

ECJ Addresses Cross-Border Share Transfers

by Marco Rossi

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COUNTRY DIGEST

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The European Court of Justice on December 11 issued its judgment in *A.T. v. Finanzamt Stuttgart-Körperschaften* (C-285/07), dealing with the tax treatment of a cross-border EU transfer of shares under German law. (For the judgment, see *Doc 2008-26059* or *2008 WTD 240-12*.)

The Court held that a German law that exempts shareholders of a transferred corporation (target) from tax on the gain from the exchange of their shares in the target for the shares of the acquiring corporation on the condition that the acquiring corporation takes a tax basis in the shares of the target that is equal to the transferring shareholder's tax basis in those shares before the transfer (carryover basis) violates EU directive 90/434/EEC of July 23, 1990 (the mergers directive), and EU law.

In the case at issue, a German public company transferred a majority shareholding in a German private company to a French public company solely in exchange for stock of the French company. The German transferor took a tax basis in the stock of the French acquiring company it received in the transaction, equal to the tax basis it had in the shares of the German transferred company (substituted basis). The French acquiring company carried the shares of the German acquired company at their fair market value at the time of the transaction.

The mergers directive prescribes that to qualify for tax-free treatment and defer tax on the gain from the exchange of stock in the target for stock of the acquiring company, the shareholders of the target company must take a substituted basis in the stock of the acquiring company they received in the exchange. The directive is silent as to the tax basis at which the acquiring company should carry the stock of the acquired company received in the transaction.

German law prescribed that the acquiring company take a carryover basis in the shares of the target (the double carryover basis requirement). The position of the German government on the issue was that the directive is silent and the matter falls within the authority of the member states.

The Court rejected that argument and held that the double carryover basis requirement imposed by German law violates the mergers directive and EU law in that it results in an undue restriction of a cross-border exchange of shares between EU companies.

Italian Law

The December 11 judgment has no negative impact on Italy's tax regime for cross-border share transfers.

Italy implemented the mergers directive by way of Legislative Decree 544 of 1992. Recently, the directive was amended and extended by Council Directive 2005/19/EC, implemented in Italy by way of Legislative Decree 199 of 2007.

In the case of cross-border transfer of shares, Italy's tax administration took the position in Resolution 190 of December 13, 2000, that shareholders of the target could achieve tax-free treatment on their transfer of shares of the target for shares of the acquiring company, provided that they took a substituted basis in the shares of the acquiring company and the acquiring company took a carryover basis in the shares of the target received in the transaction.

Italy's tax administration subsequently issued Resolution 159 of July 25, 2007, revoking its previous ruling and eliminating the double carryover basis requirement.

Consequently, Italian law is in line with the mergers directive and the EC Treaty on this particular issue. ♦

♦ *Marco Rossi, Marco Q. Rossi & Associati, Genoa, Italy, and New York*