

FRANCE

Customers Can Be Intangible Assets Of a PE, French Court Says

by Alexander F. Peter

The French permanent establishment of Bupa Insurance Ltd. was not required under the arm's-length principle to be compensated for transferring customers to the U.K. headquarters because the customers were not assets of the PE.

In its December 21 decision in *Bupa Insurance Ltd. v. Ministre de l'économie*, the Conseil d'Etat laid out detailed requirements to establish when the transfer of customers from a PE to its headquarters without consideration constitutes an unallowed profit transfer under article 57 of the General Tax Code. Because the French PE did not carry operational risk in this case, no profit had to be allocated to it for a customer transfer to the United Kingdom, the court said.

The *Bupa* decision confirms the previous holdings of the Marseille Administrative Court of Appeal in 2021 (No. 19MA04090) and the Administrative Court of Nice in 2019 (No. 1604093).

"The Conseil d'Etat made clear that a transfer pricing policy change does not prove an alteration of the business model," Sabine Sardou of BDO in Paris told *Tax Notes* January 13. "And the amended future compensation of a branch is not evidence per se that customers were transferred to its headquarters."

In 2005 U.K.-based Bupa acquired the Danish International Health Insurance company, which had had a PE in Nice, France, since 1993. In 2009 Bupa merged with the Danish insurer so that the Nice PE was held directly by the U.K. company. After a PE examination for tax years 2009 and 2010, the French tax authorities increased the profit of Bupa's French PE for 2009 by €6.1 million, saying the increase represented the value of the customers transferred by the French PE to its U.K. headquarters according to article 57 of the General Tax Code. This was demonstrated by the fact that the PE was later remunerated on a cost-plus basis, and therefore had changed its risk profile, the tax authorities added.

The taxpayer described the Nice PE in the transfer pricing documentation as merely a

provider of administrative services by three employees, limited to managing brokers that acquired customers in France, rendering customer service to local customers, and handling their claims. All contracts were drawn up under Danish law by the PE's previous Danish parent company, and the premiums were paid in Denmark. Bupa said it changed the method of remuneration for the PE in 2009 to correctly reflect the functions it performed, but not its risk profile.

The Administrative Court of Nice held that although some equity was previously allocated to the French PE and the customers were internally assigned a specific French code, that did not establish that the supply of services went beyond administrative support services, as evidenced by the fact that two of the three employees were secretaries. The Marseille Administrative Court of Appeal added that the noncompetition clause in the French branch manager's employment contract did not reveal the nature of the PE's functional activity.

The Conseil d'Etat concluded that the tax authorities had produced no evidence showing that the French PE could develop its own customer base; therefore, no value could be assigned to a transfer of customers to the U.K. entity.

The deliberations of Public Rapporteur Emilie Bokdam-Tognetti at the Conseil d'Etat were published simultaneously with the decision. She made clear that the Conseil d'Etat follows the authorized OECD approach on PEs and that profit allocation to a PE under article 57 of the General Tax Code can go beyond actual payments, including transfers that appear "colorless and odorless at first sight." Under French case law, the transfer of a customer base is therefore regarded as a taxable transfer if it occurs between separate legal entities (*Piaggio France SAS v. Ministre de l'action et des comptes publics*, No. 418817, 2019).

Insofar as lower courts have declined to recognize customers as part of a PE's allocable assets, that view must be rejected, Bokdam-Tognetti said. Nevertheless, for customers to be recognized as intangible assets of the French PE, the prongs of the *Piaggio* decision must be adapted, she said. Because a PE is not a separate legal person, it cannot legally act on its own