

## Transfer Tax Reform Raises Uncertainties

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# COUNTRY DIGEST

## Transfer Tax Reform Raises Uncertainties

Effective January 1, the French Finance Act significantly increased the transfer tax applicable to the transfer of shares of non-real-estate companies.<sup>1</sup> The reform of the transfer tax has many practical consequences for investors and also raises a number of issues that the tax authorities have been asked to clarify. (For prior coverage, see *Tax Notes Int'l*, Jan. 16, 2012, p. 184, *Doc 2012-470*, or *2012 WTD 7-2*.)

### Background

Before the reform, sales of shares of French companies were subject to a 3 percent transfer tax, capped at €5,000 per transfer for transfers of shares in *sociétés par action* — that is, mainly *société anonyme* (SA), *société par action simplifiée* (SAS), and *société en commandite par action*.

No transfer tax was due on sales of listed shares if there was a deed executed outside France. Transfer tax was due if the deed was executed in France.

### New Transfer Tax Rate

As a result of the reform, the €5,000 cap no longer applies. When applicable, the transfer tax is now calculated as follows:

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<sup>1</sup>The transfer of real estate companies is not affected by the reform and remains subject to a non-capped 5 percent tax. The transfer of shares that are considered “*parts sociales*,” a concept mainly relevant for the *société à responsabilité limitée* (SARL), *société civile* (SC), and *société en nom collectif* (SNC), is not affected by the reform and remains subject to a non-capped 3 percent tax. Before the adoption of the U.S. entity classification regulations in 1997, many French entities were formed by U.S. investors as SARLs in order to retain the flexibility for partnership tax treatment in the U.S. The combination of additional forms of French entities, such as the *société par action simplifiée* (SAS), and the more flexible entity classification regulations have reduced the use of SARLs, and thus reduced the possibility of enhanced transfer taxes when U.S. investors are involved.

- 3 percent for the portion of the purchase price lower than €200,000;
- 0.5 percent for the portion of the purchase price between €200,000 and €500 million; and
- 0.25 percent for the portion of the purchase price exceeding €500 million.

Moreover, when a deed is executed, the transfer tax is due regardless of whether the deed is executed outside of France.

When the transfer of the shares of a French company is realized through a deed executed outside France, a tax credit is granted for any transfer taxes effectively paid in the state of registration or the state of residence of each party.

The transfer tax does not apply to instruments other than shares, such as bonds or warrants. There are also several exemptions applicable to, for example, intra-group transfers, share buybacks, or share capital increases.

When transfer tax is due, the seller and the purchaser are jointly liable for its payment to the French tax authorities.

### Main Consequences of the Tax Reform

Investors should be aware of the following practical consequences:

- Investors purchasing shares of listed French companies will fall within the ambit of the new transfer tax (imposed at rates between 3 and 0.25 percent — see above) only if a deed is executed, in France or abroad.
- Investors purchasing shares of unlisted French companies will always be subject to the new transfer tax, regardless of whether a deed is executed.
- As a result of the French territoriality rules, the purchase of listed or unlisted shares of non-French companies will fall within the ambit of the new transfer tax if a deed is executed in France. Therefore, effective immediately, no share purchase agreement should be executed in France for the purchase or sale of shares of non-French companies (listed or not).

### Remaining Uncertainties

The reform raises many unanticipated uncertainties. The French tax authorities have been asked to immediately clarify the following issues:

- What is a deed for the purpose of the transfer tax reform? For example, are over-the-counter transactions involving listed shares always subject to the new transfer tax? Does a deed require a written share purchase agreement, as opposed to agreements that are only evidenced through the exchange of electronic information or confirmations between financial institutions?
- What is a taxable transfer for the purpose of the transfer tax reform? For example, do stock loan transactions fall within the ambit of this new transfer tax, or should they be exempt on the grounds that such transfers are not otherwise considered taxable transfers (as I believe they should be)? How should repo transactions be treated? How should the conversion of French stocks into American depositary receipts be treated?<sup>2</sup>

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<sup>2</sup>Reportedly, some U.S. banks have begun restricting orders to convert French stocks into American depositary receipts because of concern over how tax changes will affect share dealing.

- Will the French tax authorities agree to amend French territoriality rules in order to exclude from the scope of the transfer tax the purchase or sale of stocks in a non-French company implemented through a deed executed in France?

The statement of practice answering these questions should be issued sometime in February.

### Outlook

The adverse tax consequences of this reform, which was passed by the French Parliament despite the opposition of the French government, could lead the government to soon ask Parliament to amend it to be less strict.

In a related topic, President Nicolas Sarkozy has announced his desire to have the French Parliament adopt a Tobin tax, which would apply to financial transactions during 2012. The draft bill of this tax should be presented in February. (For prior coverage, see *Tax Notes Int'l*, Jan. 16, 2012, p. 182, *Doc 2012-471*, or *2012 WTD 6-2*.) ◆

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