

News & Country Digest



This Week's Top News

ECJ Advocate General: Belgian Stock Exchange Taxes Violate EU Law

by Marc Quaghebeur

Belgium has failed to comply with its obligations under article 11 of Directive 69/335/EC by imposing a stock exchange tax on the remittance of securities to subscribers and a tax on the physical delivery of bearer securities when bearer securities are remitted to the subscribers, a European Court of Justice advocate general has found.

If the ECJ follows the opinion of Advocate General Antonio Tizzano in case C-415/02, *Commission v. Belgium*, Belgium will have to end its tax on the physical delivery of bearer securities. Belgium imposes a tax on stock exchange transactions (*taxe sur les opérations de bourse*) for any delivery to the subscriber of shares or bonds relating to Belgian or foreign public securities following a solicitation of funds from the public through issue, offer, or public sale. (The controlling law is found at articles 120 and 121 of the Belgian Code on taxes equated with stamp duties, or *code belge des taxes assimilées au timbre*.) Moreover, a tax is due at the time of the physical delivery of bearer securities.

The European Commission initiated legal action against Belgium for failure to comply with its obligations under article 11 of Council Directive 69/335/EC of 17 July 1969 on indirect taxes on the raising of capital.

Tizzano said the directive aims to promote the free movement of capital, which is regarded as essential for the creation of an economic union whose characteristics are similar to those of a domestic market.¹ Concerning taxes on the raising of capital, establishing a single market presupposes replacing member states' indirect taxes with a duty charged only once in the common market and at the same level in all member states, with the exclusion of any taxes or duties other than capital duty and the duties in article 12 of the directive.

Article 11(a) of the directive prohibits member states from taxing "the issue" of shares or other securities of the same type. The advocate general agrees with the Commission that ECJ case law requires broadly interpreting this article.² The term "issue" must be understood as including not only the activity of issuing the securities, but also their delivery and, in the case of bearer securities, the delivery of the securities to the subscribers.

The Belgian government insisted that the issue of securities has to be seen separately from the acquisition of the securities by the subscribers and that the prohibition on taxation in article 11 covers only the issue. To support its argument, Belgium referred to a 1976 proposed directive on securities

¹ECJ, 20 April 1993, cases C-71/91 and C-178/91, *Ponente Carni and Cispadana Costruzioni / Amministrazione delle finanze dello Stato*, ECR [1993] I-1915, paragraph 19.

²ECJ, 27 October 1998, cases C-31/97 and C-32/97, *Fuerzas Eléctricas de Catalunya and Autopistas Concesionadas Española / Departament d'Economía i Finances de la Generalitat de Catalunya*, ECR [1998], I-6491, paragraphs 18 and 19.

transactions that was never adopted (1976 O.J. (C 13) 1). It made the same distinction between "issue" and "assignment" and laid down the prohibition to tax either. Because the directive was not implemented, however, Belgium argued that member states have remained free to tax the acquisition of securities after their issue.

The advocate general was not swayed by that argument, however. Under the draft directive, any transfer or acquisition of securities would have constituted a separately taxable transaction. Even if the draft directive had become law, the prohibition of article 11 would have remained in place for both transactions.

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Based on ECJ case law, Belgium also pointed out that the ban is limited to taxes affecting capital companies as issuers of securities and does not apply to investors. Moreover, the stock exchange tax applies only to transactions via professional intermediaries.

The advocate general conceded that the ECJ has never ruled on a tax affecting investors and that its case law relates to tax on the issue of securities affecting the issuers. However, he again was not swayed by Belgium's argument — in this case, an argument that would be irrelevant if the directive prohibits any tax on the raising of capital (with certain exceptions mentioned in article 12), regardless of the identity of the taxable person.

Belgium also defended the tax on the physical delivery of the securities by distinguishing the "dematerialized" transaction, which is the issue of the securities, and the "materialized" transaction relating to the remittance or the physical delivery of the securities to the subscriber. In Belgium bearer securities are commonly used, and the government argued that the tax was a justified way to modernize Belgium's financial markets and encourage investors to deal in "dematerialized" securities held in an investment account.

The advocate general objected by referring to the last recital of the preamble to Directive 90/435/EEC, which says: "The retention of other indirect taxes with the same characteristics as the capital duty or the stamp duty on securities might frustrate the purpose of the measures provided for in this Directive and those taxes should therefore be abolished." Moreover, if Belgium wanted to modernize its finan-

cial markets, according to Tizzano, other options exist that would be more compatible with the direction, such as a ban on issuing bearer securities.

The advocate general rejected any distinction between the taxable event of both taxes, and he determined that both the remittance of newly issued securities (for the stock exchange tax) and the physical delivery of the newly issued bearer securities (for the tax on the physical delivery of bearer securities) fall within "issue" as meant in article 11 of Directive 69/335.

Belgium also argued that both taxes fall within the ambit of article 12 of the directive, which excepts certain taxes from the taxation ban, and, in particular, at article 12(a), "duties on the transfer of securities." This article derogates from the text of the previous articles, according to Belgium, so that it limits the scope of the ban contained therein.

The advocate general said article 12 must be interpreted to limit the directive's general rule as little as possible. It must be understood in the sense that this provision refers to any "transfers" of securities with the exception of their remittance (or the physical delivery for bearer securities) to the subscribers.

Technically, these transactions are not "a transfer," but they are part of an acquisition at the origin of the security. It is only after the subscriber has first acquired the securities that he can actually "transfer" them. Construing article 12 in such a way that it would authorize member states to tax the delivery of bearer securities by the issuing company would erode the meaning of article 11, the advocate general said.

If the ECJ follows Tizzano's recommendation, that will not be the end of Belgium's stock exchange tax, which is also imposed on transfers of securities via a professional intermediary after the securities have been delivered to the original subscribers. However, it might significantly reduce Treasury proceeds.

Following the recommendation will mean the end of the Belgian tax on the physical delivery of bearer securities. Most investors opt for bearer securities, as they can be transferred without incurring any further tax. Interestingly, Belgium recently raised the tax on the physical delivery of bearer securities from 0.2 percent to 0.6 percent.³ (For prior coverage, see *Tax Notes Int'l*, 17 Nov. 2003, p. 607.)

The introduction of this tax was meant to discourage the use of bearer securities in favor of secu-

³Article 304, Loi Programme 22 December 2003, Belgian State Gazette 31 December 2003, p. 62160. The change took effect on 1 January 2004.

rities held in investment accounts. However, the tax hasn't been a great success, and when Belgium's recent tax amnesty was announced, the government declared it would decide in September on abolishing all forms of bearer securities — the exact alternative proposed by the advocate general's opinion. (For prior coverage of ending bearer securities, see *Tax Notes Int'l*, 12 Jan. 2004, p. 115.)

◆ *Marc Quaghebeur is an international tax lawyer with Vandendijk & Partners in Brussels.*