

The inclusion of capital gains in the amount of turnover depends on the business model of the company

In order to determine whether capital gains from disposals of fixed assets should be included in turnover, it is necessary to determine whether such disposals fit into the business model of the company.

Corporate taxpayers with a turnover of more than 250 million euros were taxed with an exceptional contribution equal to a fraction of this tax calculated on the basis of their taxable results for financial years closed between December 31, 2011 and December 30, 2016 (in accordance with Article 235 ter ZAA of the French General Tax Code, hereinafter CGI).

In deciding on the appreciation of the threshold for annual turnover in the case of a German company whose business in France consists in the administration and management of buildings on behalf of investment funds but that also realized capital gains on the sale of these buildings, the Council of State decided that:

- on the one hand, the threshold is appreciated by reference to revenue from all transactions carried out by the taxpayer in the course of his normal professional activity in France and abroad, regardless of the tax regime of the result of operations corresponding to this turnover;
- on the other hand, in order to determine whether the capital gains from the sale of real estate made by the company should be taken into account in the turnover, it is necessary to determine whether these disposals are part of the economic model of the company.

The case before the Council of State concerned a German company whose object was to provide regular rental income to investment funds. This company held several properties located in France, listed as assets on its balance sheet and leased. In addition to generating income from the rental of this property, the company realized a capital gain during its sale (selling ten buildings in 2011, three in 2012, two in 2013, five in 2014 and four in 2015). In particular, in 2011, sales almost ten times exceeded rental income.

Due to the recurring nature of the sales as well as their importance and quantity, the Versailles Administrative Court of Appeal, seized of the dispute, considered that the capital gain thus obtained should be included in the annual turnover of the company for its further imposition of the exceptional contribution (CAA Versailles, 1-6-2017).

Although the court considered that in order to be subject to an exclusive fee, only turnover related to profits taxed in France in accordance with Article 209 of the CGI should be taken into account, the Council of State, on the contrary, judged that should be taken into account the revenue from all operations carried out by the taxpayer in the course of his usual professional activities in France and abroad, regardless of the tax regime of the result of operations corresponding to this turnover.

It should be noted that in this way the Council of State confirmed the position already adopted in other cases (in particular, in the case of CE 9-12-2016). It follows in particular that the territorial rules provided for in respect of income tax should not be taken into account for the assessment of the threshold for turnover above which an exceptional contribution was due. It should also be taken into account that in respect of the exclusive contributions of large companies applicable to fiscal years closed between December 31, 2017 and December 30, 2018, drawn up in terms identical to the contributions in question, the administration, on the contrary, indicated that it would be advisable to maintain the turnover associated with corporate taxable profit in France in accordance

with article 209 of the CGI. But it has not extended this solution either to the social contribution (CGI Art. 235 ZC) or to the exceptional contribution referred to in the present case (Art. 235 ZAA).