

finished form, would take effect in January 2024.

FRANCE

SAP's Cash Pool Agreement Is Arm's Length, French Court Says

by Alexander F. Peter

SAP France's interest income from a cash pool loan to SAP Germany must be considered in combination with other benefits SAP France could have obtained through that arrangement, a French court has held.

In its September 20 judgments in *SAP France S.A. v. Ministre de l'économie* (No. 461639 and No. 461642), the Conseil d'Etat, France's highest administrative judicial court, overturned two lower administrative courts' decisions, holding for the taxpayer.

In 2019 the Administrative Court of Montreuil and in 2021 the Administrative Court of Appeal of Versailles (in case nos. 20VE01009 and 20VE00043) had approved an assessment of €27.5 million in additional corporate tax for tax years 2012-2015 and withholding tax, interest, and penalties of €150,000 for 2012-2013 against SAP France for a deemed dividend paid to cash pool leader SAP Germany.

The Conseil d'Etat remanded the case to the Versailles court to ascertain whether the cash pool agreement was beneficial and therefore at arm's length for SAP France because the interest calculation formula was capped at a zero interest rate. It did not provide for the charging to SAP France of negative deposit rates, which could have been due if and when the contract's interest rate — based on the Euro Overnight Index Average (EONIA) — fell below zero. The EONIA, which has been replaced by the Euro Short-Term Rate, had been negative from 2015 through 2021.

"It has been a contentious issue whether income derived from a cash pool arrangement has to be commensurate with a return on investment or must be equal to rates agreed on loans with a bank," Sandra Hazan of Dentons Paris told *Tax Notes* September 27. "Depending on the market circumstances, the tax administration has appeared to favor a return on investment rate for French lenders and a bank loan rate for French borrowers."

SAP France S.A., a 98-percent-owned subsidiary of SAP France Holding, engages in

software sales, maintenance, consulting, and training. In December 2009 it entered into a cash pool agreement with German grandparent SAP AG (now SAP SE). The cash pool agreement provided interest rates at the EONIA rate minus 0.15 percent for deposits of SAP France S.A.'s funds, and at the EONIA rate plus 0.3 percent for loans.

"This spread between lending and borrowing is very usual. It's the compensation for the cash pool management," Sabine Sardou of BDO Paris said.

Because the EONIA rate fell to 0.11 percent in August 2012, SAP Germany owed no interest to SAP France, and no negative interest was charged to SAP France for deposits because of the cash pool agreement's zero interest rate cap. Without the cap, SAP France would have had to pay negative interest of 0.05 percent.

The taxpayer said the cash pool provides immediate and unconditional access to financing at the agreement's preferential rate. Because the cash pool rate was based on the EONIA, an OECD-recommended reference rate, and capped at zero, SAP France can never be charged negative interest for deposits, it argued. Further, the placement of the funds with SAP Germany is particularly secure because of the cash pool leader's credit rating, SAP France said.

The lower courts had objected that SAP France was profitable and never had to borrow, but always had surpluses in the cash pool. The counterparty risk would be part of the remuneration but could not justify its complete absence, they said. At a financial institution, SAP France could have received interest at rates of 0.15 percent to 0.18 percent for sight deposits. The rate under the cash pool agreement was different from what would have been agreed with third parties and therefore was not at arm's length under article 57 of the French General Tax Code, the courts said.

However, the Conseil d'Etat disagreed because the amount of remuneration resulted from the agreement's formula and was capped at zero. On remand, the lower courts will have to determine whether SAP France acted in its own interest by entering into the cash pool agreement and what obligations it had under the agreement during the years in dispute.

Further insight into the highest court's reasoning will be possible only if the written deliberations of the public rapporteur — who is equivalent to the advocate general at the Court of Justice of the European Union — are published. That disclosure usually occurs at an unspecified time after the decision.

"Basically, the Conseil d'Etat states that the lower courts didn't consider the overall context in which the agreement was concluded," Sardou said. "Transfer pricing should not look at a moment in time. It appears that the Conseil d'Etat considers the potential borrowing capacity important. That could mean that a hypothetical situation would have more relevance than the actual one."

The remand likely will not change the outcome. "The remand is a formality," Hazan said. The Versailles court will rule like the Conseil d'Etat, she added.

The taxpayer in *SAP France S.A. v. Ministre de l'économie* was represented by Arsene Taxand at the Administrative Court of Appeals and by Celice Texidor Perier at the Conseil d'Etat. ■