

## CHAPTER X

### ADMINISTRATIVE RULE-MAKING PROGRAMS

#### Section A. *Character of the Underlying Statute*

##### 2.1 *The precision of the statute itself*

There are more than 2,000 articles in the General Code of Taxes which covers all taxes levied in France by the central government, departments, communes, and certain public institutions. Of these, only 248 articles deal with determination of the tax on income. These cover 80 pages, each of which includes about 600 words. An added 28 pages deal with collection, penalties, procedure, and litigation.

To the statutes enacted by Parliament<sup>1</sup> must be added the regulations<sup>2</sup> which are issued by administrative agencies and which may be tested, as to legality, before the judiciary. Tax regulations appear in an annex to the General Code for Taxes. Those relating to the income tax cover 77 pages, and thus, in bulk, almost equal that part of the code to which they relate.

A factor contributing to the importance of these regulations is the form of French tax statutes. Principles and fundamental concepts are not defined, although the terms—for example, income, profits, etc. — are used constantly. Ultimately, independent tribunals hammer out the general meaning of such terms.

Special rules and exceptions, though relatively few in number, are set out in both the statute and in the regulations. And when these come before the independent tribunals, they are construed strictly.<sup>3</sup> Illustrating the degree of specificity found in the exceptions is Article 157 of the Code, which enumerates the types of income which need not be taken into account in determining the total net income of an individual. Excludable income under this article includes (1) income from properties

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<sup>1</sup> Article 34 of the French Constitution gives Parliament exclusive power, in the case of all taxes, to enact statutes relating to the tax base, the rates, and the methods of collection.

<sup>2</sup> Parliament, in enacting a statute, can delegate expressly to the administrative agency the power to fix the method of applying the law which itself states only a general principle.

<sup>3</sup> See 2.4 *infra*.

classed as historical monuments subject, however, to such conditions as may be imposed by the classifying decree, (2) interest on Treasury bonds with a maturity date of five years or less, (3) gratuities given to long-time workers to whom the Minister of Work has conferred a medal of honor, (4) arrearages on certain bonds issued in 1952 and 1958.

As distinguished from the exceptions, however, the general rules leave room for much interpretation. To illustrate, Article 209 states that corporations are subject to the corporate income tax only to the extent that profit is derived from enterprises conducted in France.<sup>4</sup> The Code does not define the meaning of "conducted in France." An indication of the degree to which this created interpretative questions is implicit both from the following description of criteria which evolved out of case law and administrative regulations, and from the fact that, despite these criteria, difficulty in practical application persists. The criteria which evolved include: (1) operation of an establishment in France, (2) activity in France of an agent whose legal identity, in concluding contracts in the name of the enterprise, is not distinct from that of the enterprise itself, and (3) realization in France of profits from operations entirely carried on in France, e.g., purchases and sales of merchandise there.

Also illustrating the generality of France's statutory pattern is the area of depreciation deductions. The Code itself does nothing more than authorize deduction of "amortizations really effectuated by the enterprise, within the limit of those generally admitted according to the usages of each particular type of industry, of commerce or of operation."<sup>5</sup> Under this general provision, enterprises are free within the limits of the particular industry's customary usage, to determine their own depreciation deductions in the first instance. The tax administration is also free, however, to prove those deductions excessive.<sup>6</sup> In this same connection, a recent statute which permits

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<sup>4</sup>The text of Article 209 follows in part: "... en tenant compte uniquement des bénéfices réalisés dans les entreprises exploitées en France."

<sup>5</sup>Article 39-2 reads in part as follows: "... amortissements réellement effectués par l'entreprise, dans la limite de ceux généralement admis d'après les usages de chaque nature d'industrie, de commerce ou d'exploitation."

<sup>6</sup>In actuality, the rate of depreciation is less of a problem in France than in other countries, such as the United States, where very precise and detailed rules have been set. There is little interest in

the use of the declining balance method in calculating depreciation states only the principle; the method of application is left entirely to administrative regulation.

## 2.2 *Legislative pre-enactment aids to interpretation*

The initial characterization applied to proposed legislation depends upon its source. If presented by the government, it is termed a *draft*, if by a member of Parliament, a *proposal*. In either case, however, the initial presentation of the bill is accompanied by a written statement of the motives, *exposé des motifs*. This statement explains the purpose and scope of the proposed legislation. It also puts into lay language the technical terminology of the proposed bill which frequently will contain cross-references to existing statutes.

The proposed bill is examined by the Committee on Finances of the National Assembly. The Minister of Finance, accompanied by senior civil servants from the office of the Director General of Taxes, attempts a full explanation of the bill and answers inquiries. These hearings are not open to the public, nor are they published. The final report prepared by a reporter appointed by the Committee is published and distributed to the members of the Parliament. However, professional groups get in touch with individual members of Parliament and make known their opinions or objections. Further, the press usually carries a critical analysis of the bill as proposed.

In contrast to the non-publication of the Committee's hearings, the debates which follow in the National Assembly are fully published in the official journal. These parliamentary discussions are preceded by an explanation of the entire *draft* or *proposal*. Spokesmen for different groups state their general views on the proposed bill. Discussion of the bill then follows, article by article, with proposed amendments to any article being discussed before the article itself.<sup>7</sup> Deputies state their positions, and the Minister of Finance, assisted by technical counselors (officials from the office of the Director General of Taxes), states his view of any proposed amendment,

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(footnote continued)

France in instituting such a system. Under French law, all gains derived from the sale of active elements, assets, are taxed as ordinary income, and hence excessive depreciation cannot yield a preferentially treated capital gain on subsequent sales.

<sup>7</sup>Any deputy is free to propose such amendments during the hearings before the Committee or before the debate opens.

whether in criticism or assent. He also explains the government's interpretation of the proposed text. Finally a vote is taken on the article in question.

Because debates are published in full, the public has ready access to the Minister's stated opinions, explanations, and the answers he gave to the questions posed. These are extremely valuable in future attempts to interpret the statute, for in them may be found the intention of the legislature. Indeed, deputies frequently address interpretative questions to the Minister, in writing or orally, to force disclosure of the administrative interpretation of particular clauses.<sup>8</sup> These questions usually are prepared by tax practitioners and provoke wide interest.<sup>9</sup> In addition to publication in the official journals, the official tax administration bulletins and the tax law reviews reprint them with added commentaries.

### 2.3 *Standards of construction followed by the judiciary in interpreting the statute*

Administrative tribunals, with the Council of State at the apex, and not the ordinary judiciary, have jurisdiction both to determine the legal status of tax laws and regulatory acts (decrees and orders) and to interpret them. It is most unusual, however, for the tribunals to encounter a case wherein the taxpayer seeks to have even a regulatory act declared invalid for reasons of illegality, *recours pour excès de pouvoir*, on the ground the regulation exceeds the limits set by the law. But where such an action is successfully maintained, the act being declared *ultra vires*, it will suffer that impediment as to all taxpayers, present and future, *erga omnes*.

The prime function of administrative tribunals in tax cases is to apply the law and regulatory acts, and if their texts be silent, obscure, or inadequate, the tribunals must interpret them. This interpretative function has become an increasingly significant source of law because of the increasing complexity of legislation and the wide ranging diversity of transactions. Marginal and paradoxical situations heretofore unforeseen continually arise. Consequent imperfections in the regulatory texts

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<sup>8</sup>The oral questions are known as *orales*. Actually, they are written but are termed *orales*, because their text and the answer, also in writing, are read aloud.

<sup>9</sup>These questions frequently relate to an anticipated interpretative difficulty which the recently enacted statute will create for some section of the tax codes, or to an apparent conflict between a taxpayer and some local tax official as to a particular situation.

are inevitable, have become every day matters, and their firm resolution is the important task of the administrative tribunals.<sup>10</sup> The manner in which these tribunals have approached their task has been marked by at least two tendencies.

The first has been facilitated by the generality of the French statute's basic principles. As distinguished from other areas of case law, the results actually reached by these tribunals reflect a greater concern for similarities in the net effect of transactions than for differences involving mere legal niceties. That facts and factual effects are stressed,<sup>11</sup> rather than legal arguments based on the subtleties of the private law, warrants the conclusion that these tribunals tend to construe the basic provisions of the statutes broadly, not narrowly or pedantically. This rests on the supposition that France's publicly oriented income tax statute was intended, to a greater extent than the private law, to focus on the economic essence of transactions, and this necessarily renders formal legal distinctions less significant. Thus account may be taken of illegal situations or those lacking an equivalent in private law—e.g., illegal commercial practices, the existence of irregular corporations, or prohibited activities (drug traffic, white slave traffic, etc.). This is not to suggest, however, that the tax law is completely independent of the private law. Indeed, it appears primarily in instances where the broadly based general principle of a statute or regulatory act is coupled with a precise identification of those matters to be excepted.

A second tendency reflected in the results reached by the administrative tribunals shows their interest in guaranteeing certain basic rights to taxpayers, by imposing what might be called due process requirements. For example, it was the Council of State that first established the principle that a regulatory act could not have a retroactive effect if it established a tax covering the past.<sup>12</sup> Again, the Council of State held that, to the end of preserving to a taxpayer the chance of making an adequate defense, a judge in a tax case could not take judicial notice of facts, submitted by the tax administration, if access to the source was denied to the taxpayer. While these guarantees may represent nothing more than an extension to the tax area of general legal principles, it is noteworthy that

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<sup>10</sup> C. Lasry, *The Council of State, Studies and Documents* (1955).

<sup>11</sup> See Conclusions Corneille, Order of January 21, 1921. Sirey 1921, 3.38.

<sup>12</sup> Order, December 23, 1949, Lebon 567; Order March 16, 1956, Lebon 121.

that the extension was accomplished in the first instance by courts. Only afterwards were they confirmed by the legislature.<sup>13</sup>

Where a court is faced with an interpretative question as such, it seeks to determine the intention of the legislature in order to clarify its own understanding of the text of the statute. It will give prime attention to the *exposé de motif*, the explanation presented by the government at the time the bill embodying the presently considered statute was under consideration by the Parliament. In addition, the court will read carefully the debates to note the comments made prior to enactment, such comments frequently providing considerable assistance in the resolution of issues. In general, it may be said that the courts do not seek to limit the tax statute by strict construction but instead seek to effectuate what they conceive to be the basic purpose of the provision in question.

### Section B. *The "Regulations" Program*

#### 2.4 and 2.5 *Types, force, and purpose of "regulations"*

In France, the expression, regulations, has a quite different meaning than that accorded the term in United States tax administration. In France, the term covers both regulatory texts—that is, the decrees—which as a part of the law must be followed and thus possess true legal significance, and administrative instructions which do nothing more, on the substantive side, than reflect the administrative view.

The legal effect of the regulatory texts stems from the constitution, which vests regulatory power in the Prime Minister.<sup>14</sup> These texts may be promulgated under the general regulatory power or pursuant to a particular statute which delegates to regulatory texts the establishment of details regarding a general principle and its application. The regulatory texts are published in the official journals and must be taken into account both by the tax administration and the tribunals.

In no case, however, may these regulatory texts be contrary to the statutes themselves.<sup>15</sup> While the judiciary must recognize their force, it may inquire into their legality. Should the occasion arise, careful consideration will be given to the

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<sup>13</sup> Acts of 1959 and 1963.

<sup>14</sup> Art. 21, Constitution of 1958.

<sup>15</sup> See 2.3 *supra*.

question of whether a regulatory text creates a taxpayer obligation exceeding that prescribed in the law.

As noted earlier, taken together, these regulatory texts have considerable bulk as well as importance,<sup>16</sup> in part because they both implement and supplement the statutes themselves. Thus not only do the regulatory texts complete the gaps left in the statute by the legislature but further they specify the manner in which the statute is to be applied in practice. All such texts, however, are not issued by the same governmental level and all are not of equal weight. The formal classification is significant, for the provisions of the text cannot be revoked or modified by a text of lesser weight. The revoking text must be at least of equal or greater weight. Thus a simple decree cannot cancel a decree issued by the Council of State, whereas a decree from the Council of State can revoke a simple decree or a ministerial order. A description of the different types of regulatory texts, ranked in descending order, follows.

Decrees which take the form of a regulation of the public administration spring from language of a specific statute which delegates the rule-making function regarding details and methods of application. They are issued by the Prime Minister after consultation with the general assembly of the Council of State. Drafts are prepared in the office of the Director General of Taxes and forwarded to the Ministry of Finance which submits them to the Council of State. There they are examined fully. Senior civil servants from the Director General's office are present for the purpose of explaining the regulation's general purpose and specific objectives, as well as to answer queries. The Council of State renders an opinion, favorable or unfavorable. It is free to propose changes both as to form and substance. Proposed changes of form are generally, but not always, accepted by the office of the Director General. Proposed substantive changes raise questions of public policy which the government itself ultimately must resolve, as such matters are not left to civil servants.

A second type, decrees of the Council of State, arise from the government's request that the Council of State render an opinion, which takes the form of a decree. It is not necessary to convoke the general assembly of the Council of State for this purpose; one of the administrative divisions acting alone is competent to act. As suggested earlier, such a decree carries

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<sup>16</sup>See 2.1 *supra*.

less weight than a decree in the form of a regulation of the public administration. And should the Council of State render an unfavorable opinion, the government may disregard it. Moreover, opinions by the Council of State, falling in this second category, are never published.

Simple decrees issued by the Prime Minister constitute a third type. While he customarily consults the Council of State, this is not required.

Ministerial orders, a fourth type, are issued by the competent minister as he considers necessary or desirable.

Apart from these regulatory texts, circulars, instructions, and memoranda are prepared by the office of the Director General of Taxes for use by the tax administration. Unlike most regulatory texts, these publications are not submitted to the Council of State. Nor are there any public hearings, though in some cases officials will contact representatives of affected trade and professional groups<sup>17</sup> or officials of other interested Ministries. These publications rephrase in lay language the statutes and the implementing decrees.<sup>18</sup> They specify the procedures to be followed by the local tax officials who must abide by these instructions. Taxpayers are not bound by the interpretations set out in the instructions but they find them an excellent source of information regarding the governmental interpretation of the statute. They are free, however, to contest the application of such instructions to their personal cases before competent tribunals, citing in support of their position the statutes and regulatory texts. These administrative interpretations differ from the regulatory texts not only by reference to their respective official sources and in the weight accorded them, but also in the form they follow. Regulatory texts follow a legal form, similar to a statute. Administrative instructions are expository in that they seek to explain the law and the implementing decrees, using as an aid numerous examples. The examples cover not only the most frequently arising situations, but also some unusual ones. Often the administrative position they reflect is more liberal than strict construction of the statute would permit. These instructions are not considered unalterable; additional ones are published where

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<sup>17</sup>Typically, as soon as a statute is passed by Parliament, affected groups clamor to be heard that they may express their opinions on the implementation of the statute. Thus it is very easy for the office of the Director General of Taxes to learn their views and reactions.

<sup>18</sup>In a typical instruction, the official text of the statute and the regulatory texts appear in an *Annex*.

modification appears desirable, e.g., where new unforeseen interpretative difficulties arise. Unfortunately, however, the instructions do not cover all of the legislation enacted. Irregularly, the tax administration collects instructions which have been issued intermittently over a period, rearranges them in logical order and republishes them in a major circular. The prime shortcoming of the instructions is that they do not cover all of the legislation enacted.

### 2.6 *Manner of processing "regulations"*<sup>19</sup>

While regulatory texts and the administrative instructions have the important differences noted above, there is a strong unifying force. The same office prepares both. In fact the same officials will have drafted the original bill<sup>20</sup> to which the regulatory text and instructions relate.<sup>21</sup> This preserves continuity of thought beginning with the draft of a bill through its implementing regulatory text and complementary instructions.<sup>22</sup>

The time which elapses between the enactment of a statute and the appearance of the regulatory texts is not uniform. If the statute itself fixes a specific period of time, usually an attempt is made to comply. However, some regulatory texts have never been prepared for publication, despite statutory directives. This is most likely to occur where the statute was enacted as a result of parliamentary initiative, over government opposition stemming from a belief the statute itself is unworkable in practice. Illustratively, in 1959 a member of Parliament proposed—and Parliament enacted—a provision imposing a complementary tax of 15 percent on income derived by workers who took on additional jobs during their free time, that is, over the weekends and vacations.<sup>23</sup> Complaints had arisen over

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<sup>19</sup> The diverse types of French regulations required that their purposes be dealt with in 2.4 and 2.5 *supra*.

<sup>20</sup> Changes, of course, may have been made in the course of the parliamentary debate.

<sup>21</sup> Where a circular treats the administrative matters outside the tax law area itself, it will be prepared by another group of officials who are charged with a different level of activity—i.e., administrative duties.

<sup>22</sup> As pointed out in Chap. IX, the office of the Director of Taxes is divided into groups of officials by reference to particular types of taxes or activity. Thus the office responsible for taxes on industrial and commercial profits prepares, as to that subject, the drafts of any law, implementing or supplementing decrees, and the administrative instructions.

<sup>23</sup> Law of December 22, 1959, Art. 22, paragraph 45.

this practice, *travail noir*, and the legislation was in response thereto. However, the tax administration considered that it was impossible to apply the measure, recognizing the clandestine nature of the activity and the difficulties in securing information. In consequence, it made no effort to take any actual steps to implement the legislation and hence addressed no instruction to the men in the field.

Administrative instructions tend to appear within one to four months after publication of the law and the implementing decree. The law of December 28, 1959, instituting the use of the declining balance method of depreciation, can be used to illustrate the typical time pattern. The regulatory text or decree was issued on May 9, 1960. The first administrative instruction was dated August 22, 1960, and since then a few decisions on particular points have been published by the administration.

### Section C. *The Rulings Program*

#### 2.7 *Formal advance rulings to taxpayers*

France makes no provision for advance rulings requested by individual taxpayers on prospective transactions. On occasion, however, collective rulings are issued in these circumstances, and even private rulings may be obtained in the case of completed transactions.

The so-called collective rulings are issued in response to requests received from the tax departments of trade or professional organizations, to resolve interpretative difficulties or unanticipated situations encountered by that trade or profession. Such tax departments constantly study new laws, implementing decrees, and instructions, to ascertain possible effects on the association's members. A commentary on the law, taking due account of administrative interpretations, is prepared and distributed to the members. Not infrequently, an organization's tax division contacts the appropriate officials in the office of the Director General to resolve a question or raise an objection bearing, e.g., on the rate of depreciation regarding new types of equipment or on the variations in the provisions regarding risks insured by insurance companies. If the matter lends itself to easy resolution, the competent official's oral opinion may suffice. If the matter does not lend itself to such informal treatment, detailed and thoughtful consideration being required, no oral answer is given. Instead, after the informal

discussion, the organization's representatives submit the problem in writing to the office of the Director General of Taxes. This memorandum is turned over to the same group of officials who drafted the bill, decrees, and administrative instructions which provoked the inquiry. This group prepared the official response. The importance of the question posed by the trade or professional organization determines at what official level the response will be signed.<sup>24</sup> Should a quite liberal interpretation be considered desirable, the Minister, who is responsible to Parliament, will make the actual decision, not the civil servants. In any event, any written response is always in the form of a memorandum which the administration is willing to have published. Once transmitted to the tax division of the particular association, the administration feels bound by the decision. The association itself will distribute this decision to its members, and the tax administration will send it to all officials.

Individual taxpayers may, though rarely do, request that the administration advise them of the effect of a statute, regulatory text, or administrative instruction on a given completed transaction. Such a request must be written, and should be as clear, complete, and precise as possible, explaining each detail of the completed transaction, so the administration's agents can obtain readily all of the requisite information and factual proof. Requests of this kind, addressed to the departmental Director of Taxes, are investigated by an inspector who makes a field audit. Should the departmental Director feel uncertain regarding the proper response, the taxpayer's request is forwarded on to the Director General of Taxes. The written response of this office is then forwarded to the taxpayer. A declaration of income prepared by a taxpayer in accordance with the official response will not be challenged if his own situation, and the relevant law and regulations, remain unchanged. However, the official response binds the administration only as to that taxpayer alone; it does not have general application.

While the above procedure is seldom used, another is employed fairly often. Trade associations or tax advisors will contact a deputy in the National Assembly and request that he pose an interpretative question to the Minister of Finance. The deputy will submit the question to the Minister in writing. The

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<sup>24</sup>In the order of increasing importance, the response will be signed by the head of the office, the under director charged with the tax on enterprises, the chief of the legislative service, or by the Director General himself.

resulting answer from the Minister, contrary to a private ruling on a completed transaction, will apply to all taxpayers and as to both prospective and completed transactions, absent a statutory or regulatory change.

### 2.8 *Informal technical advice to taxpayers on proposed transactions*

It is most unusual for a French taxpayer to request informal advice from a tax agent on the tax consequences of a proposed transaction. Occasionally, legal advisors of large corporations do contact officials in the office of the Director General of Taxes to discuss orally some anticipated tax questions. Such officials do indicate their own opinions, and on occasion, at the request of the taxpayer, these are reduced to writing.<sup>25</sup>

### 2.9 *Technical advice to field offices*

Should a local inspector be unable to resolve interpretative questions which arise during the course of an assessment, he will refer the question to the departmental Director. Should the Director, in turn, feel the need for advice from a yet higher echelon, the question is forwarded by him to the appropriate officials in the office of the Director General. The officials, to whom the matter is referred there, previously will have drafted the bill, implementing regulatory texts or decrees, and administrative instructions, and served also as the earlier described point of contact with trade associations. Thus consistency of interpretation is assured. These in-service requests for advice can be handled informally—i.e., by telephone or in a written communication *not* sent through the usual channels. More often than not, they are forwarded as official requests, and the formal answer of the superior relieves his subordinate of all responsibility. The taxpayer is not informed that such a request has been made, is not given a hearing by the higher echelon, and the response is confidential.

Most frequently, these requests for advice are settled at the departmental level. Those which reach the Director General's office usually raise questions having both broad theoretical and practical significance. Occasionally, conclusions reached

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<sup>25</sup> While this procedure is rarely requested by French taxpayers, American law offices located in France request advice with great frequency, without doubt to relieve them of responsibility or because of the well established American practice to invoke such a procedure.

at the national level are published in the official weekly bulletin of the tax administration.

*2.10 Publication of technical advice given taxpayers and local offices*

The tax administration publishes a weekly bulletin which reprints statutes and decrees which appeared earlier in the official journal. Also included are the instructions, circulars, and interpretative memoranda sent out by the office of the Director General. Where deemed appropriate, the bulletin also sets forth the previously published answer to the written questions posed by deputies in the National Assembly, significant case law, accompanied by official comments, as well as other memoranda reflecting administrative positions. There is no systematic pattern as to the publication of such memoranda.

Those bulletins appear in looseleaf form with an index. They are distributed to the local inspectors, and taxpayers may subscribe to the edition which omits directives relating to internal procedures and policies. Unfortunately, the publication of the clarifying memoranda is seriously in arrears; the appropriate offices have not had time to complete the necessary synthesis and coordination. Further, in actual practice, outside publishers in contact with the tax administration and with government officials have taken over the prime responsibility of integrating such material as is made available, and prepare commentaries thereon.