French-Swiss Point of View on the *Société Schneider Electric* Case: Some Thoughts on the Personal Attribution of Income Requirement in International Tax Law[1]

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The *Société Schneider Electric* case[5] judged by the Conseil d'Etat on June 28 2002 undoubtedly belongs to the series of the 'great sentences' of the French jurisprudence in the field of international taxation.[6] Indeed, the most solemn formation of the Conseil d'Etat asserts for the first time in history the incompatibility between Art. 209B of the French Tax Code (*Code général des impôts*) the main effect of

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1 The present contribution is a revised and updated English version of an article that was published in the *Revue de Droit Administratif et de Droit Fiscal*, 2002, no. 4, pp. 289–302 as well as in the *Revue de Droit des Affaires Internationales/International Business Law Journal*, 2002, vol. 8, pp. 911–922.

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5 Hereafter referred to as the *Schneider* case for the sake of brevity.

6 On this decision, see also P. Dibout, 'L'inapplicabilité de l'article 209 B du CGI face à la Convention fiscale franco-suisse du 9 septembre 1977' (A propos de l'arrêt

which is to submit to the French tax jurisdiction the profits of foreign subsidiaries subject to a privileged tax regime,[7] and Art. 7, s. 1 of the French–Swiss Convention of 9 September 1966, modified by the covenant of 3 December 1969.[8]

The facts were the following: Schneider, a French-based corporation, owned 100 per cent of the capital of Paramer, a corporation localized in the canton of Geneva. The sole activity of Paramer was to manage a portfolio of securities. The French tax administration intended to tax Paramer's profits on the ground of Art. 209B. The taxpayer answered that this text should be set aside by virtue of its incompatibility with Art. 7 of the French–Swiss Convention. According to this text, 'the profits on an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein'. This latter argumentation eventually prevailed before the Conseil d'Etat, thus putting an end to a particularly intense judicial debate.[9]

The considerable importance of this sentence may be explained in several ways. First of all, it differs from the 'ordinary' case law of the Conseil d'Etat insofar as it clearly intends to assert great principles of international taxation. More precisely, it may be said that the *Schneider* case lays down a genuine methodology for the judge. Whatever might be said about the content of this methodology, this initiative should be approved in principle, since the doctrine of the Conseil d'Etat until then seemed to be better expressed by its *Commissaires du Gouvernement* than by the Court itself. This observation is particularly relevant regarding the principle of subsidiary, which implies that:

> 'if a bilateral convention concluded in order to prevent double taxation may, according to article 55 of the Constitution, lead to set aside, on a particular point, the domestic legislation, it may not, by itself, serve directly as a legal basis for a decision concerning taxation; ... whereby the tax judge, in case of a dispute concerning such a convention, must first of all refer to the domestic legislation to check if, according to such legislation, the challenged tax was validly assessed and, in case of a positive response, on the ground of which qualification; ... then, if necessary, he must determine, by comparing this qualification with the stipulations of the convention, and depending on the arguments presented before him or even upon his own initiative – since the determination of the scope of the law is at stake, if this convention is or not an obstacle to the application of the tax legislation.'

Let us also mention, among the interesting points of this case, the refutation of the argument which strives to disregard international conventions when they are used for tax fraud purposes. According to the Conseil d'Etat, 'even supposing that a goal of fight against tax evasion and fraud would be established, such a goal would not permit to derogate to the rules of this convention, in default of a specific stipulation thereupon'. There is no better way to reassert the principle of strict interpretation of international treaties.[10]

Apart from its methodological merits, the *Schneider* case is of obvious practical interest insofar as its scope reaches far beyond the French–Swiss Convention and affects all international conventions concluded by France. Indirectly, the *Schneider* case brutally challenges the very mechanism of Art. 209 B, which explains why the French Government seriously considered reforming it immediately in order to make it compatible with France's international commitments. The project has nevertheless been temporarily withdrawn, waiting for some new developments. This strategy may well have been wise, since the latest version of the OECD commentary published in January 2003 states that Art. 7, s. 1 of the OECD Model ''does not limit the right of a Contracting State to tax its own residents under controlled foreign

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CE, Ass., 28 June 2002, Schneider Electric, *Revue de droit fiscal* 2002, no. 36, p. 1133); C. Acard, note in *Banque & Droit*, no. 84, July–August 2002, p. 56; D. Blaise, 'Fiscalité internationale: article 209 B et conventions fiscales', *BF Francis Lefebvre* 11/02, p. 763 ; B. Boutemy *et al.*, note in *Petites Affiches* 2002, no. 171, p. 4; Ch. Nouel and S. Reeb, note in Bull. Joly 2002, nos. 8–9, p. 897; L. Olleon, 'Article 209 B et conventions internationales: Après les ténèbres, la lumière', RJF 10/02, p. 755; J.-M. Tirard, RF compt. 2002, no. 348, p. 8.

7 The conditions of implementation of this text have changed over time. The participation required in the present case was 25 per cent of the shares of the foreign company, but this rate has been lowered to 10 per cent. The concept of privileged tax regime is characterized by reference to Art. 238A of the French Tax Code and interpreted by the tax administrations in several instructions (see in particular an instruction of 17 April 1998, *Revue de droit fiscal* 1998, nos. 20-21, instr. 11.988).

8 A covenant to the Convention was signed on 22 July 1997 (transposed by decree no. 98-747 of 20 August 1998, *Revue de droit fiscal* 1998, no. 40, comm. 858), which was not applicable in the case. Its scope is controversial: while French authorities see it as implicitly integrating the mechanism of Art. 209B in the Convention, Swiss authorities refuse to interpret it as derogating to the ordinary rules of the Convention. No doubt that the present decision will only make the controversy more vivid. On the subject, see Y. Noel, 'Interaction entre les réglementations sur les sociétés étrangères contrôlées et les conventions de double imposition – le cas de l'article 209 B et de l'Avenant à la Convention franco-suisse', *Revue de droit administratif et de droit fiscal* 2000, p. 135; T. Amonn, Zweitinstanzliches Urteil zur Anwendbarkeit der französischen CFC-Regelung im Verhältnis zur Schweiz', *Archives de droit fiscal suisse* 2001, p. 117; Federal Tax Administration Circular letter of 9 June 1999 relating to Swiss DTCs , in *Archives de droit fiscal suisse* 1999, p. 141.

9 To quote only the present case, see the position of the administrative court of Paris in favour of the compatibility (TA Paris, 13 February 1996, no. 9218670/1), cancelled by the Administrative court of appeal of Paris (30 January 2001, no. 96-1408, *Revue de droit fiscal* 2001, no. 10, comm. 207, note Dibout, concl. Mortelecq; *Droit 21 Etudes et Recherches*, p. 18, note Gutmann (on http://www.droit21.com). On the decision of the Administrative court of appeal of Paris, see also N. Chahid-Nourai and P. Couturier, 'L'article 209 B est-il soluble dans le droit fiscal international?', *Revue de droit fiscal* 2001, no. 8, p. 333. See Y. Noel, pp. 138 to 146, and T. Amonn, n. 8 above, p. 181.

10 About this principle and the way it is implemented by the Conseil d'Etat, cf. D. Gutmann, 'Interpretation of Tax Treaties in France. The Relevance of EC Law', *EC Tax Review* 2001-4, p. 201; also in M. Lang (ed.), *Tax Treaty Interpretation* (Kluwer Law International, 2001), p. 95.

companies provisions found in its domestic law even though such tax imposed on these residents may be computed by reference to the part of the profits of an enterprise that is resident of the other Contracting State that is attributable to these residents' participation in that enterprise. Tax so levied by a State on its own residents does not reduce the profits of the enterprise of the other State and may not, therefore, be said to have been levied on such profits" (§ 10.1).

The many aspects of the case make it impossible to explore all the consequences of the *Schneider* decision within a reasonable space.[11] This is why the present point of view will only intend to demonstrate that the Conseil d'Etat has shed the light on a potential conflict between France and Switzerland concerning the qualification and attribution of the profits referred to in Art. 7 of the Convention.

In this perspective, we shall first of all focus shortly on the question of attribution of income in conventional law. Then, we shall try to analyze Art. 209B in that respect.

1. Attribution of income and double tax treaties

There is little doubt that the primary purpose of double taxation conventions patterned upon the OECD Model Convention is the avoidance of international double taxation with a view to contribute to remove obstacles to the exchange of goods and services as well as to the movement of persons and capital.[12] This being said, tax treaties do not aim at eliminating double taxation in all circumstances.[13] Rather, their application is subject to various conditions.[14] Among these conditions is the so-called 'personal attribution of income' requirement which the distributive rules of the OECD Model Tax Convention (and the French–Swiss Convention) crystallize by terms such as:

- 'derived by' (Arts. 6(1), 13(1), 15(1), 16(1) and 17(1));
- 'of' (Arts. 7(1) and 21(1));
- 'accrued to' (Arts. 9(1)b);
- 'paid to' (Art. 10(1), 11(1) 18 and 19(1)a);
- 'beneficially owned' (Art. 12(1));
- 'receives' (Art. 20).

As a result of these terms, the distributive rules require that the relevant item of income or capital *be attributed* to a resident of a Contracting State. From this perspective, double tax treaties take into consideration an essential substantive requirement of domestic tax systems, namely the connection between a tax object and a tax subject (*persönliche Zurechnung*).[15] This connection may be established autonomously for tax purposes or by an implicit reference to private law. It is this latter approach which, as a rule, is favoured by Switzerland. Accordingly, under Swiss tax law the person to whom an element of income or capital is fiscally attributable is generally the one holding the unconditional right (*feste Anspruch*) to receive the latter under civil law.[16]

Despite the fact that this requirement does not appear in all distributive rules, it is obviously of general nature. This conclusion stems from the bilateral character of double tax treaties, which is codified in Art. 1 of the OECD Model Tax Convention.[17] Indeed, as a general rule, tax treaties are only intended to eliminate – effective or virtual[18] – double taxation arising between the Contracting States and not with third states.[19] To that end, the income does not only need to arise in a Contracting State but also to be fiscally attributed to a resident of the other Contracting State. Hence, in our view, the personal attribution of income requirement applies to all items of income addressed by the Treaty, irrespective of the fact that they may fall into the scope of application of a distributive rule in which this requirement is not expressly mentioned.[20]

This being said, double tax treaties do not define the meaning of 'paid to', etc. In these circumstances, Art. 3, para. 2 of the OECD Model Tax Convention provides that:

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11 It would be interesting to use the *Schneider* case as a starting point for a reflection between the distinction between economic and juridical double taxation (which will be tackled only through some of its aspects in the present article) and, more generally, for a critical approach to the conditions of implementation of international conventions.

12 D Luthi, 'Countering the abuse of tax treaties – a Swiss view', in *Intertax*, 1989/8-9, p. 336.

13 M. Lang, *The Application of the OECD Model Tax Convention to Partnerships* (Vienna, 2000), p. 29.

14 First of all, Art. 1 of the OECD Model Tax Convention specifies that: 'This Convention shall apply to persons who are residents of one or both of the Contracting States'. Most other requirements are included in the text of the distributive rules, For instance Arts. 10 to 12 of the OCDE Model Tax Convention provide that the recipient of an item of income shall also be the 'beneficial owner' of this income.

15 K. Tipke and J. Lang, *Steuerrecht*, 16th ed. (Köln, 1998), p. 265.

16 J.-M. Rivier, *Droit fiscal suisse – L'imposition du revenu et de la fortune* (Lausanne, 1998), p. 318; E. Hohn and R. Waldburger, *Steuerrecht*, Band I, 9th ed. (2001), p. 280, no. 32. With regard to income realized by partnerships, see H. Salome, *International Taxation of Partnerships: Divergences in the Personal Attribution of Income* (Zurich, Brussels), pp. 33–35.

17 R..J. Danon and H. Salome, Swiss national report 'Avoidance of Double Non-Taxation', presented on 20 to 23 June in the context of the High Level Scientific Conference organized each year *Institut für Oesterreischisches und Internationales Steuerrecht* of the University of Vienna, to be published by the end of 2002 or beginning of 2003 in Eucotax Series on *European Taxation* (Kluwer, Pays-Bas), section 1.3.2; Salome, pp. 63 and 42.

18 K. Vogel, *Klaus Vogel on Double Taxation Convention* (The Hague, London and Boston, 1997), p. 26, no. 46a.

19 Salome, p. 42; Danon and Salome, see n. 17 above, section 1.3.2

20 In the OECD Model Tax Convention, this is for instance the case of Art. 8, para. 1 and Art. 12, para. 1.

'as regards the application of the Convention at any time by a Contracting State, any term not defined therein shall, unless the context otherwise requires, have the meaning that it has at that time under the law of that State for the purposes of the taxes to which the Convention applies, any meaning under the applicable tax laws of that State prevailing over a meaning given to the term under other laws of that State[21].'

In the *Schneider* case, the attribution of income under Swiss tax law did not seem to be problematic. In accordance with private law principles, we shall therefore assume that the income at issue was clearly attributable to Paramer for Swiss tax purposes. By contrast, as a result of the application of Art. 209B, the situation is, as we shall see, less clear under French tax law. Indeed, the application of Art. 209B may, in essence, lead to three different conclusions. That is, under this provision one may consider that the income is fiscally attributable to the following.

1. The Schneider company (*divergence* with the personal attribution under the Swiss tax law).
2. The Paramer company and, subsequently, deemed distributed to the Schneider company (*convergence* with the personal attribution under the Swiss tax law).
3. The Paramer Company but nevertheless taxed in the hands of the Schneider company (*convergence* with the personal attribution under the Swiss tax law).

Hence, it is only if the conclusion is drawn that the proper interpretation of Art. 209B is the one mentioned under 1 above, that a divergence in the personal attribution of income may arise between Switzerland and France in a treaty context.

As we shall now see this question is intimately linked to the characterization of the income falling into the scope of Art. 209B.

2. Attribution of income and Article 209B

As shortly said in introduction, the problem of compatibility between Art. 209B and international conventions arises essentially because of the difficulty to analyze in a correct way the very mechanism of Art. 209B. As a matter of fact, this analysis is made compulsory by the international convention itself, which turns to domestic law to interpret its own ambiguous terms.

A. The necessity of a domestic analysis of Article 209B

Although the Conseil d'Etat and the Administrative Court of Appeal of Paris gave convergent solutions to the case, it is particularly interesting to underline a substantial difference in the way they proceeded to reach such a solution. It should be noticed, indeed, that the Administrative Court of Appeal had quite clearly neglected the question of the French qualification of the subsidiary's income by adopting an original conception of the function of international conventions. Let us record that, according to the Administrative court of appeal of Paris, 'an international convention defines the ways by which two countries share a taxable basis that, according to their domestic rules, they would both be entitled to tax'. The Parisian court had deducted from this assertion that the profit of the Swiss company – the 'taxable basis' of the case – pertained exclusively to the Swiss tax jurisdiction as a profit of a Swiss enterprise. The interest of the sentence issued by the Administrative Court of Appeal of Paris seems to be, nowadays even more than yesterday, this definition of the function of international conventions. By the way, the Conseil d'Etat did not import this definition for its own use, which is noticeable since it did the opposite for many other principles already clarified by the Administrative Court of Appeal of Paris.[22] This is probably because making reference to the 'taxable basis' enabled the appeal judges to refrain from entering into the difficult task of qualifying such basis according to French law. As a matter of fact, this way of reasoning was supported by the *Commissaire du Gouvernement Mortelecq*,[23] whose conclusions on the case tackled only superficially the question of qualification of the taxed income. The reasoning about Art. 7, s. 1 was therefore quite simple: the relevant 'taxable basis' being by hypothesis the profits of the Swiss subsidiary, it was *already attributed and qualified lege fori* of profits of an enterprise before the compatibility between Art. 209B and the Convention was checked. There could be no doubt, under such conditions, that the taxation in France of the subsidiary's profits was contrary to the French–Swiss Treaty.

A posteriori, the analysis appears to be somewhat unsatisfactory because of its presupposition, i.e. the identity of qualification and attribution between the French and Swiss law. More precisely, the appeal decision neglected the problem of interpretation arising

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[21] The French–Swiss Convention also contains a similar provision (Art. 3, para. 2). In addition, the OECD recently issued recommendations pertaining to the interpretation of these terms, in the context of transactions involving partnerships. In its report 'The Application of the OECD Model Tax Convention to Partnerships', the Committee on Fiscal Affairs examines the application of double tax treaties in situations where, due to the reference to their domestic law (*lex fori*), the Contracting States have different views with regard to the person to whom an item of income should be attributed under domestic tax law and as a result for treaty purposes. The solutions put forward by the OECD have furthermore been inserted in the 2000 update of the OECD Commentary (see in particular paras. 2 to 6.7 and Art. 1, para. 8.4 and Art. 4 as well as paras. 32 to 32.7 and Arts. 23A and 23B). On the compatibility of these recommendations with Swiss double tax treaties, see Salome and Danon and Salome, n. 17 above.

[22] This is the case, for example, of the principle of subsidiary which had already been defined (although in a different way) by the court of appeal, or of the impossibility to derogate to a tax convention in default of a conventional clause making it possible.

[23] A *Commissaire du Gouvernement* is a member of the Court who is in charge of issuing a report on each case from the viewpoint of the law; he does not represent the government nor the tax authorities. His report is called 'conclusions' (findings).

on the French side of Art. 7, s. 1 of the French–Swiss Convention, and particularly of the words 'of' and 'profits'. The former, which expresses the necessity of the attribution of income ('the profits *of* an enterprise') has apparently been considered to be obvious, insofar as the income could only be attributed to the Swiss subsidiary, not to the French company. As far as the notion of profit is concerned, the Conseil d'Etat naturally reasserts that it is not defined by the French–Swiss Convention and must therefore be interpreted according to the principle enclosed in Art. 3, s. 2 of the Convention, which states that: 'as regards the application of the Convention by a Contracting state, any term not defined therein shall, unless the context otherwise requires, have the meaning that it has under the law of that State for the purposes of the taxes to which the Convention applies'. The Conseil d'Etat therefore requires, in accordance with this text, that the French qualification of the profits of the Swiss subsidiary be made clear.

This way of putting things is not new, since the Conseil d'Etat had already refused to accept the Administration's claims several times in the past by referring to domestic qualifications before applying international conventions.[24] The substance of the question, however, was presented for the first time to the Conseil d'Etat: what is the correct qualification of the Swiss subsidiary's income, to explain that is should be taxed in the hands of the French corporation?

B. Elements of a domestic analysis of Article 209B

In order to provide for an analysis of Art. 209B as it was formulated at the time of its applicability to the case,[25] we shall start with a presentation of the terms of the problem as they were set forth before the Conseil d'Etat. Then we shall present a few observations which will be our contribution to the debate.

1. The dispute as presented before the Conseil d'Etat

The newest element put forth by the Conseil d'Etat is this assertion:

> 'it results from the very terms of these provisions [Art. 209B, para. I] that their object is to permit the taxation in France of the profits arising from the running of a company established abroad and not, contrarily to what the minister sustains, of deemed distributions of profits by this foreign company to its French resident shareholder.'

This analysis drives the Conseil d'Etat to state that, unless other elements require to interpret the conventional term 'profit' in a way diverging from the rules provided by the French Tax Code:

> 'the court did not commit any legal mistake by judging that there is an identity of nature between the operating profits of Paramer, the taxation of which is attributed to Switzerland by article 7, 1° of the French-Swiss tax convention, and the beneficiary results of Paramer taxed in France in the name of Schneider on the ground of article 209 B.'

These sentences, worded for the purposes of the 'great' decision, are marvelously deceiving: they seem to unveil a legal obviousness ('it results from the very terms of these provisions...') and, while doing so, conceal the complexity of the analysis of Art. 209B which, however, had been perfectly underlined by the *Commissaire du Gouvernement* Stéphane Austry.[26]

It is indeed impossible to understand the position of the Conseil d'Etat without stressing the fact that it is in full contrast with the conclusions of the *Commissaire du Gouvernement*, especially regarding two main points. First of all, Stéphane Austry had carefully demonstrated that the very wording of Art. 209B is ambiguous. Surely, it states that the French company is 'subject to corporate income tax on the profits of the foreign company' and adds that those profits, assessed in accordance with the rules provided by the French Tax Code, 'are subject to taxation'. Moreover, it is true that the imputation of the tax paid abroad by the foreign company on the tax assessed in France on the ground of Art. 209B may be interpreted as meaning that the legislator intended to prevent a single profit from being taxed twice. However, the same Art. 209B submits foreign income to a separate taxation, which implies in particular that foreign losses are not deductible from the French income of the parent company. Besides, the second paragraph of Art. 209BI states that the tax bears on those profits which are

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[24] See, for examples, the following cases of the Conseil d'Etat: *Malet*, 26 February 1992, no. 83 461, RJF 4/92, no. 534, concl. Fouguet, *Revue de droit fiscal* 1992, no. 52, comm. 2459; *Hubertus AG*, 9 February 2000, no. 178 389, *Revue de jurisprudence fiscale* 3/00, no. 342, concl. Arrighi de Casanova, *Bulletin des conclusions fiscales* 3/00, no. 31; *SA Bank Polska*, 31 January 2001, no. 199 543, *Revue de jurisprudence fiscale* 4/01, no. 489, concl. Bachelier, *Bulletin des conclusions fiscales* 4/01, no. 489.

[25] Let it be noticed that the wording of the present Art. 209 B is slightly different from the previous one. Indeed, Art. 209BI*bis* provides for a new definition of the conditions of implementation of the text from 30 September 1992 on, and is supposed to substitute the provisions of para. I from 1 January 2003. According to Art. 209I*bis*, 'the beneficiary result of the enterprise, of the company or of the groupment is deemed to constitute a result of this legal person'. To put it in a different way, the profit of the subsidiary established abroad is 'deemed to constitute a profit' of the parent company in France. Should we consider, like for instance P. Dibout, p. 1136, that this difference in the wording of Art. 209BI is of no significance at all? That between the fact of being 'subject to corporate income tax on the beneficiary results of the foreign company' and the fact that such profits are 'deemed to constitute a result' of the French company, the difference is only formal? This is possible, but it is not obvious. If one may possibly admit that, by virtue of para. I, the French company was only obliged to pay a tax laid upon a foreign legal person, one may also sustain, the other way round, that the most recent version of Art. 209B institutes the French legal person as the subject to which the income of the foreign subsidiary is attributed. This analysis is all the more convincing as Art. 209BI*bis*, unlike Art. 209BI, explains clearly the ways by which the subsidiary's income should be attributed to the parent company.

[26] His findings are published in *Bulletin des Conclusions Fiscales* (BDCF), 10/02, p. 13.

'*deemed to be acquired*' by the French company, which might indicate that the taxation regards deemed distributions of profits. Literal arguments may therefore be used in contradictory ways, which is enough to show that Art. 209B cannot be considered as a 'clear text'.[27] Under such conditions, one should only approve the *Commissaire du Gouvernement* to have wondered, following Arts. 31 and 33 of the Vienna Convention, which interpretation was most relevant with respect to the object of the law and the intention of the legislator.

At this second stage of the reasoning, Stéphane Austry diverges radically from the position which will be chosen later on by the Conseil d'Etat. The *Commissaire du Gouvernement* indeed considers, with reference to the preparatory work of the Financial Bill 1980 introducing Art. 209B in the French legislation, that the main goal of this provision was to avoid the double exemption of profits made by subsidiaries established abroad where they distribute tax-free, thanks to the parent-subsidiary regime, profits already taxed at a low level by virtue of their localization in low-tax jurisdictions. From a historical point of view, Art. 209B would therefore intend to provide for a remedy to an excessively favourable result of the parent-subsidiary regime. A second goal of the system would also be to tax in France profits intentionally hoarded in subsidiaries localized in tax-privileged countries. The convergence between these two goals leads Stéphane Austry to analyze Art. 209B as instituting a form of legal presumption of distribution of foreign income to the French parent company. Since such income is not explicitly covered by the French–Swiss Convention, it logically falls under the scope of the 'other income' clause (Art. 23 of the Convention) which gives the taxing right to the state of the recipient, hence France.

The powerful arguments set forth by Stéphane Austry, as well as the unjustly brief answer given to them by the Conseil d'Etat, deserve a few observations.

2. Additional observations on the nature of Art. 209B

The first observation which comes to our mind may be worded as a question: can we not consider, before wondering if Art. 209B establishes a fiction of distribution or of attribution of income, that the ordinary principles of corporate taxation are sufficient to justify the taxation of the subsidiary's income in the hands of the parent company? The question cannot be circumvented because one could be tempted to state that, at the end of the day, Art. 209B is a mere application of the very classical theory according to which a debt is deemed to be acquired as long as it is certain. In favour of this approach, one may notice that the ECJ has already admitted that the fact, for a company which is the sole shareholder of another company, to register in its accounts a dividend which has not yet been decided upon by the assembly, did not infringe the principle of carefulness which ordinarily prevails in such matters.[28] It is therefore legitimate to sustain, on the basis of this decision, that a company may consider that it has acquired an element of profit which does not yet exist legally speaking, as long as its certainty is sufficiently demonstrated at the end of the tax year. Such an argumentation is put forward by some scholars to explain why a domestic administration should be able, even in default of a CFC rule such as Art. 209B, to tax the parent company in respect of the results to be received from the subsidiary.[29]

However, these scholars also acknowledge 'the exclusive goal of the ECJ's decision is to enable the shareholder to register in his accounts the dividend to be received, without making it compulsory'.[30] Moreover – and most of all, this argumentation operates only in the case where the shareholder is the only one to decide upon the distribution. By contrast, Art. 209B may apply, not only in such a case – which, by the way, was *Schneider's* – but also in less clear situations. As we know, it is enough for the parent company to own 10 per cent of the shares, participations, financial or voting rights in a foreign company for Art. 209B to be applicable. Such a percentage is obviously too low for the subsidiary's profits to be considered as part of the parent's profits in accordance with the previous reasoning. To conclude on this point, it is therefore impossible to explain the taxation in France of the subsidiary's profits by referring exclusively to the traditional theory of the relationship between the tax subject and the taxable basis. These limits of the ordinary tax principles confirm the necessity to explain the legitimacy of Art. 209B through fictions and presumptions.[31]

Entering the realm of fiction, unfortunately, means setting aside the realm of rationality. This is the main objection which may be addressed to the argumentation of the *Commissaire du Gouvernement* Stéphane Austry. Does Art. 209B provide for a fiction of distribution or more simply for a fiction of realization of the subsidiary's profit by the parent company? It

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[27] In favour of an opposite analysis, see P. Dibout, 'l'inapplicabilité de l'article 209B', no. 16; D. Villemot, 'Qualité requise pour invoquer le bénéfice des conventions fiscales internationales à l'encontre de l'article 209 B du CGI', *Revue de droit fiscal* 2001, no. 47, p. 1641, especially p. 1644.

[28] ECJ, June 27th, 1996, case C-234/94.

[29] A. Steichen and Ch. Duro, Luxembourg. Rapport national', *Cahiers de Droit Fiscal International*, vol. LXXXVIb, 'Limites à l'usage des régimes à fiscalité privilégiée par les entreprises multinationales: mesures actuelles et tendances', 2001, p. 667, especially p. 683.

[30] *Ibid*.

[31] On this point, it should be noticed that the Swiss theory of attribution of income by residual reference to the civil principles of attribution is not, as such, received in France. Most scholars seem to accept the idea of the tax fiction, while there is, as a matter of fact, a great deal of problems to be thought over more deeply, especially due to the fact that the analysis of a tax fiction is rationally impossible.

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seems that no rational answer may be brought to this question, and the goals pursued by the legislator in 1980 do not help in that respect. As often in the field of taxation, the legislator's attitude was essentially pragmatic: what counted most was to provide for a possibility to submit to the French tax rules items of income, whether distributed or not, which were artificially localized in low-tax jurisdictions. In that respect, it is rather vain to wonder if the law presumed that this income was distributed or if, more bluntly, it attributed this income for the purpose of tax law to the parent company. The only certainty, in the end, is only that the taxation in France of the subsidiary's profits takes place by virtue of an unilateral act of sovereignty of the French state, without the ordinary tax qualifications explaining rationally such taxation. If this analysis is accepted, the only conclusion is that, neither the wording of Art. 209B, nor its history, nor pure reason, provide for efficient tools to qualify correctly Art. 209B.[32]

3. Conclusion

This observation does not mean that the findings of the Conseil d'Etat are erroneous. Rather, in our view, these findings flow from a correct analysis of *the function* of Art. 209B. Indeed, the function of this provision is primarily to dispute to a foreign country the right to assess an item of income or capital on the basis of ordinary rules controlling jurisdiction to tax (i.e. in the present instance a tax liability based on the statutory seat of a Swiss legal entity). Stated differently, under Art. 209B the right to tax of this foreign country is implicitly recognized but it is the field of application of France's fiscal sovereignty that is purposely extended. In sum, the conflict of taxing rights that here occurs is *intended* by France.

For these reasons, we are of the opinion that the application of Art. 209B does, under French tax law, not amount to deny the connection existing between the relevant item of income and the foreign subsidiary. Therefore in the *Schneider* case, 'the profits' to which Art. 7, s. 1 refers were also, from a French perspective, those 'of' Paramer, an enterprise of Switzerland. Accordingly, France was correctly placed in the position of the state of source and, consequently, in the absence of a permanent establishment on its territory, had no right to tax the profits of the Swiss company.

Notes

[32] This analysis shows, beyond Art. 209B, how difficult it is to draw a genuine fiscal theory in a context dominated by legislative pragmatism. The observation was already made to notice that the definition of income (of crucial importance in our case) is mostly dependent upon the field and the context (cf. B. Plagnet, 'La consécration par le droit fiscal de la définition économique du revenu?', in H. Isaia and J. Spindler (eds.), *Histoire du droit des finances publiques*, vol. II (Economica, 1987), p.189 especially p. 206).