

French Financial Transaction Tax – Update of official guidelines for ADRs

The French Tax Authorities (FTA) have updated their official statement of practice on the FTT yesterday evening. This is in order to give additional clarifications on ADRs that are due to come in the scope of the FTT for transactions entered into from 1 December 2012 (and settled within less than 4 working days).

The tax authorities give clarifications on a number of points that we have summarized below.

Scope of the tax

The tax authorities confirmed that “Certificats Représentatifs d’Actions” (CRA) which specifically include ADRs are in the scope of the French FTT from 1 December 2012. For the purpose of this tax alert we refer hereafter to “Certificate” and of course this includes ADRs.

The acquisition of the underlying share, the creation and acquisition following the creation of the Certificate is to be considered as one single transaction for the purposes of the tax as it reflects the transfer of ownership of the underlying share. Therefore the tax should only be due on the purchase of the Certificate.

The other intermediary operations (acquisition in view of the conversion and the conversion itself and the cancellation giving rise to the attribution of the underlying shares to the investor) should remain out of the scope of the FTT, i.e. not reportable and not taxable.

Subsequent transfers of the Certificate are reportable and taxable following the normal FTT rules.

Exemptions

All exemptions should apply in the same manner to Certificates and to ordinary shares.

In particular, the tax authorities have also confirmed that where a Certificate is created with “new shares”, the acquisition of the Certificate itself may benefit from the primary issue exemption (exemption n°1). This is particularly the case where the issuer of the share is also the sponsor of the ADR.

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Reporting and Payment

Certificates issued by non-French issuers and particularly ADRs are outside the Euroclear system and therefore the process of reporting and payment does not in principle go through Euroclear or its members.

The tax authorities have given the following clarifications:

As a principle, where the acquisition of a share or Certificate is done through a Central Depository established outside France, the accountable party should report and pay the tax directly to the tax authorities in France.

However, in the context of Certificates and ADRs in particular, the process should be the following:

The acquisition following the creation should be declared (and where necessary paid) based on the same process as the acquisition of ordinary shares, (i.e. through Euroclear) as long as the acquisition is in fact the translation of the transfer of ownership of the underlying shares which is still within Euroclear's remit.

The acquisition of a Certificate outside the creation process should be either:

- declared and paid directly to the tax authorities; or
- upon election, declared and paid via a Euroclear member designated by the accountable party

Conclusion

These clarifications are welcome a few days away from the entry into force of the law for ADRs transactions. There are still questions around practicalities and control of reporting and taxation and especially with rumors of non compliance in the US.