The tax on all insurance and assurance systems was introduced for the benefit of the Territory's revenue. The rate of the tax is 3%. Subject to the tax are insurance companies and life insurance companies which are governed by the insurance code and subject to the companies tax.

The taxable base is constituted by the gross sum of all taxes, fees, duties and levies of every kind and money and assets received or to be received as the product of taxable activities.

The rate of the house tax is fixed at 5% and the person who must pay is the tenant in the light of a declaration made by the owner. This tax is an annual one. A system of discount is applied from 78,000 South Pacific francs up to 120,000 South Pacific francs and above that the payment is due in its totality. The taxable base is established by the annual total of the rents.

There is also a tax on the operations of finance and banking activities. All profits which accrue from banking activities undertaken in the Territory by those enterprises which are subject to it and who compete in the determination of the net banking product are taxable. This tax was set at 2% in 1992.

To all the duties are added some small sums for the benefit of the local authorities and the Chamber of Commerce. The liberal professions do not pay the extra levies for the benefit of the Chamber of Commerce.

Finally this Department has functions in matters relating to land involving the collection of dues and rentals when there is the grant of a maritime concession or a permit for the removal of sand or river shingle or simply when the Government of the Territory leases land.

This Department, which in reality is 3, collects about 1.5 billion South Pacific francs annually. Its role as a public service is especially important particularly as far as the protection of individual property titles is concerned.

A final point to make is that the local laws do not derogate in any way from metropolitan French principles; only the rates and the amounts differ.

#### **IV THE DEPARTMENT FOR DIRECT TAXES AND SIMILAR CHARGES**

The role of this Department is to collect direct taxes and to provide a fiscal control on companies, merchants and the liberal professions. This operation collects about 10 billion South Pacific francs per year.

The responsibilities of the tax payers are identical to those of metropolitan France: respect for the Commercial Code, a duty to keep accounts consistent with the accounting plan promulgated in 1982, which, though it is not generally well known, applies also to sole traders.

Among the numerous duties and taxes collected by this service some should be mentioned here.

The companies tax affects the net profit declared by companies. The original character of this direct tax lies in the method of its calculation which is totally different

from that of metropolitan France. The rate of taxation varies from 25-45% depending on a ratio established according to 3 variables which take into account the costs of personnel, exclusive of levies on personnel by directors in law or fact whether or not they are partners, shareholders or otherwise and the net real property possessed in French Polynesia and the net profit declared. This method of calculation favours the taxpayer, who provides employment and invests in the Territory, by reducing the rate of tax towards its minimum of 25%.

The tax on business licences is a duty directly derived from the Revolution. It involves a real tax often poorly appreciated by tax payers in the extent to which it affects their business and the means of production. This duty is called *contributions* because in reality it is made up of several duties: a fixed duty depending on the type of activity involved; a proportional duty calculated on the basis of the rental value of the professional premises; and variable duties which relate to the overheads of production and quantities produced (hectolitres of beer for example).

Several measures affecting licence duties were introduced in 1991 to encourage investment: enterprises which have been created after 28 March 1991 can benefit from the temporary exemption from the duty on condition that at least 3 salaried positions were created between 28 March and 31 December 1991. This exemption will continue until 1994. The field of application of the licence duty has been amended and extended to the extent that any legal person or any natural person of any nationality who, on a temporary or permanent basis, exercises an unsalaried professional activity (which is not included in the list of exceptions set out in the code) must pay the licence duty.

## V BUILDINGS TAX

In 1992 the exemption was again lifted from 5 to 10 years in respect of property development for which the construction application was lodged after 28 March 1991 and approved no later than 31 December 1992. This measure was adopted within the framework of the encouragement of economic activity in the Territory.

Moreover, the process of valuation and the revision of rental values of properties with buildings was the subject of a new set of regulations which can be summarised as follows: the rental value is determined on the basis of the actual leases or even oral leases or by a method of direct valuation (a valuing of the basic land value of the property; a decision as to the level of interest for each type of property in the area). The practical rules of valuation are established by a decision of the Territorial Assembly.

The transaction tax is charged on the gross transaction figure declared by merchants whether they are natural or legal persons and legal persons who do not pay company duty or who have not opted to pay it. The transaction duty has no homologue in metropolitan France. It has aspects similar to value added tax, in that it affects sales and the performance of services at all levels but without any right to deduction, and to an income tax, in that it affects gross income from all types of discounting, franchise, abatement and moderating coefficients in order to take account of the taxable capacity of the tax payer and of the nature of the enterprise. Commercial receipts are taxed at a rate of between 1% and 5% and the providers of services at levels between 2% and 10%. All

transfers of moveable property in an immovable asset of the tax payer within the field of application of the duty are taxable. The concept of transfer here extends broadly, for example winding-up, the cesser of an activity, transformation, merger etc. A moderating coefficient<sup>6</sup> of 30% is provided when there has been a holding of the transferred elements for at least five years; and for more than 10: 60%. Finally, the benefit of all the moderating coefficients which are utilised in the calculation of the transaction tax is conditioned on the taxpayer's presenting declarations regularly. So in the case of a recalculation of tax the moderating coefficients will not be of any more benefit to the taxpayer.

The tax on the earning of investment sums affects the distribution of earnings, in particular the distribution of the net profits earned by companies. This is also the only tax which is the subject of an agreement with France for the purposes of avoiding double taxation and which provides administrative assistance between metropolitan France and French Polynesia. It should also be noted that the notion of *avoir fiscal* (tax credit) does not exist in the Territory because of the absence of any income tax for natural persons.

For 1992 the field of application of the tax regime provided by article 36 section 2 division 2 has been extended so that all profits and gains distributed which have not been placed in reserve or incorporated into capital; all sums or credits put at the disposition of partners, shareholders and holders of bearer titles which have not been taxed as profits, are taxable.<sup>7</sup> Moreover, a duty of 2.5% on the income from deposits, treasury bonds and cash bonds issued by financial institutions and credit houses was established.

Finally, from now on subsidiaries and branches of companies which do not have their head office in French Polynesia are liable to tax on the earnings from bank deposits because of the distributions which they make.

## VI SOME REFLECTIONS ON THE TAX SYSTEM OF FRENCH POLYNESIA

After this brief survey of the tax system of French Polynesia several comments can be made concerning it.

- 1 The duties are not well distributed: the territorial fiscal system is characterised by a preponderance of indirect taxes which are themselves linked to imports. It follows that the sums raised by indirect taxation are directly linked to the growth in value of imports and that this situation places the Territory in a state of economic dependence which is very difficult to alter in spite of all the efforts of the last 10 or so years.

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<sup>6</sup> Moderating coefficients are factors used by taxpayers and the Department to minimise the incidence of tax.

<sup>7</sup> See the decision of 31 January 1992 of the Territorial Assembly for the details of this system.

- 2 Direct taxation is attractive. Because the system of indirect taxes is relatively painless and invisible to the extent that the tax is incorporated in prices, most tax payers will only be concerned about direct taxes. In fact, direct taxation offers undeniable advantages particularly for investors: There is a favourable calculation of the tax on companies, an absence of tax on salaries and payments to directors of companies and their employees, very favourable levels of tax on the distribution of profits because of the very absence of an income tax for natural persons, various measures which aim at the exemption from all taxes by virtue of the operation of the investment code and/or of reinvested profits.
- 3 The fiscal autonomy of the Territory. This situation results from Law number 506-619 of 23 June 1956 and from decree number 57-812 of 22 July 1957. Ordinance 58-1337 of 23 December 1958, which relates to the Council of Government and to the Territorial Assembly of French Polynesia, brought about no changes in these matters. Laws number 77-772 of 12 July 1977 and 84.820 of 6 September 1984, as amended by law 90.612 of 12 July 1990 relating to the organisation of French Polynesia, confirmed this fiscal autonomy.

Moreover, the full authority of the Territorial Assembly is not limited by article 34 of the Constitution of France which requires a statute for the imposition of tax, tax rates and the methods of recovery of taxes in kind. Articles 74 and 75 of the Constitution as they relate to the particular organisation of Overseas Territories in fact lead to the view that the rules relating to the division of material between statute and regulation in matters where the overseas territories have full legislative authority are not those applicable in metropolitan France.

The constitutional council decided this way on 2 July 1965. More recently a judgment of the Administrative Appeal Court of Nancy (2nd Chamber) of 25 June 1991 number 974 - which states: "that those parts of the national territory in which the income tax instituted by the general tax code are not applicable must, in the context of article 482 of the General Tax Code, be regarded as foreign states; that the field of territorial application of the income tax does not extend to the Overseas Territories, which are subject to a specific tax regime; ... that the Overseas Territory of French Polynesia must be regarded as a foreign country in a sense of paragraph 2 of article 4B of the above code".<sup>8</sup>

Thus the State cannot raise any tax in French Polynesia, and the General Tax Code is not applicable in the Territory. The Assembly is alone competent, not only to institute or abolish taxes, but also to fix the rates of taxation, the tax levels and also the methods of recovery of taxes. However, there are some restrictions on this plenitude of powers: customs duty must comply with the GATT; the Territory must respect the agreement between the French Government and the French Establishments of Oceania<sup>9</sup> concerning the elimination of cases of double taxation on investment income and the

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<sup>8</sup> Reference can also be made to CE.19.03.86 number 31.550 and number 34.615 of 29 July 1983.

<sup>9</sup> Decree 57-924 of 1 August 1957.

rules for mutual administrative assistance for the levying of these taxes; the amount of tax paid by France for importations by CEA/CEB is fixed according to a bilateral agreement between French Polynesia and the State; finally the Territory has no fiscal authority over its residents who receive income from the Metropolis: this is the corollary of the plenitude of power in the field of fiscal authority.

The last observation to be made bears on the question of the regulating of disputes which arise in the application of the local tax system. The competent courts are the State courts - the judicial tribunals for registration duties, and the administrative courts for the direct and indirect taxes.

Administrative appeals and appeals by way of case stated come before the Paris judges (the Administrative Appeal Court of Paris and the Conseil d'état).

It is perhaps here that the limits on the powers of the Territorial Assembly become visible. Indeed, two different views can be taken on this matter. Either the judges will develop a local case law based on the particularities of the local legislation in which case the doctrinal writing will draw principles from it and a truly Polynesian fiscal regime will be developed. Or else contrariwise the judges will try to maintain harmony with the grand revolutionary principles, that is to say with the fiscal philosophy of metropolitan France, and the particular local conditions will then be set aside or will be considered less significant in the context of disputes heard by the State courts.

The latter possibility seems the more logical and likely. However it must not be seen by the local legislator and the practitioners as a limiting of the plenitude of power, but as a basic concern to maintain legal unity within the tax law and to guarantee equality and justice for the taxpayer.