

International Tax Alert

GLOBAL INSIGHTS



A Review of Key Regulatory Issues Impacting International Tax Practices

October 2012

Registration duties: latest comments from the French Tax Authorities on the new tax regime of transfer of shares in a company

The Finance Act (28 December 2011) and the Amended Finance Act (14 March 2012) for 2012 modified significantly the treatment of registration duties applicable to the transfer of shares in listed and non listed companies. Since 1 August 2012, new rates have come into force, new exemptions are applicable and the geographic scope of registration duties has expanded significantly. A tax regulation (7 D-1-12), dated 3 August 2012, specified these reforms.

Preliminary Explanations in relation to Taxable Transactions

Transfers of shares *stricto sensu* are subject to registration duties, except for transactions without consideration and/or transactions that do not lead to a transfer of ownership. In this respect, the French Tax Authorities specify that even though the issuance of a bond exchangeable or convertible into existing shares does not constitute a transfer of shares, the conversion or exchange of bonds for existing shares does constitute a transfer of shares which leads to transfer the ownership of the shares and whose payment is made through offsetting the bondholders' receivable and which is thus subject to registration duties.

Applicable Rates (article 726 of the French Tax Code)

The registration duties rates applicable to transfers of (i) interest in companies whose share capital is not divided into shares (3%) and (ii) shareholdings in real estate companies (5%) remain unchanged. However, the registration duties applicable to transfers of shares in a corporation have led to two successive reforms.

At first, the Finance Act for 2012 dated 28 December 2011 replaced the pro rata rate of 3% which was capped at €5000, by a degressive scale comprising three levels:

- (i) 3% for the portion of the tax base below €200 000;

- (ii) 0.5% for the portion of the tax base which ranges from €200 000 to 500 million; and
- (iii) 0.25% for the portion of the tax base above €500 million.

The abovementioned degressive scale came into force on 1 January 2012.

The first Amended Finance Act for 2012 dated 14 March 2012 eventually partially reconsidered the abovementioned measures and, as from 1 August 2012, replaced such a degressive scale by a single pro rata taxation of 0.1%, without reinstating the €5000 cap previously applicable, thus bringing the registration duties rate applicable to transfers of securities in line with the financial transaction tax rate applicable to the transfer of certain listed shares (companies whose capitalization exceeds €1 billion)¹

Exemptions

In addition to the already existing exemptions (such as the transfer of shares in a company for no consideration, the payments of dividends in securities, or the acquisition and resale transactions), the Finance Act for 2012 and the first Amended Finance Act for 2012 introduced new exemption.

Thus, the following transactions are now exempt from registration duties:

- (i) The acquisition of shares in a company through the buy back by a company of its own shares or through a capital increase. The exemptions initially planned by the Finance Act for 2012 applied to any and all share buy backs. However, the first Amended Finance Act for 2012 significantly reduced the scope of application of such an exemption: in fact, as from 1 August 2012, two conditions must be met in order for the exemption to apply:
 - the company which buys back its own shares must be listed; and

¹ The second amended finance act for 2012 dated 14 August 2012 nonetheless increased the rate of the tax on financial transactions to 0.2%. Although the increase of the 0.1% rate is not under discussed yet, it cannot be excluded that such a rate may, in the near future, be increased so as to be in line with the 0.2% financial transaction tax rate.

- the shares which are bought back must be intended to be transferred to the members of a company savings plan.

However, even though the buy back by a company of its own shares is in theory subject to the pro rata rates provided for by Article 726 of the French Tax Code, the French Tax Authorities have admitted, in a Tax regulation dated 29 December 2009 (7 H-03-09, BOI-ENR-AVS-20-20-20120912- n°180) that this transaction may lead to solely the fixed registration duty of €375 or €500 (depending on the company's share capital), provided that the following two conditions be met:

- the buy back by a company of its own shares, made in view of their cancellation, be followed by a capital reduction; and
- the buy back and capital reduction transactions be formalized in a single document.

Given that the abovementioned regulation has not been repealed, such a solution should continue to apply, even though it is not included in the regulation dated 3 August 2012.

- (ii) The acquisition of shares in companies placed under a safeguard procedure or judicial rehabilitation.
- (iii) The acquisition of shares between companies forming part of the same group within the meaning of Article L.233-3 of the French Commercial Code² or of Article 223 A of the French Tax Code (tax consolidation regime). It seems that a combined application of these two articles allows transfers of shares between companies that may, in theory, be members of a consolidated tax group within the meaning of Article 223 A of the French Tax Code (parent company holding at least 95% of the share capital of its subsidiaries) to be made free of registration duties, even though in practice, these companies have not actually elected for the tax consolidation regime.
- (iv) The acquisition of shares in a company under the conditions provided for by Articles 210 A of the French Tax Code (favorable tax regime for mergers), 210 B of the French Tax Code (favorable tax regime for partial contribution of assets of a complete branch of activity), 220 quarter, 220 quarter A and 220 quarter B (Management Buy Out) of the French Tax Code.

² Article 233-3 of the French Commercial Code specifies the circumstances under which a company is considered as controlling another company. For instance when it holds directly or indirectly a part of the share capital conferring to it the majority of the votes in the general meetings of such a company. It has to be noted that a company is presumed exercising such a control when it holds directly or indirectly a part of the voting rights that exceeds 40% and that no other shareholder holds a higher part of the shares.

- (v) The transactions subject to the financial transaction tax within the meaning of Article 235 ter ZD of the French Tax Code (tax of 0.2% payable on all acquisitions of equity instruments issued by a company, regardless of the place of its registered office, with a capitalization over €1 billion).

Unfortunately, the French Tax Authorities have not shed additional light on some of these exemptions, in particular as regards the acquisition of shares in a company through a capital increase, a merger or a partial contribution of assets under the favorable tax regime set forth in Articles 210 A and 210 B. In fact, in accordance with articles 809, I-3°, 810, I and III, and 8163 of the French Tax Code, these transactions are not subject to the registration duties provided for by Article 726 of the French Tax Code, but rather to a fixed duty of €375 or €500 as the case may be. In addition, the French Tax Authorities do not give any detail as to the meaning of "acquisition of shares in a company through a capital increase" and "acquisition of shares in a company under the conditions provided for by Articles 210 A and 210 B of the French Tax Code". A number of issues are thus outstanding and would need to be further explained, as need be, via advance tax ruling.

A Geographic Scope of Application

With respect to listed companies, transfers of shares are subject to registration duties in France only if they are formalized in a written agreement. In the event that an agreement is concluded in France, the registration duties are payable regardless of the country of the registered office of the company whose securities are being sold. Conversely, in the event that an agreement is concluded abroad, the registration duties are payable in France only if the company whose shares are being sold has its registered office in France.

With respect to non listed companies, the registration duties are payable in France (i) if the agreement is concluded in France, regardless of the country of the registered office of the company whose securities are being sold, and (ii) if the company whose securities are being sold has its registered office in France, whether or not the transfer was formalized in a written agreement or not.

Thus, from now on, all agreements executed abroad in relation to shares in listed or non listed companies whose registered office is based in France are subject to registration duties.

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