Corporate Tax - France

Share-for-share contributions: contrary to tax law?

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The Supreme Court has censured many share-for-share contributions for constituting an abuse of law, resulting in both the taxation of the operation and the imposition of significant penalties to punish inappropriate tax behaviour.

An 'abuse of law' is defined as an operation that has been set up solely for tax purposes and which is restrictive and, accordingly, favourable to taxpayers.

An '*apport-cession*' is the operation by which a share-owning individual transfers those shares to a company subject to corporate tax and not immediately subject to capital gains tax; such taxation will occur on the subsequent transfer by the individual of the securities received in exchange.

The optional tax deferral system which applied until December 31 2011 has now been replaced by an automatic deferral system, which entered into force as of January 1 2000.

After years of disagreement between the tax administration and taxpayers, in three judgments issued on the same day the Supreme Court has clarified its position on *apport-cessions* subject to the previous tax deferral regime.(1) The court now considers that in certain circumstances, an *apport-cession* is not a financial arrangement constituting an abuse of law.

The court appears to limit the qualification of an *apport-cession* as an abuse of law to two circumstances:

- a financial arrangement which is intended to allow the taxpayer to obtain liquidity from the disposal of the shares while remaining the holder of the shares; and
- an obligation to reinvest a significant portion of the gains from disposal in the equity of a company engaged in an economic activity (ie, not a patrimonial investment resulting in the receipt of passive income).

Subsequently, the reinvestment obligation was clarified in a judgment of February 3 2011,(2) which considered that investment grants of 60% in the current account (not the equity) of a company engaged in an economic activity did not meet the criteria laid down by case law.

The Supreme Court case law has been widely criticised for several reasons. First, from a technical point of view, contrary to the Supreme Court's position, it is wrong that an individual can apprehend the amount received by the company unless there is a taxable distribution or unless it uses the sums personally, which would have equivalent tax consequences. In addition, it is unclear why the court introduced a significant obligation to reinvest in an economic activity (as opposed to passive investments). Finally, an *apport-cession* is necessarily different from a simple transfer because it has non-fiscal consequences.

However, this case law has been consistently applied, so it must be considered before an *apport-cession*. For now, it applies only to *apport-cessions* under the old tax deferral regime, not those under the automatic deferral system. Most commentators believe that the court should apply the same criteria to *apport-cessions* subject to the automatic deferral system.

Nevertheless, the question arises as to whether there is still an abuse of law where the taxation of a holding is deferred automatically unless the taxpayer challenges the principle of interposition of a holding, which may protect the property of the individual and his or her family in terms of assets and liabilities.

The Consultative Committee against Abuse of Law considered that no abuse of law

existed in two judgments issued in 2004,(3) under the new deferral system, before reconsidering its position to state that there could be an abuse of law.(4)

Perhaps for this reason, in a later case the tax authorities chose not to consult the committee and maintained the burden of proof to find that an abuse of law was applicable to an *apport-cession* under the automatic deferral system. On appeal, the Versailles Administrative Court of Appeal ruled in favour of the tax authorities.(5) This decision is subject to confirmation by the Supreme Court. Its decision will be interesting as the facts of the case are unfavourable to the taxpayers: on October 10 2001 they committed to sell their securities, but then proceeded with an *apport-cession* on January 23 2002.

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Endnotes

(1) CE, October 8 2010, 301934, *Bazir*; 321361, *Min v Four* ; 313139, *Min v Bauchart*).

(2) CE, 329839, *Conseil*.

(3) BOI 13 L-3-06 58, March 30 2006.

(4) Opinion of November 15 2011, 13 L.2-12 and February 2 2012, 13 L.8-11.

(5) CAA Versailles 09VE02218 and 09VE02217, 1ère ch, January 24 2012.