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Change in the calculation of mandatory employees profit-sharing

By nullifying the so-far applied administrative doctrine, the *Conseil d'Etat* (France's Highest Administrative Court) has just modified the calculation of mandatory profit-sharing.

In the case at hand, the company Schlumberger challenged the calculation of the special mandatory profit-sharing reserve according to the legal formula determined by the administrative doctrine published by the French General Tax Directorate.

Pursuant to this doctrine, the French tax authorities recommended to use the profits deducted by the corporate income tax after offsetting of any applicable tax credits, including the Research Tax Credit ("RTC").

In a decision rendered on March 20, 2013 in the *Société études et productions Schlumberger* case, the *Conseil d'Etat* approved the claim of Schlumberger and consequently nullified the paragraphs of the challenged administrative documentation on the ground that the French tax authorities had not simply interpreted the law but had added new rules that were not provided for by applicable legal provisions.

This landmark decision will undoubtedly cause quite a stir. The general wording of the grounds put forth by the *Conseil d'Etat* to substantiate its decision seems to apply to all kinds of tax credits, not only to the RTC as was the case in the commented matter. In particular, the French tax authorities have recently published an administrative comment in relation to the new Competitiveness and Employment Tax Credit, a comment that is similar to the one that has just been nullified by the *Conseil d'Etat*.

In practice, this means that companies that apply the legal mandatory profit-sharing calculation formula could henceforth determine the net profits by deducting the whole corporate income tax without taking into account any tax credits.

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For a number of companies, this calculation method would automatically entail a decrease in the sums to be paid to employees under the mandatory profit-sharing plan.

Companies that intend to change the calculation of the mandatory employees profit-sharing should – as a precautionary measure – connect with their staff representatives to provide them with complete information on the calculation and have such calculation approved by their statutory auditor.

The French tax authorities should amend the relevant doctrine to bring it in line with the decision of the *Conseil d'Etat*. Yet, the legislator could also decide to tackle this issue directly to specify the legal profit-sharing calculation formula by upholding the position adopted by the French tax authorities.

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