

## Ghent Court of Appeal Ratifies Company's €12 Million Tax Settlement

by Marc Quaghebeur

The Ghent Court of Appeal on September 14 ratified a settlement between Belgian tax authorities and Artwork Systems Group NV under which the Belgian company has agreed to pay more than €12 million in corporate income tax. The settlement closes all litigation that had been pending before the court of appeal and the *Conseil d'Etat* (Supreme Administrative Court).

The Ghent Court of First Instance confirmed the tax authorities' claim against Artwork Systems Group for more than €58.1 million in 2002. That claim was the result of a construction that enabled the controlling shareholders of Artwork Systems to avoid the Belgian capital gains tax on substantial shareholdings and to make their participation invisible through a string of holding companies in Belgium, Luxembourg, and Panama.

The shareholders sold their shareholding in Artwork Systems to Artwork Systems Group NV for a price based on the historical value of the company (a net value of €7.2 million). For purposes of the initial public offering (IPO), they indicated at the same time that Artwork Systems Group NV had a market value of €167 million.

Tax authorities thought that the difference between the market value (the first share price on the stock exchange) and the net value was a taxable profit for Artwork Systems Group NV.

After the directors initially announced that they would fight the decision of the Court of First Instance, they were forced to settle. The tax claim made the company highly unattractive for potential investors and clients, and it did nothing to improve the relationship between the directors and the shareholders

who had purchased their participations after the IPO.

By way of settlement, the board of directors accepted the valuation principle approved by the Court of First Instance and agreed that the Artwork Systems shares should be valued at €34,018,879. That means that the company will pay more than €12 million in corporate income tax. The Ghent Court of Appeal has now ratified that settlement. (For prior coverage, see *Tax Notes Int'l*, Feb. 23, 2004, p. 713.)

However, that is not the end of the story for the directors and their advisers; criminal proceedings are still pending. When the settlement was reached, the Public Prosecutor's Office indicated that it would agree to a suspension of the possible sentence. The directors, however, would prefer not to enter an (implicit) guilty plea and would rather see their indictment quashed altogether. They still face a potential claim from disgruntled minority shareholders who resent that the company has to pay a tax bill intended for the majority shareholders. Some of them have already indicated that they would not have invested in Artwork Systems Group NV if they had been aware of the company's potential tax liability.

The decision of the Ghent Court of First Instance has set a precedent that tax authorities are using against many other taxpayers. In the past, when a company received an asset for free or at a discount, the generally accepted principle was that the company could record the asset at its historical acquisition value. The company could later record a capital gain and show the asset at its real value on the balance sheet without any tax liability. Recorded but unrealized capital gains are exempt from corporate

income tax as long as the revaluation reserve remains untouched.

However, the *Cour de Cassation*, Belgium's highest court, on May 18, 2001, ruled that a free acquisition resulted in a taxable profit at the actual value of the asset received. The Belgian Commission for Accounting Standards followed that case law in its opinions 126/17 and 126/18, holding that when a

company has received assets for free or at a discount, it should record those assets at fair value.

The settlement with Artwork Systems will give tax authorities an additional argument to reinforce the precedent set by the Ghent Court of First Instance. ♦

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