

New registration rules for share transfers of non French companies owning French property.

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Please note that tax law is a complex subject and you should not rely on this article without professional advice on the facts of your case.

New rules come into force on 1st November 2011 requiring buyers of shares in non French property companies to register the share transfer in France and pay 5% French transfer tax on the purchase. The new law is aimed at stopping buyers evading French stamp duty by selling shares in offshore companies. It will also enable France to obtain information about sellers and so recover more capital gains.

The rules

The rules are in Article 635, 2, 7bis of the French Tax Code and apply to companies which are of “prépondérance immobilière”. This is defined as a company whose assets are predominantly (i.e. more than 50%) either French real estate or rights over French real estate or shares in companies whose assets are predominantly French real estate. Unlike for capital gains tax and wealth tax purposes, assets used by the company for its professional purposes are included in this calculation so they count towards the 50% ratio.

The exemptions

There are few exemptions from this law. In the main it is only possible to be exempt if the company does not fall within the above definition. Effectively this means that it will need to hold other assets which exceed the value of the French property owned by the company. The strict reading of the law suggests that worldwide assets of the company should be taken into consideration for this assessment although in practice, for other purposes, the French Revenue will generally only consider French assets. Further clarification is required from the Revenue on this point.

In addition, a company will not be considered to fall within the above definition if its shares are sold on a regulated market or if the company carries out the activity of constructing social housing.

Stamp Duty

This law on registration is in addition to the law introduced in 2010 that the transfers of such companies are subject to French stamp duty at the rate of 5%. Double tax treaties do not cover stamp duty but there is a unilateral relief provided in the French tax code so that any stamp duty paid in the country where the company is registered is allowed as a credit against the sum due in France. For example in the case of a UK company, it would be necessary to pay 0.5% UK stamp duty and this would be deductible from the 5% French stamp duty. In practice, it will be sensible therefore to carry out the necessary formalities in the country where the company is based first then present the

evidence of the stamp duty paid to the French authorities upon registration of the transfer in France.

The stamp duty is assessed on the value of the shares being transferred. If the company's value is reduced due to borrowing, the stamp duty would only be due on the net value. The value of any shareholder loans will be taken into account when assessing the company value. This loan could be assigned separately to the buyer without any charge to stamp duty.

Connections to other taxes

As a company owning French property, it will be necessary (in the majority of cases) for the shareholders to be revealed to the French authorities each year in order to avoid a charge to the French 3% tax. This means that the authorities will become aware if the shareholders have changed. They will in all likelihood seek to enforce penalties and interest if the necessary steps have not been taken to formalise the share transfer.

Unless a helpful double tax treaty is in place with the country where the company is based, the transfer of shares will also be subject to French capital gains tax. The requirement for transfers to be registered should make it easier for the French authorities to enforce this charge.

Obtaining details of transfers is also likely to assist the authorities in enforcing the annual charges to wealth tax.

Mechanisms of registering

The document transferring the shares will need to be in an approved form in French. This is not comparable to a UK company where a simple stock transfer form is all that is required. In France a more comprehensive agreement will be necessary which provides details of the underlying property. An English share purchase agreement is unlikely to be sufficient for formalising the share transfer in France.

The sale deed will need to be registered within one month of completion by a French notaire who will charge a fee based on the sale price. The stamp duty of 5% has to be paid at the same time as the sale deed is registered.

Consequences of breach of law

Failure to pay the stamp duty by the date it is due will result in interest becoming due at the rate of 0.4% per month.

Alternative options for structuring the sale

It may be possible to issue new shares in the company to the buyer in exchange for a capital contribution to the company. This capital contribution could subsequently be used to reimburse the seller for the cancellation of his shares in the company. The acts of increasing the share capital in the company and reducing the share capital in the company should not be viewed as a disposal of shares from the seller to the buyer and would therefore fall outside the scope of the new law. Care will need to be taken to properly record each of the actions and the transaction would be open to challenge from

the French authorities who would become aware of the change in ownership due to the annual filing requirements for the 3% tax. In this case, they might argue that the transactions when viewed together constitute a disposal of the shares.

Rather than dispose of the legal title to the shares, the buyer could acquire the beneficial interest from the seller. As the legal owner would remain the same in these circumstances, the transaction should not be viewed by the French authorities as a transfer of the shares. The buyer would expect to pay a premium in these circumstances as the seller will remain the legal owner of the shares. Careful consideration of the ongoing arrangements will be necessary here as, for French purposes, the seller is likely to remain the taxable person. The newly introduced rules in France relating to assets held in a trust may have an impact here.

A lower risk strategy is to pay a lower sum for the shares themselves and attribute more consideration to any shareholder loan in place. Although the share transfer would still need to be registered, the French stamp duty should be significantly reduced in these circumstances.

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