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GLOBAL GUIDE TO M&A TAX

2013 EDITION

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Foreword

Year-on-year global merger and acquisition (M&A) activity is on the increase. However trends are varied and M&A continues to face uncertainty.

Europe is weathering the economic storm, while deal volume in the Asia-Pac region has fallen. But in spite of this we are seeing optimism. The Americas has recently been boosted by a number of mega-deals. Businesses and investment funds are sitting on cash piles they will need to use for investment. With low interest rates across the globe, debt financing of private equity transactions is increasing in the US. And this trend is beginning to also emerge in the UK and other European countries.

New regimes for intellectual property (IP) in several jurisdictions combined with the upcoming Organisation for Economic Co-operation and Development (OECD) publication means tax efficient supply chain planning is a key focus for M&A. However heed must be taken as governments and the media's focus on perceived "tax avoidance" of certain multinational corporations.

A number of jurisdictions are using taxation as a way to encourage inward investment. Popular methods include reducing the corporate tax rate or by introducing incentives for new investment. Conversely a number of countries are looking at restricting the availability of certain reliefs. Spain has introduced restrictions on the carry forward of losses, while there continues to be a focus on restricting the availability of tax relief for interest expense with new rules now being introduced in South Africa.

While operating in an uncertain market, taxpayers need to be mindful of the economic conditions in which a deal is made. Multinationals should understand the current key tax issues and opportunities that come with every deal. With careful planning multinationals can maintain a tax advantage throughout the lifecycle of investments.

This edition of the Taxand Global Guide to M&A Tax has been designed as a desktop reference book covering 35 countries. In the same format as previous editions, it provides at-a-glance insight into the tax treatment of mergers and acquisitions worldwide. The guide accounts for key changes made to increase the attractiveness of regimes, such as mergers or goodwill amortisation rules and provides an understanding of differing local regulations and their impact on deals.

Every merger or acquisition has tax implications. Many create tax opportunities that can get overlooked in the rush to get the deal done. We hope this guide provides some insight to identify these opportunities. It must be stated that the guidance provided in the pages that follow does not replace the need for professional tax advice in contemplating – and acting on – a company's individual needs and circumstances. Should you require further assistance please contact your local Taxand advisor.

Finally, a book such as this one only happens with the help of many individuals – we gratefully acknowledge the contribution of our fellow Taxanders from across the globe.

Ian Fleming – Taxand global M&A tax service line leader

On behalf of the Taxand global M&A tax team

ARGENTINA

Argentina

From a Buyer's Perspective

1. What are the main differences among acquisitions made through a share deal versus an asset deal in your country?

Share deal

- The procedure is simple
- There is no substantial tax cost
- The tax losses of the Argentinean company are transferred to the buyer. Also, the tax credits arising from taxes other than income tax remain in the company and, consequently, are transferred to the buyer
- The Argentine company's liabilities remain in the company and, consequently, are acquired by the buyer
- If the acquisition is made by a foreign company or an Argentine individual, the potential sale of the Argentinean company's shares are exempt from income tax in Argentina
- If another Argentine company purchases the Argentine company's shares, the acquisition cost of the shares cannot be depreciated for income tax purposes. In addition, the Argentine company cannot apply tax adjustment for inflation
- The purchaser keeps the depreciation terms of the seller's assets

Asset deal

- The procedure is complex
- The tax losses of the seller's company are not transferred to the buyer except if the transfer is of a going concern under a tax-free reorganisation
- The business's non-assessed tax and social security liabilities are not transferred from the seller to the buyer if the appropriate notification to the Federal Tax Authority (AFIP as per its acronym in Spanish) is made prior to the transfer of the assets and if the AFIP does not take any action afterwards within a certain period of time

- The seller's unpaid assessed tax and social security liabilities are transferred to the buyer
- The buyer depreciates the acquisition cost of the portion of the purchase price corresponding to the fixed assets. However the portion of the purchase price that exceeds the purchase price of the fixed assets and inventories is considered goodwill of the buyer and is not subject to tax depreciation in Argentina

2. What strategies are in place, if any, to step up the value of the tangible and intangible assets in case of share deals?

In principle there are no special provisions in Argentina's income tax law that provides a step-up in the value of the underlying assets in share deals.

However each case should be analysed separately. For example a step-up could be applicable in a purchase of assets.

3. What are the particular rules of depreciation of goodwill in your country?

As a general rule Argentina's income tax law does not allow the deduction of intangibles such as goodwill, trademarks and similar assets.

However depreciation of intangible assets with limited economic useful life – such as concessions, patents and licenses – can be deducted for income tax purposes.

4. Are there any limitations to the deductibility of interest on borrowings?

General considerations

There is no special limitation to the deductibility on interest of borrowings between Argentinean parties. In such cases general rules of expenses deduction apply to the deductibility of interest payments.

General rules of expenses deduction also apply in the case of loans granted by foreign entities. In these cases thin capitalisation rules may apply.

Thin capitalisation rules

Thin capitalisation rules apply to interest paid to foreign-related banks or financial entities (non-located in a low-tax jurisdiction). Thin capitalisation rules also apply to foreign-related parties when the withholding rate on interest is different than the statutory 35% – this is the case for tax rate reductions under a Double Taxation Treaty (DTT). However most double taxation treaties include a non-discrimination clause under which thin capitalisation rules do not apply to interest payments made to the treaty's other party.

In cases where thin capitalisation rules apply, the total amount of interest-bearing liabilities cannot exceed 2 times the net worth of the Argentinean borrower at the end of the fiscal period. The portion of interest that exceeds the thin capitalisation rules (if any) is not deductible for income tax purposes and is treated as dividends.

Transfer pricing rules

Argentina's income tax law also provides transfer pricing provisions under which any payment to a non-Argentinean related party made by an Argentinean taxpayer is deductible.

Deductions can only be made to the extent that the terms and conditions agreed upon with the related party, deriving in the payment, are in accordance with the arm's length principle in Section 14 of the income tax law. This provision basically holds that any transaction between related parties must be regarded as entered into between independent parties. This is the case insofar as all considerations and conditions are consistent with normal market practices between independent parties.

As evidence of compliance with the arm's length standard, local taxpayers must prepare and submit a transfer pricing study (that includes comparability and economic analyses). Such transfer pricing studies must contain the functions, activities and risks borne by each party in the transaction and an explanation of the transfer pricing method used. Failure to submit transfer pricing studies and informative returns is subject to severe penalties.

Local taxpayers carrying out transactions with non-resident related parties are also required to maintain additional documentation, which must demonstrate the correct determination of prices or profit margins that are declared in the informative returns and the acceptability of the comparability criteria used in determining such prices.

As a result these transactions are subject to the Argentinean transfer pricing rules. Please note that in accordance with Section 15 of the Income Tax Law transactions made by Argentinean entities, among others, with companies domiciled, registered or located in low-tax or no-tax jurisdictions listed in its regulatory decree (related with the Argentine entities or not) will not be considered adjusted to the arm's length principle and therefore will be subject to the transfer pricing rules.

This regulatory decree – National Executive Decree No. 589/2013 – published in the Official Gazette on 31 May 2013, repealed the low or no-tax jurisdiction list, which was in force since November 2000 in the Regulatory Decree of the income tax law. This Executive Decree abandons the black list system and replaces it with a white list system. The white list will include all jurisdictions or special regimes deemed acooperative on fiscal transparency so that the low or no-tax qualification will apply to a particular jurisdiction or special regime as a result of its exclusion from the white list. The white list will be presented by the Federal Tax Authority, published on its website, and updated according to certain parameters. The referred Executive Decree has been in force since 30 May 2013 but will apply from the date when the Federal Tax Authority publishes the white list, which has not occurred to date.

In view of the Argentinean transfer pricing provisions the interest payments in the cases mentioned above should follow the arm's length principle in order to allow the Argentinean party its full deduction for income tax purposes.

Test debt/equity

In past years the AFIP has been focusing on the deduction of interest associated with loans granted by foreign lenders under certain conditions. Based on a series of circumstances such as, among others, the lack of proper documentation, the absence of usual indemnity and guarantee agreements and interest rates that do not correspond with market standards, the AFIP has been presuming that the aim of certain loans under scrutiny were designed to erode the tax basis of the local borrower. This has resulted in denied deduction of interest payments and exchange differences.

Evidence to prove the existence of loan agreements

If the loan's existence was not proved, the registered liabilities could be considered an unjustified wealth increase (subject to taxes accordingly) and the deduction of interest and exchange differences for income tax purposes could be challenged. In order to avoid any challenges from the AFIP, certain formalities and facts are relevant or advisable to prove the existence of loan agreements.

5. What are usual strategies to push-down the debt on acquisitions?

Usual strategies to push-down debt on acquisitions include a leveraged buyout of the target company. Under this scenario the AFIP does not allow Argentinean entities to deduct interest payments if the loan proceeds are applied to the acquisition of an Argentinean company's shares. This is based on the fact that dividends or distribution of profits received by Argentinean entities from other Argentinean entities are not subject to income tax and therefore such interest is not related to the company's taxable income.

In this regard the AFIP has issued administrative precedents in the last 5 years that have not allowed such interest deductions. There is also a precedent from Argentina's Federal Tax Court holding the AFIP's position, which was subsequently confirmed by the Federal Court of Appeals and the Federal Supreme Court for formal reasons.

It could be argued that such interest payments should be deductible because:

- Dividends are already taxed at the distributing company's level, following the integration system adopted by Argentina
- Dividends are further subject to the so-called equalisation tax when distributed to shareholders
- Future capital gains arising from the sale of Argentinean shares by Argentinean companies is subject to income tax

In the case an Argentinean entity finances an acquisition by issuing private bonds with public offering, this provides a strong case to sustain the interest deduction. Private bond law states that interest payments are fully deductible for income tax purposes if certain requirements are met. AFIP does not allow for such interest deduction either. However there is a precedent from Argentina's Federal Tax Court allowing the deduction of interest in this case, which has also been confirmed by the Federal Court of Appeals and the Federal Supreme Court for formal reasons.

The second part of a leveraged buyout is the merger between the buyer entity and target entity. In order to perform a merger under the tax-free reorganisation regime certain requirements must be met. There are 2 main requirements:

- Both entities should have maintained for at least 12 months before the reorganisation date the same or related activities
- The continuing entity must maintain the same or related activities as of the previous entities for at least 2 years as from the reorganisation date

In the AFIP's opinion a holding entity and an operative entity do not comply with such requirements. However this interpretation has met with harsh criticism in the market. Currently under certain new precedent of the Federal Supreme Court this position could be changed. Also if certain conditions are met a tax-free reorganisation could be possible in this alternative scenario.

6. Are losses of the target company/ies available after an acquisition is made?

In share deals the target company's tax losses are transferred to the buyer.

Also under the scenario of a tax-free reorganisation tax losses can be transferred from 1 company to another, provided that certain requirements are met (see section 9). Argentina's income tax law provides for 3 types of tax-free reorganisation: mergers, spin-offs and transfers within the same economic group.

7. Is there any indirect tax on transfer of shares (stamp duty, transfer tax, etc)?

If Argentinean bank accounts are used in a share transaction, any credit or debit in such accounts is subject to a tax on debits and credits on Argentinean bank accounts. A tax rate of 0.6% applies on each debit or credit. Part of this could be used as a credit against income tax and/or minimum presumed income tax (MPIT) and the remaining amount is deductible for income tax purposes.

A transfer of shares could be subject to provincial stamp tax if the transaction is formalised on written instruments. There are some alternatives depending on the transaction to enter into agreements that are not subject to the stamp tax.

Turnover tax could also apply depending on the activity of the seller and where that activity is carried out. Foreign individuals and foreign companies are not subject to turnover tax.

No other indirect tax (such as VAT) applies on transfer of shares.

8. Are there any particular issues to consider in the acquisition of foreign companies?

There is no special holding regime in Argentina. Therefore the tax implications would be as follows:

- Dividends distributed by a foreign company to Argentinean tax residents are subject to income tax
- The sale of shares is subject to income tax in Argentina if performed by an entity or an individual who trades shares on a habitual basis
- The acquisition cost of the shares cannot be depreciated for income tax purposes. In addition the Argentine company cannot apply tax adjustment for inflation
- Tax losses arising from the disposition of shares, quotas or other corporate participations outside Argentina may only be offset against foreign source income and only from the disposition of the same type of assets obtained in the same year or in the subsequent 5 years
- Anti-deferral tax rules may apply in Argentina in the following situations:
    - Argentinean resident shareholders must include taxable income derived from passive transactions obtained by foreign stock companies organised in low-tax jurisdictions, regardless of whether such passive income has been distributed as a dividend, plus all passive income obtained by the underlying entity organised or located in a low-tax jurisdiction
    - The passthrough effect for the allocation of income and financial results to Argentinean shareholders only takes place if the ‘passive income’ of the entities surpasses 50% of

the income resulting from commercial or industrial activities. This rule also applies to the underlying entity

- Argentinean tax residents are subject to income tax in Argentina on the profit of foreign non-stock corporations, whether or not such a taxable profit is distributed among Argentinean residents as a dividend

Holders of shares or any other participation in foreign companies are subject to either (i) minimum presumed income tax (1% on the assets) if the holder is a legal entity or (ii) Personal Assets Tax (PAT) (from 0.5% to 1.25% on the assets) if the holder is an individual. In the case of legal entities, in addition to the minimum presumed income tax, such entities should pay PAT at a rate of 0.5% on the net worth on shareholders' behalf (in case the shareholders are foreigners or Argentine individuals) whereby:

- Transactions performed between related parties must comply with transfer pricing regulations
- If a similar income tax is paid abroad, a tax credit (either direct or indirect) is allowed
- If Argentinean bank accounts are used, tax on debits and credits would apply

Currently Argentina has strong foreign exchange regulations on the inflow and outflow of funds that should be taken into consideration when acquiring foreign companies.

9. Can the group reorganise after the acquisition in a tax neutral environment? What are the main caveats to consider?

The group can be reorganised after the acquisition in a tax neutral environment if a tax-free reorganisation is performed.

Argentina's income tax law provides for 3 different types of tax-free reorganisation procedures: merger, spin-off or transfer within the same economic group. The law sets forth special provisions required to achieve a tax-free reorganisation in which the assets and tax status of a company may be transferred with attractive tax benefits. If the law's requirements and regulatory provisions are met, the tax-free reorganisation is subject neither to federal taxes (ie income tax and VAT) nor, in certain cases, to provincial taxes (ie turnover tax and stamp tax).

Failure to comply with these requirements triggers the collapse of the tax-free reorganisation regime and therefore becomes subject to applicable federal and provincial taxes.

For a merger or spin-off to qualify as a tax-free reorganisation under Argentina's income tax law, and for the tax status to transfer to the continuing or surviving company, the following general requirements must be met:

- The owners of the previous company or companies must have held at least 80% of their capital in the 2 years prior to the reorganisation

- Capital must be maintained at the moment of and after the reorganisation
- The companies must have been conducting the same or related business prior to the date of reorganisation
- The same or related activities of the previous company must be continued for at least 2 years from the date of the reorganisation
- A tax report must be filed before the AFIP

Compliance with all requirements established under a merger or spin-off scenario is required when qualifying a transfer within the same economic group as a tax-free reorganisation. Exceptions are made in fulfilling related activities prior to the tax-free reorganisation, the requirement of conducting business prior to the tax-free reorganisation and certain capital requirement differences.

10. Is there any particular issue to consider in case of companies whose main assets are real estate?

The sale of real estate is subject to income tax on net income. The final income tax of Argentina legal entities is calculated at fiscal year-end by applying the 35% corporate income tax rate to the result of such particular fiscal year. The real estate transaction affects the fiscal year result as per the difference between the sale price and the acquisition cost of the land plus the depreciated construction and improvements cost. The depreciation of the premises and improvements takes place at a rate of 2% per year; for real estate, depreciation is 2% per year over 50 years.

The collapse of the Argentine financial system resulted in the Argentine Peso's devaluation from its 10-year-long exchange rate of US$1 = AR$1. In addition after 2002 Argentina has fallen into an inflationary scenario and it has not been allowed to make inflation adjustments for tax purposes. As a consequence any capital gain from the sale of real estate could be high since real estate cost is historical. However rollover transactions are applicable in Argentina whenever a depreciable asset is sold and replaced. Income derived from a sale transaction may be assigned to the new asset cost, resulting in a deferral in the recognition of built-in gains. General depreciation rules provided in the income tax law are then applied on the new asset cost reduced by the assigned income amount. This option is available to the extent that both operations are performed within a 1-year term.

In general real estate transfers are not subject to VAT. However if the seller uses premises as a fixed asset the seller must pay VAT in some specific cases, for example if the property is sold within 10 years after the date the seller obtained permission to use the premises.

The holding of real estate is subject to minimum presumed income tax. Investments to construct new buildings or make improvements in real estate that are fixed assets are not subject to the minimum presumed income tax in the construction year as well as the following year.

The sale of real estate could be subject to turnover tax. Generally the sale of fixed assets is exempt from turnover tax.

The sale of real estate is subject to the stamp tax in the city of Buenos Aires at a rate of 3.6%. If the real estate is in a jurisdiction other than Buenos Aires the tax treatment may vary.

An alternative to avoid paying capital gain taxes is to sell the Argentine entity's shares. Real estate investments in Argentina are usually structured under 2 possible scenarios:

- Direct acquisition of the real property made by a local vehicle (eg an Argentine corporation or branch)
- Acquisition of shares in an Argentine corporation (sociedad anónima) that owns the real property. The applicable tax treatment for each of the referred scenarios would have certain advantages and disadvantages. The chosen alternative will depend on the purpose of the transaction

11. Thinking about payment of dividends out of your country and a potential exit, is there any particular country that provides a tax efficient exit route to invest in your country?

In principle dividends distributed by Argentinean companies are not subject to income tax regardless of the shareholder's country of residence. Dividend distributions that have not paid income tax at a corporate level are subject to an equalisation tax. This equalisation tax applies whenever accounting profits exceed taxable income at the corporate level at a rate of 35% on the excess.

However the impact of equalisation tax, if any, can be minimised if the shareholders are residents of a country that has executed a DTT. Argentina has executed and ratified conventions with the following countries: Australia, Belgium, Bolivia, Brazil, Canada, Denmark, Finland, France, Germany, Great Britain and Northern Ireland, Italy, the Netherlands, Norway, Spain (treaty subject to Congress approval) and Sweden.

12. How is foreign debt usually structured to finance acquisitions in your country?

Acquisitions in Argentina can be financed through equity or debt. If the Argentinean entity is funded with loans instead of capital, the tax base of the equity is reduced. Depending on the case funding with loans has certain tax advantages including full deduction for the Argentinean entity and reduced withholding tax on interest payments and deduction of exchange differences among others.

Argentina's income tax law establishes a withholding tax ranging from 15.05% to 35% on interest payments to foreign beneficiaries as follows:

- A 15.05% tax rate is applicable if the borrower is either an Argentinean financial entity or an Argentinean individual or legal entity and the lender is a banking or financial entity that is (i) not incorporated in a low-tax jurisdiction, or (ii) incorporated in countries which have a treaty with Argentina to exchange information and with no banking secrets of any kind
- A 35% tax rate is applicable if the borrower is an Argentinean legal entity (excluding banking and financial entities) or individual and the lender does not fulfil the requirements mentioned above

Under Argentina's DTT there are some opportunities for tax planning to minimise income tax when funding Argentine companies. Indeed income tax can be reduced potentially to 0%. As to interest payments withholding tax can be reduced to 0% if a bank in the UK, Belgium and Denmark grants the loan, provided it is a 3 to 5 year loan (depending on the treaty) and is subject to preferential terms or a preferential rate.

The tax impact of financing can also be reduced by using publicly placed financial trust notes or publicly placed debt notes both of which are efficient from a tax perspective.

Particular consideration should be taken into consideration to the thin capitalisation rules and transfer pricing rules described above (section 4).

From a Seller's Perspective

13. What are the main differences between share and asset deals?

Share deal

- There is no substantial tax cost. Note that Argentine companies can be stock corporations (SA) or limited liability companies (SRL)
- The sale of SA shares by foreign individuals or companies is exempt from income tax. The sale of SA shares by individuals who do not trade shares on a habitual basis is not subject to income tax
- The sale of SRL quotas by non-Argentinean corporate quota-holders to Argentinean purchasers is subject to a 17.5% capital gains tax withholding on the gross purchase price. The alternative, at the seller's option, is subject to a 35% capital gains tax withholding on the gross purchase price less costs incurred in Argentina to keep, maintain and preserve the source of income. The sale of SRL quotas by non-Argentinean corporate quota-holders to non-Argentinean purchasers is also subject to the same withholding tax, but no mechanism has been implemented to make such withholding and to pay such tax to the AFIP

- It is debatable whether or not the sale of SRL quotas of by non-Argentinean tax-resident individual quota-holders to Argentine purchasers would be subject to a 31.5% capital gains tax withholding on the gross purchase price
- The sale of SRL quotas by an Argentinean tax resident who is not involved in the habitual trading of these participations is not subject to income tax
- Upon the sale of SA shares or SRL quotas, Argentinean companies are subject to income tax
- Although tax debts are transferred to the buyer, the Argentinean company's directors who were in charge during the period of such tax debt would remain jointly and severally liable if the company does not pay the tax debt claimed by the AFIP
- The procedure is simple

Asset deal

- The sale of assets is subject to taxation. The tax impact for the seller is made up of income tax, VAT on the transfer of certain assets (VAT is usually not an economic cost for Argentinean taxpayers), tax on debits and credits in Argentinean bank accounts, turnover tax (generally fixed assets are exempt from this tax) and stamp tax on certain agreements
- The seller's tax losses are not transferred to the buyer except if the transfer is of a going concern under a tax-free reorganisation
- The seller always remains liable for tax debts related to the assets
- The procedure is complex

14. How are capital gains taxed in your country? Is there any participation exemption regime available?

There is no special capital gains tax for Argentinean companies. The capital gains obtained by Argentine companies are subject to income tax at the ordinary corporate tax rate of 35%.

For foreign corporations capital gains are subject to withholding tax depending on the asset involved.

While the capital gains of Argentinean companies are subject to regular taxation very specific transactions conducted by individuals, regardless of whether or not they are Argentinean tax residents, are subject to taxation. For example the transfer of real estate is subject to only a 1.5% transfer tax.

Consequently when Argentinean assets are held by Argentinean companies, one way to mitigate the tax impact of the transfer of such Argentinean assets is through the transfer of the corresponding Argentinean company instead of the transfer of the underlying Argentinean assets.

There is no participation exemption regime available in Argentina.

15. Is there any fiscal advantage if the proceeds from the sale are reinvested?

Argentina does not provide any fiscal advantage if the proceeds from a sale are reinvested. Argentina only provides fiscal advantages for reinvestments in depreciable assets (ie real estate or movable assets). In this particular case if the depreciable asset is sold and replaced, the taxpayer can either (i) charge such income to the fiscal period or (ii) affect such gain to the cost of the new depreciable asset. Therefore the depreciation rules provided in Argentina's income tax law would then be applied on the new asset cost reduced by the assigned income amount. The sale and replacement of depreciable assets must take place within a 1-year term for the taxpayer to apply this regime.

Your Taxand contacts for further queries are:

Argentina

Matias Olivero Vila

T. +54 115 288 2308

E. matias.olivero.vila@bfmyl.com

Ezequiel Lipovetzky

T. +54 11 5288 2950

E. ezequiel.lipovetzky@bfmyl.com

AUSTRALIA

Australia

From a Buyer's Perspective

1. What are the main differences among acquisitions made through a shares deal versus an assets deal in your country?

Australia permits certain corporate groups to consolidate for income tax purposes. The head company of the corporate group is responsible for the choice to consolidate. Under the single entity rule the head company and subsidiary members of the consolidated group are treated as a single entity for income tax purposes. Subsidiary members are in effect treated as head company divisions and transactions wholly within the consolidated group are effectively ignored for income tax purposes.

If the buyer and the target consolidate for income tax purposes, the buyer is treated as if it had acquired the target's assets. Accordingly there may be little difference between a share deal and an asset deal from an income tax perspective.

A share deal and an asset deal are treated differently for Goods and Services Tax (GST) purposes. GST is a value-added tax payable at the rate of 10%. A transfer of shares is a financial supply. A financial supply is generally input taxed. This means that GST is not payable on the transfer of shares but there is also no entitlement to an input tax credit for GST paid on inputs to the supplier (eg adviser fees).

In contrast a transfer of assets may be the supply of a going concern if it includes all the things necessary for the continued operation of an enterprise and satisfies certain other conditions. The supply of a going concern is GST-free. This means that GST is not payable on the transfer of assets, but that there is an entitlement to an input tax credit for the GST paid on inputs to the supply.

Share and asset deals are also treated differently for the purposes of stamp duty, which is a state or territory tax. A share deal may be subject to marketable securities duty and landholder or land-rich duty. (Market securities duty, landholder duty and land-rich duty are discussed in more detail below.) An asset deal may be subject to transfer duty where the assets constitute dutiable property. What constitutes dutiable property varies between the 8 states and territories of Australia.

2. What strategies are in place, if any, to step up the value of the tangible and intangible assets in case of share deals?

As noted above if the buyer and the target consolidate for income tax purposes, the buyer is treated as if it had acquired the target's assets. The buyer's acquisition cost is pushed down and into the assets of the target. The tax cost of the assets may therefore be reset potentially as high as their market value.

3. What are the particular rules of depreciation of goodwill in your country?

Goodwill is not depreciable for tax purposes in Australia.

4. Are there any limitations to the deductibility on interest of borrowings?

Thin capitalisation rules may apply to limit the deductibility of interest on borrowings and other debt deductions. Broadly in the case of inbound acquisitions, thin capitalisation rules operate to deny a deduction to the extent there is a failure of (i) the safe harbour debt test or (ii) the arm's length debt test.

At present the safe harbour debt test is flawed to the extent that the debts of a company or group exceed 75% of the value of its assets. This means that the debt-to-equity ratio of acquisition finance should not exceed 3:1. The value of assets is the average of the opening and closing book value of assets for the relevant income year. Note that the rules take into account total debt and not just related party debt.

Broadly the arm's length debt test is flawed to the extent that the debt of a company or group exceeds the debt that could be borne on a standalone basis. Note that the burden of proof rests with the company or group.

Thin capitalisation rules also apply to outbound acquisitions with modifications.

The interaction between thin capitalisation and transfer pricing rules also needs to be considered. In summary transfer pricing rules apply first to determine the arm's length pricing, with thin capitalisation rules then applying to the debt deductions determined by that pricing.

It should be noted that the 2013-14 Federal Budget, announced on 14 May 2013, included a proposal to reduce the safe harbour debt test percentage from 75% to 60% (representing a halving of the permitted debt-to-equity ratio from 3:1 to 1.5:1.) The arm's length debt test will also be reformed. The changes are scheduled to apply to income years commencing on or after 1 July 2014.

5. What are usual strategies to push-down the debt on acquisitions?

The acquisition structure will often include the incorporation of an Australian holding company and a subsidiary company. The holding company will then choose to form a consolidated group with itself as the head company and the subsidiary as a subsidiary member. (See above for more detail on consolidation.)

The subsidiary may then borrow for the purposes of acquiring 100% of the target company. The target company and its subsidiaries will also become subsidiary members of the consolidated group upon completion of the acquisition.

Subject to the thin capitalisation rules discussed above and transfer pricing, interest incurred by the subsidiary on the debt will be deductible against the target company's income and its subsidiaries as a consequence of consolidation.

6. Are losses of the target company/ies available after an acquisition is made?

Losses of a company are generally available subject to the company passing either the Continuity of Ownership Test (COT) or the Same Business Test (SBT).

Broadly COT is passed if the same persons have more held than 50% of the voting power of the company and rights to more than 50% of dividends and capital distributions of the company during a test period. The SBT is passed if the company carries on the same (that is identical) business during a test period. It must also not derive income from a business of a kind it did not previously carry on or from a transaction of a kind that it did not previously enter into in the course of its business operations.

Where a consolidated group acquires a company, the test period is generally a 12-month period before the acquisition.

Upon joining the consolidated group the losses are transferred to the consolidated group's head company. The losses are also assigned an available fraction, which determines the rate at which the consolidated group may utilise transferred losses. Broadly the available fraction is calculated by dividing the company's market value by the consolidated group's market value as a whole.

Subject to the company or consolidated group continuing to pass either the COT or the SBT losses may be carried forward indefinitely.

7. Is there any indirect tax on transfer of shares (stamp duty, transfer tax, etc)?

Stamp duty is a state and territory tax. Accordingly it varies between the 8 states and territories of Australia. Where the relevant company is incorporated in either the state of New South Wales or the state of South Australia, marketable securities duty is payable on a transfer of shares in the company at the rate of 0.6% on the transfer of the shares or the unencumbered value of the shares (whichever is greater).

Marketable securities duty is not payable on a transfer of shares in a company incorporated in the other 6 states and territories.

In addition to marketable securities duty, landholder duty (or land rich duty in the state of Tasmania) may be payable in any state or territory where the company has real estate. This is discussed below.

There are also GST consequences as discussed above.

8. Are there any particular issues to consider in the acquisition of foreign companies? In case of acquisition of foreign companies, is there any particular issue to consider?

An Australian buyer of a foreign company needs to consider the accruals taxation system, which may in certain circumstances operate to attribute income of the foreign company to the Australian buyer and subject it to Australian tax on an accruals basis.

The accruals taxation system is made up of the controlled foreign company rules (which are in the process of being modernised), the foreign accumulation fund rules (which have not yet been passed into law) and the transferor trust rules (which will be amended to enhance their effectiveness and improve their integrity).

The accruals taxation system is currently in a state of flux and specific, detailed advice should be sought in relation to any proposal to acquire a foreign company.

9. Can the group reorganise after the acquisition in a tax neutral environment? What are the main caveats to consider?

As discussed above transactions wholly within a consolidated group are effectively ignored for income tax purposes. This generally enables post-acquisition reorganisations to be income tax neutral.

Post-acquisition reorganisation may however attract stamp duty. Relief from stamp duty may be available, in whole or in part, subject to the conditions for relief being satisfied and an application for relief being made to, and approved by, the each relevant state and territory revenue authority.

10. Is there any particular issue to consider in case of companies whose main assets are real estate?

As noted above landholder duty (or land rich duty in the state of Tasmania) may be payable in any state or territory where a company has real estate.

Landholder duty is payable on the acquisition of significant interest in a company that has interests in land (including mining tenements) in the state or territory where the market value equals or exceeds a dollar threshold. A significant interest is generally 50% or more of an unlisted company and 90% or more of a listed company but there are exceptions to this general rule. The interest may be acquired directly or indirectly. The dollar threshold varies from nil in the Australian Capital Territory to A$2,000,000 in the states of New South Wales, Queensland and Western Australia.

The rates of landholder duty range from 5.15% in the state of Western Australia to a maximum of 7.25% in the Australian Capital Territory. These rates apply to the market value of the land. However if the relevant company is listed the effective rate is discounted by 90% in the states of New South Wales, Victoria and Queensland.

Note that once a significant interest has been acquired, landholder duty is also payable on the acquisition of a further interest in the company by the same acquirer or an associate.

As previously noted in the state of Tasmania, land rich duty is currently payable in place of landholder duty. This means that land rich duty is payable on the acquisition of 50% or more of an unlisted company where the company has:

- Interests in land in the state where the market value of which equals or exceeds A$500,000
- Interests in land in or out of the state where the market value equals or exceeds 60% of the market value of all its property

The rate of land-rich duty is up to 4.5% of the market value. Land rich duty is also payable on the acquisition of a further interest once a significant interest has been acquired.

The above discussion focuses on the acquisition of an interest in a company. Note that the rules also apply to the acquisition of an interest in a trust subject to certain modifications.

Real estate held by a company also gives rise to capital gains tax issues. These are discussed below.

11. Thinking of payment of dividends out of your country and a potential exit, is there any particular country that provides a tax efficient exit route to invest in your country?

Franked dividends paid to a foreign resident are exempt from withholding tax. Unfranked dividends paid to a foreign resident are subject to withholding tax at the rate of 30% unless reduced by a Double Taxation Agreement (DTA). A dividend is franked to the extent it is paid out of profits that have borne Australian corporate tax and unfranked to the extent it is not. Profits may not have borne Australian corporate tax due to permanent and timing differences between accounting and tax.

Australia's DTAs with Finland, France, Japan, New Zealand, Norway, the UK and the US reduce the rate of withholding tax on dividends to zero in certain circumstances.

Some of Australia's DTAs may also provide a more tax efficient exit route. However the Australian Taxation Office considers that the general anti-avoidance rule can apply to treaty shopping.

12. How foreign debt is usually structured to finance acquisitions in your country?

As noted above the acquisition structure will often include the incorporation of an Australian holding company and a subsidiary company. The holding company will then choose to form a consolidated group with itself as the head company and the subsidiary as a subsidiary member. Foreign debt to finance the acquisition will normally be borrowed by the subsidiary company.

Third party foreign debt may be structured to take advantage of exemptions from interest withholding tax for (i) the issue of debentures or debt interests or (ii) syndicated loan facilities of at least A$100,000,000.

Taking advantage of these exemptions (known as the Section 128F exemptions) generally involves offering participation in the issue or facility on the same terms to at least 10 financial institutions or other participants in financial markets.

Australia's DTAs with Finland, France, Japan, New Zealand, Norway, the UK and US also reduce the rate of withholding tax on interest paid to a financial institution to zero in certain circumstances. For this purpose the term financial institution generally means a bank or other enterprise substantially deriving its profits from raising debt finance in financial markets or by taking deposits at interest and using those funds in carrying on a business of providing finance.

From a Seller's Perspective

13. What are the main differences between share and asset deals?

Where the seller is the head company or a subsidiary member of a consolidated group, the sale is treated as a sale of assets by the head company regardless of whether it is a sale of shares or assets.

Where the seller is not the head company or a subsidiary member of a consolidated group, the seller may be subject to capital gains tax on a sale of shares (assuming the shares are not trading stock or otherwise held on revenue account). In the case of a sale of assets, the seller may make capital gains or derive assessable income (which includes balancing adjustments in respect of previous capital allowances), depending on the nature of the asset sold.

Where the seller is a foreign resident the application of capital gains tax rules is discussed below.

Share and asset deals are treated differently in relation to GST and stamp duty as discussed above. In the case of stamp duty this will normally be an issue for the buyer.

14. How are capital gains taxed in your country? Is there any participation exemption regime available?

A foreign resident is subject to capital gains tax on a capital gains tax event happening to taxable Australian property. Where the foreign resident is a company the rate of capital gains tax is 30%.

Each of the following is taxable Australian property:

- Taxable Australian real property
- An indirect Australian real property interest
- An asset used at any time in carrying on a business through a permanent establishment in Australian option or right to acquire 1 of the above

The term taxable Australian real property comprises:

- Real property situated in Australia (including a lease of land situated in Australia)
- A mining quarrying or prospecting right if the minerals, petroleum or quarry materials are situated in Australia

The term indirect Australian real property interest is most relevant to the acquisition of a company. This includes an interest in a company or another entity where:

- The seller (alone or together with associates) holds 10% or more of all interests in the company or other entity at the time of sale, or throughout a 12-month period in the 24 months before the sale
- More than 50% of the company's market value or other entity is directly or indirectly attributable to taxable Australian real property as discussed above

Note that the 2013-14 Federal Budget announced on 14 May 2013 included a proposal to attribute the market value of intangible assets connected to mining, quarrying or prospecting rights (eg mining information) to the right itself for the purpose of applying the 50% test above. This change was scheduled to apply from 14 May 2013.

15. Is there any fiscal advantage if the proceeds from the sale are reinvested?

Scrip-for-scrip rollover relief from capital gains tax may be available on the exchange of shares in one company for shares in another in certain circumstances (which include the buyer acquiring at least 80% of shares in the first company). Where rollover relief is available any capital gain made on the disposal of shares in the first company is disregarded and the cost base of the first company's shares carries over to the cost base of shares in the second company. This is relevant to capital gains tax consequences of a subsequent capital gains tax event in relation to shares in the second company (in the absence of further rollover relief in relation to the subsequent event).

Partial scrip-for-scrip rollover relief may also be available on the exchange of shares in one company for shares in another and other consideration. In that case any capital gain made on the disposal of shares in the first company is apportioned between shares in the second and the other consideration. The capital gain apportioned to shares in the second company is disregarded while the capital gain apportioned to the other consideration is taxable. A portion of the cost base of shares in the first company is also carried over to the cost base of shares in the second.

Scrip-for-scrip rollover relief may also be available on the exchange of units in a trust and options, rights and similar interests to acquire shares in a company or units in a trust.

There are also certain limited concessions available on the reinvestment of proceeds from the sale of a small business.

Your Taxand contact for further queries is:

Australia

Jonathon Leek

T. +61 8 9460 1616

E. jonathon.leek@corrs.com.au

AUSTRIA

Austria

From a Buyer's Perspective

1. What are the main differences among acquisitions made through a share deal versus an asset deal in your country?

In the course of an asset deal the purchase price has to be allocated to the acquired assets and any excess is treated as goodwill. This entails a step-up of the assets' tax basis to their market value. Depreciation will be determined based on the new tax bases and the expected (remaining) useful life of the assets. Goodwill is amortised over 15 years on a straight-line basis. A write-down or even write-off of the goodwill is tax deductible if there is impairment. Tax losses of the seller cannot be carried over to the buyer. Interest expenses for acquisition borrowings are deductible.

Where real estate located in Austria is acquired, 3.5% real estate transfer tax and 1.1% registration fee (both based on the property purchase price) will be incurred. Asset deals are subject to VAT. The VAT rate depends on the asset, where most assets (including goodwill) are subject to 20%. Certain assets are subject to the reduced 10% rate (eg food, livestock) while some assets are exempt (eg cash, receivables, shareholdings, partnership interests and bonds). Please note an option is available towards real estate transactions where the transaction is either subject to 20% VAT or is VAT exempt. The VAT basis for the asset is determined under the purchase price allocation. However, the buyer can recover such VAT – in practice VAT is paid by assignment of the VAT credit (input VAT of the buyer) to the seller's tax office (to cover the VAT liability of the seller). This procedure avoids a cash flow issue for the buyer, but needs to be agreed between the parties. If the assignment does not work (for whatever reason), the risk of exposure is that a 2% penalty will be attracted on the part of the seller. Sellers are therefore sometimes reluctant to agree to a proposed assignment.

If the acquisition is structured as share deal, generally speaking the buyer cannot step up the underlying assets' bases nor can the buyer amortise goodwill. Tax losses do not disappear unless the business is discontinued. Acquisition interest is deductible unless the shares are acquired from a shareholder or an affiliated corporation.

Real estate transfer tax is attracted if 100% in a corporation holding real estate is acquired. If there is a second buyer, even an affiliate, real estate transfer tax can be avoided. Share transfers are exempt from VAT.

2. What strategies are in place, if any, to step up the value of the tangible and intangible assets in case of share deals?

An Austrian corporation needs to be the buyer in order to step up the value of assets in share deals. If no existing Austrian subsidiary is available in the buyer's group an Austrian holding company (SPV) needs to be set up. If the buying corporation acquires a majority interest in the Austrian target company, group relief may be claimed. Group taxation not only offers the advantage of offsetting profits and losses within the tax group, but also provides for a so-called goodwill amortisation. Strictly speaking the amortisation is not limited to actual goodwill, but is in substance a combination of a step up in assets and goodwill amortisation. The amount that can be amortised over 15 years (invariably over 15 years straight-line) is limited to the lower of:

- 50% of share purchase price
- Difference between share purchase price and book equity of the target, reduced by book-fair market value differences related to fixed assets that are not depreciable (eg investments in subsidiaries or land)

Please note that such goodwill amortisation is only available if the shares are acquired from an unrelated seller (similar to the rules applicable to the deductibility of interest on acquisition borrowings for share deals, section 4).

3. What are the particular rules of depreciation of goodwill in your country?

Strictly speaking goodwill can only be amortised if it is acquired in the course of an asset deal. The useful life is invariably 15 years (with exceptions for professional services firms). If a write-down or write-off is required due to an impairment test, an immediate tax deduction can be taken.

4. Are there any limitations to the deductibility on interest of borrowings?

If the buyer is an Austrian corporation general rules on hidden equity are applicable. No strict debt equity ratios apply neither is there an earning stripping regime in Austrian tax law. However if the borrowings are from related parties the loan may be re-characterised as equity if it is not at arm's length. This general rule is applicable to both asset and share deals.

In the case of a share deal additional restrictions apply as follows:

- Only interest in the strict sense is deductible. For example exchange losses from loans in foreign currencies are not deductible, while fees and charges on loans are also non-deductible
- If the shares are acquired from a shareholder that is an affiliate rather than from an unrelated party, interest expenses are non-deductible

5. What are usual strategies to push-down the debt on acquisitions?

It used to be common strategy to acquire the target through an Austrian SPV and then merge the holding company into the target (through a downstream merger). But this is outdated and rarely employed today due to the following reasons:

- The acquisition structure described above (group taxation between holding and target) offers more advantages (in particular goodwill amortisation) than just debt push down
- The (downstream) merger has become subject to some company law restrictions. In particular the qualification as an unlawful return of capital may incur personal directors' liability

The only scenario where a merger route is still advantageous is when it comes to securing acquisition borrowings with assets that belong to the target, eg a mortgage on the target's real estate. Such security is null and void if the loan is made to the holding company rather than to the target itself.

6. Are losses of the target company/ies available after an acquisition is made?

In basic terms there are available losses after an acquisition. However the acquisition of a corporate shell eliminates these losses. A share deal may be qualified as a corporate shell acquisition if the management changes and the business have been reduced significantly (ie by more than 75%; although there are some tests that the Revenue applies to determine the significant reduction of a business). However the corporate shell rules will not be applied in a restructuring scenario if at least 25% of the workforce remains employed.

Careful tax planning is required if a subsequent reorganisation (ie merger, spin-off, etc) is envisaged. In the course of a reorganisation all tax losses generated by a business that has been discontinued or by an asset that the company has already disposed of will disappear.

7. Is there any indirect tax on transfer of shares (stamp duty, transfer tax etc)?

For the time being there is no (share) transfer tax or stamp duty on a share deal in Austrian tax law. However the EU intends to introduce a financial transaction tax. Austria will certainly introduce such tax if the EU establishes a Member States Agreement between the member states.

If the target company holds real estate located in Austria there will be a 3.5% real estate transfer tax if 1 single buyer acquires 100% of the target real estate holdings. Such tax can be avoided in most cases by introducing a second buyer. Please note that real estate transfer tax on share deals is based on (300% of) the real estate's assessed value. This assessed value, even 300%, is way below market value. The Austrian Constitutional Court has held that applying these low assessed values for real estate transfer tax purposes violates the Austrian constitution and has to be abolished. Therefore the law will be amended (probably in 2014) which will entail an increase in the tax burden.

Share transfers are always exempt from VAT even if the target is a real estate company.

8. Are there any particular issues to consider in the acquisition of foreign companies?

Investments in foreign subsidiaries qualify for the international affiliation privilege provided that the shareholding exceeds 10% and the investment is held for more than 12 months. The foreign affiliation privilege includes both a dividend exemption and a capital gains exemption from corporation tax. The drawback is that capital losses and write-downs are not deductible. Therefore the Austrian parent company can opt to elect to absorb capital gains and losses (including write-downs) in the year of acquisition. This option can only be exercised in the first year and cannot be revoked.

It should be noted that the international affiliation privilege is not available where the foreign subsidiary generates passive income in a low-tax jurisdiction (broadly speaking where the effective tax rate is below 15%). Both the dividend exemption and the capital gains exemption are denied.

The same set of rules as for domestic investments applies regarding the deductibility of interest on acquisition borrowings. However goodwill amortisation is not available, although first tier foreign subsidiaries can be included in the Austrian group relief.

9. Can the group reorganise after the acquisition in a tax neutral environment? What are the main caveats to consider?

A group is able to reorganise after an acquisition in a tax neutral environment. However tax losses may be eliminated due to such subsequent reorganisation (see section 6).

10. Is there any particular issue to consider in case of companies whose main assets are real estate?

The acquisition may attract real estate transfer tax (see section 9).

No goodwill amortisation under the Austrian group taxation regime is available unless the target conducts a business. It is not required that the business is the main asset of the target to qualify for the goodwill amortisation.

Please note that there are restrictions to the calculation of the basis for such goodwill amortisation, in particular where the land's market value is much higher that its book value (see above).

11. Thinking about payment of dividends out of your country and a potential exit, is there any particular country that provides a tax efficient exit route to invest in your country?

In general the EU Parent Subsidiary Directive provides for a withholding tax exemption on outgoing dividends. There are still a number of Double Tax Treaties (DTTs) that do not allow Austria to tax capital gains from the sale of an investment in Austria, even if the main asset is real estate. A few tax treaties (eg UAE) exempt dividends and capital gains from Austrian tax.

12. How is foreign debt usually structured to finance acquisitions in your country?

There are no strict debt equity ratios to be considered, as there are no earning stripping restrictions. However the debt has to be considered at arm's length. Therefore it is recommended to avoid profit participating loans, subordinated loans, perpetual loans and unsecured loans etc. Plain vanilla debt provides the smallest exposure that can be challenged.

Under domestic law Austria does not impose withholding tax on outgoing interest unless the loan is secured by a mortgage on Austrian real estate. Therefore interest may be paid even to tax haven jurisdictions.

From a Seller's Perspective

13. What are the main differences between share and asset deals?

See section 14.

14. How are capital gains taxed in your country? Is there any participation exemption regime available?

Share deal

If the seller is an Austrian corporation the capital gain from the sale of a domestic subsidiary is subject to 25% corporation tax. If a foreign subsidiary is sold the capital gain may qualify for a tax exemption under the international affiliation privilege provided that:

- The interest is at least 10%
- The investment has been held for more than 12 months
- The subsidiary did not generate passive income in low-tax jurisdictions
- The Austrian parent company did not opt for capital gains being subject to tax

If the seller is an Austrian resident individual capital gain from the sale of shares is invariably subject to a flat tax rate of 25%. There is no share transfer tax and only real estate transfer tax will be attracted where 100% of a real estate company is sold to a single buyer. Share transactions are exempt from VAT.

Asset deal

If the seller is an Austrian corporation the capital gain is subject to 25% corporation tax.

If the seller is an Austrian resident the gain is subject to income tax at a progressive rate of up to 50%. However a reduced rate (roughly half of the full rate) is available if the seller has run the business for more than 7 years and retires when they sell it. Even if the seller does not retire relief is available after 7 years, allowing the gain to be spread over 3 years.

If the gain relates to foreign assets or foreign permanent establishments it may be exempt from Austrian tax by virtue of the applicable DTT.

Asset deals are subject to VAT and the rate depends on the asset. Most (including goodwill) are subject to 20%, while certain assets are subject to a reduced 10% rate (eg food, livestock). Some assets are exempt (eg cash, receivables, shareholdings, partnership interests or bonds). An option available towards real estate transactions holds that the transaction is either subject to 20% VAT or is VAT exempt. The asset's VAT basis is determined under the purchase price allocation. The seller has to issue an invoice to the buyer that entitles the buyer to recover VAT.

Asset deals attract 3.5% real estate transfer tax and 1.1% registration fees, both of which are based on the real estate purchase price if Austrian real estate is among the assets.

15. Is there any fiscal advantage in case the proceeds from the sale are reinvested?

Rollover relief is not available for corporations.

Individuals may claim rollover relief under certain circumstances. However rollover relief is not available towards reinvestment into subsidiaries, not even into an acquisition of a going concern (asset deal) or a partnership interest.

One structure widely used in Austria enables individuals to settle an Austrian Private Foundation and transfer shareholdings into the foundation. If the deed and bylaws of the foundation are disclosed to the Revenue the following benefits are available:

- Transfer tax is reduced to 2.5% on the market value of the assets transferred to the foundation. A foundation is a registered legal entity. The formal trust deed is publicly available the by-laws are not, although the by-laws need to be disclosed to the Revenue to qualify for the lower tax rates and other benefits. The foundation's accounts need to be audited, but are not published. The grantor transfers assets to the foundation, which then become part of that foundation. The grantor is not the owner of or shareholder in the foundation. A foundation has no owners, but only beneficiaries determined in the by-laws. A board of directors, who must be unrelated to and independent from the beneficiaries, manages the assets of a foundation. The grantor may transfer assets in the course of the foundation's establishment or at a later point of time. Such transfer attracts transfer tax, which is 2.5% if the by-laws are disclosed to the Revenue. But it is 25% if they are not disclosed. Distributions from a foundation are subject to tax in the hands of the beneficiary. However 25% tax is withheld upon distribution to a beneficiary
- Rollover relief is available towards capital gains from the sale of a domestic subsidiary. Reinvestment may be into a domestic or a foreign subsidiary. Reinvestments into domestic subsidiaries attract 1% capital transfer tax. The capital gains tax is deferred until the reinvestment is disposed of

Your Taxand contact for further queries is:

Austria

Bernhard Vanas

T. +431 533 863 3900

E. bernhard.vanas@taxand.at

BELGIUM

Belgium

From a Buyer's Perspective

1. What are the main differences among acquisitions made through a share deal versus an asset deal in your country?

In the case of a stock acquisition the acquiring company is not entitled to depreciate the assets of the target company, nor the acquired shares in the target company.

In the case of an acquisition of business assets, the acquiring company is authorised in principle to depreciate acquired assets and goodwill or clientele on the basis of the acquisition value. This means the acquiring company will benefit from a fiscal step-up that reflects the difference between the transfer of assets' sale price and liabilities and the fiscal value of these assets and liabilities prior to the sale.

2. What strategies are in place, if any, to step up the value of the tangible and intangible assets in case of share deals?

A stock acquisition does not change the fiscal identity of the target company. As such, the company's assets and liabilities will not acquire a different tax status. The target company will continue to depreciate or evaluate its assets as it did before an acquisition.

3. What are the particular rules of depreciation of goodwill in your country?

A buyer who has acquired goodwill is entitled to a fiscal step-up. This is because the Belgian Income Tax Code allows the acquiring company to depreciate all acquired assets in accordance with their acquisition value, including the value attributable to goodwill. Additional costs can be depreciated as well either in the year in which these costs have been incurred or on a pro rata basis. This is also in accordance with the depreciation method applied to which assets these additional costs relate.

To determine depreciation methods tax law in general refers to the principles of accountancy law. As a result the depreciation period is in principle determined by the normal economic life expectancy of the assets concerned. However Belgian tax law specifically provides for a minimum depreciation period of 5 years for intangible fixed assets (such as goodwill and clientele). Often tax authorities attempt to impose a depreciation period of 10 to 12 years for depreciations on clientele. In practice and to avoid any dispute with the tax authorities taxpayers will need to demonstrate their clientele is of a more dynamic nature and that the depreciation period should therefore be shorter than 10 or 12 years.

4. Are there any limitations to the deductibility on interest of borrowings?

As a general rule taxpayers are allowed to deduct all costs incurred to acquire or to maintain taxable income. This rule also applies to interest or financing costs incurred to acquire stock or assets. Therefore there is no difference in tax treatment between a share and an asset deal.

Belgian tax law however provides some general provisions that limit the tax deduction of financing costs. Interest is not tax-deductible when the interest rate is not set in accordance with normal market conditions, taking into account the specific transaction risk and financial position of the debtor. Also interest is not tax deductible when paid to a foreign taxpayer or to a foreign establishment that is not subject to income taxation. This is also the case if it is subject to a much more favourable tax regime than the Belgian income tax regime, unless the taxpayer can prove that interest payments relate to true and sincere transactions and do not exceed normal market limits.

A special thin capitalisation rule has been introduced for corporate taxpayers (who also remain subject to the above restriction rules) regarding interest payments made to beneficiaries not subject to income taxation. They may also be subject to a much more favourable tax regime than the Belgian tax regime or related companies. Such interest payments cannot be deducted by the corporate taxpayer if and insofar as the total loan amount exceeds 5 times the total sum of taxed reserves at the beginning of the taxable period plus the amount of paid-in capital at the end of this period – the so called 5:1 debt-to-equity ratio.

5. What are usual strategies to push-down the debt on acquisitions?

Performing a debt push-down in general is often considered to be a fiscal necessity due to the absence of a fiscal unity for Belgian income tax purposes. Such debt push-down is achieved by consolidating the financial costs of the acquiring company with the profits of the target company, often by means of a national or cross-border merger. However, in order to perform a tax neutral merger, the merger needs to pass a business test and cannot be solely inspired by tax motives (which in many cases is the only real motivation for the merger). The latter condition may jeopardise the possibility of performing the merger in a tax neutral manner.

However a merger between the buyer's (intermediary holding) company and the target company may offer a solution that can result in an effective debt push-down. This is because the merger will result in profits and costs of both companies remaining taxable and deductible within the 1 single taxable entity, ie the company resulting from the merger operation.

Other debt push-down strategies may be to charge management fees to the target company or perform a debt push-down by putting in place intra-group loans. A dividend distribution or capital decrease may also be considered as an alternative. Please note that such alternative strategies will need to comply with economical substance rules and transfer pricing regulations.

6. Are losses of the target company/ies available after an acquisition is made?

Following an acquisition tax losses carried forward are in principle lost due to the change of control of the company. That is unless the company can show that the acquisition was performed in accordance with legitimate financial or economic needs.

Many disputes and court cases have resulted from the fact that events or circumstances representing a legitimate financial or economic need are not specified in the text of the law. Recent jurisprudence has confirmed that a takeover designed to prolong the company's existence even in cases where the company carries out new activities after the change of control can constitute such legitimate financial or economical motive. In order to obtain certainty on the possibility to maintain the available tax losses the parties can request an advance tax ruling.

7. Is there any indirect tax on transfer of shares (stamp duty, transfer tax etc)?

Transfer taxes are due when immovable property (houses, land, industrial facilities, etc) is involved. As a general rule the transfer of real estate is subject to 12.5% registration duties on the sales price. However these duties may not be inferior to normal market value of the property. Registration duties amount to 10% when the property is located in the Flemish region. However new buildings can be transferred under the VAT regime instead of registration duties, in which case the sale is subject to a 21% VAT levy. This rate is higher than the 12.5% or 10% registration duties' rate. But when the acquiring company is entitled to deduct VAT, such a VAT-sale may be more advantageous. Indeed when the acquiring company is entitled to deduct input VAT and uses the acquired immovable property for activities subject to VAT, the paid input VAT can be recovered by reclaiming it in the VAT return period relating to when the transfer took place.

In principle the transfer of all other movable assets will be subject to VAT. However an exemption applies when the assets form a universality of goods or branch of activities.

Share deals are in principle not subject to any transfer tax, except for the tax on the physical delivery of bearer securities (0.6%) or the stock exchange tax (various rates apply depending on the nature of the security concerned; the standard rate amounts to 0.25%). However various exemptions apply.

8. Are there any particular issues to consider in the acquisition of foreign companies?

In principle the acquisition of a foreign company is not treated differently to the acquisition of a Belgian company.

However when the acquired company is located in a tax haven or in a country whose common tax regime is considerably more favourable than a normal income tax regime, the acquiring company will not be able to benefit from the deduction on dividends received by such company. Moreover capital gains realised on shares of such a company cannot benefit from the capital gains exemption and are taxable at a rate of 33.99%.

9. Can the group reorganise after the acquisition in a tax neutral environment? What are the main caveats to consider?

A common post-acquisition restructuring is the merger of the acquiring company and the Belgian target company, certainly when a foreign buyer has used a Belgian intermediary holding company (SPV) to acquire the Belgian target company.

A tax-free merger between 2 companies is possible if certain conditions are fulfilled:

- The acquiring company must be a Belgian or a company resident in Europe
- The merger is carried out in accordance with the Belgian Code of Companies or similar corporate rules applying to the acquiring company
- Tax fraud or tax evasion cannot be the main reason or one of the main reasons for the merger. It is therefore necessary to establish that business motives (other than tax motives), such as restructuring, simplification of group structure or rationalisation of activities have motivated the merger operation

The burden of proof in principle lies with the tax authorities: they have to prove that tax fraud or evasion is the main objective or one of the main objectives in order to deny the tax neutral character of the merger. However tax fraud or evasion is deemed to exist if the authorities can prove an absence of business motives. The taxpayer may refute this presumption by giving considerations other than tax-inspired ones.

If the acquiring company is a non-Belgian company resident in another EU Member State, the tax exemption only applies to assets that remain allocated to a Belgian establishment that the foreign company avails itself of after the merger operation.

Various other alternative reorganisations may be considered (such as the transfer of activities), but many of these alternatives are often complicated to implement from a commercial point of view. Please note that these alternatives also need to comply with economical substance rules and transfer pricing regulations.

10. Is there any particular issue to consider in case of companies whose main assets are real estate?

When real estate is included in the transaction a transfer of shares may be a more tax-advantageous way to proceed since a transfer of real estate is subject to registration duties (10% to 12.5% depending on the real estate's location in Belgium) or VAT where a new building is concerned (21%). A transfer of shares in general can be effectuated without any transfer tax due (see section 7).

11. Thinking about payment of dividends out of your country and a potential exit, is there any particular country that provides a tax efficient exit route to invest in your country?

Under domestic law dividend payments are subject to Belgian withholding tax at a standard rate of 25%.

However many exceptions, reductions and exemptions apply to that rate under Belgian's significant network of tax treaties and under European tax legislation implemented into Belgian law.

In particular no withholding tax is due on dividends paid to a qualifying European resident parent company holding at least 10% in share capital of the subsidiary company during an uninterrupted period of at least 1 year.

Under the same conditions, no withholding tax is due on dividend payments to a company located in a country with which Belgium has concluded a Double Tax Treaty (DTT), provided that treaty or any other agreement or convention provides for an exchange of information clause between both countries.

12. How is foreign debt usually structured to finance acquisitions in your country?

In practice acquisitions are usually financed through normal bank or intra-group loans from a Belgian or foreign origin.

The choice between Belgian or foreign funding is usually not tax driven, but solely based on financial and economic motives. Using foreign debt in principle does not affect the tax treatment of interest payments.

However interest is not tax deductible when paid to a foreign taxpayer or to a foreign establishment that is not subject to income taxation or is subject to a much more favourable tax regime than the Belgian tax regime on such income. Exceptions exist if the taxpayer can prove that interest payments relate to true and sincere transactions and do not exceed normal market limits (see section 4).

Furthermore the 5:1 thin capitalisation rule especially envisages interest payments made to beneficiaries not subject to income taxation or subject to a much more favourable tax regime than the Belgian tax regime, as well as interest payments to related group companies.

Please note that Belgian tax law also provides for a notional interest deduction, ie a notional or fictitious interest deduction, allowing companies to reduce their taxable base when making investments through their own equity. As such, even when an acquisition is not (fully) financed by debt, the acquiring company may still benefit from a fictional interest deduction. The notional interest deduction calculation is based on the (adjusted) equity of the company and equals a fictitious interest cost on this adjusted equity. For tax assessment year 2014, the notional interest deduction rate is set at 2.74%. All companies that are subject to Belgian corporate income tax or non-resident corporate income tax (such as permanent establishments of foreign companies) are eligible for this notional interest deduction.

From a Seller's Perspective

13. What are the main differences between share and asset deals?

In most cases the vendor will prefer to carry out the transaction by means of a sale of stock, as capital gains on shares are in principle 100% tax exempt.

However Belgian legislation on capital gains realised by corporate taxpayers on shares has recently been changed. As a result the exemption remains fully applicable to small and medium-sized enterprises (SMEs). But capital gains on shares realised by large companies are now taxed at a rate of 0.412% (see section 14).

Individual sellers in principle still benefit from an exemption of the capital gain (when the capital gain is realised as a result of the normal management of the seller's private portfolio and does not concern a substantial shareholding sold to a buyer established outside the European Economic Area).

On the contrary upon a sale of business assets, the seller will in principle be taxed on all capital gains realised. It should be noted that capital gains realised on business assets might however benefit from a deferred taxation regime (see section 15).

14. How are capital gains taxed in your country? Is there any participation exemption regime available?

Capital gains realised by a corporate taxpayer are in principle deemed profit and are therefore taxable at the normal corporate income tax rate of 33.99%. However capital gains on shares are in principle tax exempt.

Please note that a new tax regime relating to capital gains on shares has recently been introduced.

As before capital gains on shares remain (as a general rule) fully exempt if the following 2 conditions are met:

- Shares must have been issued by companies subject to a normal tax regime (the taxation condition)
- Shares must have been held in full ownership during an uninterrupted period of 1 year (the holding condition)

However, since 1 January 2013 the exemption remains fully applicable for SMEs. But other large companies fulfilling the 2 exemption conditions mentioned above will be subject to a new supplementary tax of 0.412%.

In Belgium small companies are defined in the Belgian Company Code. According to this Code, a small company is a company with legal personality, which, for the last and penultimate completed financial year, does not exceed more than 1 of the following thresholds:

- Annual average number of 50 employees
- Annual turnover excluding VAT of €7,300,000.00
- Balance sheet total of €3,650,000.00

However a company cannot be considered as small if it has more than 100 employees.

For companies affiliated with another company, employees are added up and the annual turnover and balance sheet total are determined on a consolidated basis.

The current tax regime of capital gains realised by corporate taxpayers can therefore be summarised as follows:

- Full exemption of capital gains on shares realised by SMEs if both the taxation and holding conditions are met
- Taxation at 0.412% of capital gains on shares realised by companies other than SMEs if both the taxation and holding conditions are met
- Taxation at 25.75% of capital gains on shares when the taxation condition is met, but not the holding condition
- Taxation at the standard corporate income tax rate of 33.99% of capital gains on shares when the taxation condition is not met (regardless of the holding condition)

Capital gains on shares realised by individuals are fully tax-exempt unless they qualify as professional or diverse income.

Therefore capital gains on shares realised in the course of a professional activity are taxable as ordinary professional income at the normal (progressive) tax rates.

Capital gains realised within the normal management of the person's private estate are in principle fully exempt. That is unless the shares represent a substantial shareholding of more than 25% of the share capital of a Belgian company and they are transferred to an acquirer outside the European Economic Area.

Capital gains falling outside the scope of normal management are taxed as speculative income at a separate rate of 33%.

15. Is there any fiscal advantage if the proceeds from the sale are reinvested?

For capital gains realised on shares Belgian tax law does not provide for any specific method to defer or avoid taxation – if at all applicable.

By contrast when a capital gain is realised on business assets Belgian tax law does provide for a deferred taxation regime whereby the capital gain is not taxed immediately, but on a future pro rata basis. When the capital gain is realised on tangible or intangible fixed assets listed on the vendor's balance sheet for more than 5 years, the capital gain will be taxed on a deferred basis following depreciation of the reinvestment assets. However this is provided the assets' purchase price is reinvested in depreciable fixed assets used within a Member State of the European Economic Area for carrying out the vendor's business activity within a certain period of time (in principle within 3 years, but extended to 5 for reinvestments in buildings, vessels or airplanes).

Your Taxand contact for further queries is:

Belgium

Geert de Neef

T. +32 2 787 91 11

E. geert.deneef@abtaxand.com

BRAZIL

Brazil

From a Buyer's Perspective

1. What are the main differences among acquisitions made through a share deal versus an asset deal in your country?

Asset deal

From a Brazilian tax liability perspective, if the asset deal involves the acquisition of a complex of assets (that are tangible and intangible) and liabilities that can be organised are sufficient for operation of a business activity by a legal entity, the buyer would have joint or secondary liability for tax debts due up to the date of sale. The price paid by the buyer in excess of the cost of acquiring the assets (which may be the same as the book value) and attributed to individual assets may be subject to depreciation and amortisation expenses, which are deductible for corporate income tax (IRPJ) and Social Contribution on Net Profits (CSLL) purposes upon reorganisation.

Share deal

The buyer is liable for all tax debts due up to the date of the share sale. If the buyer is a Brazilian entity and the purchase price exceeds the net equity of the acquired entity, the buyer records the difference as goodwill; depending on the economic grounds of the goodwill (ie expectation of future profits of the acquired entity, difference between the fair market value and book value of tangible assets, or intangibles and other economic reasons) upon reorganisation, goodwill amortisation may be a deductible expense for the purposes of calculating corporate income tax (see section 3 for further information).

2. What strategies are in place, if any, to step up the value of the tangible and intangible assets in case of share deals?

The purchase of shares at a premium (following restructuring) and the direct purchase of tangible and intangible assets may increase such assets' depreciable and amortisation value (see sections 1 and 3).

3. What are the particular rules of depreciation of goodwill in your country?

For Brazilian tax purposes it is essential that goodwill paid by the acquirer is economically justified. The economic grounds for goodwill must be 1 or any combination of 3 types listed below and, upon merger of the acquirer and acquired entities (upstream and downstream), the goodwill has the following treatment:

- Type A Goodwill: the market value of underlying assets of the invested controlled or affiliated entity is higher than the book value of such assets. Upon merger it is recorded as a counterpart of the accounting entry for the invested entity's relevant underlying asset and could be amortised or depreciated depending on the asset's nature
- Type B Goodwill: expectation of future profits (of the controlled or affiliated entity); upon merger, it is amortised for corporate income tax purposes by the surviving entity, over the 5 years following corporate reorganisation, at a maximum ratio of 1/60 per month
- Type C Goodwill: the value of the going concern, intangible assets or other economic reasons. Upon merger it is recorded as a counterpart of the accounting entry for the invested entity's relevant fixed asset (going concern, intangible asset etc), but it is not subject to depreciation or amortisation for tax purposes

4. Are there any limitations to the deductibility on interest of borrowings?

According to general tax deductibility rules for corporate income tax operating expenses are considered to be deductible as long as they are cumulatively:

- Necessary for the company's activity and for the maintenance of the source of income
- Paid or incurred to carry out transactions or operations required of the company
- Usual or common to the type of transactions, operations or activities performed by the company

In respect of payments of interest made by a Brazilian source to a non-Brazilian resident, tax deductibility of the interest payment also will be subject to both thin capitalisation and transfer pricing rules.

Thin capitalisation rules

Thin capitalisation rules apply to interest related to loans obtained from:

- Related parties that are resident or domiciled outside Brazil, according to the definition provided by Brazilian tax law for transfer pricing purposes
- An individual or legal entity resident or domiciled in a favourable tax jurisdiction or in a jurisdiction under a privileged tax regime

The following entities are considered related to the Brazilian party in accordance with transfer pricing rules:

- A branch or subsidiary, domiciled abroad
- Head offices, when domiciled abroad
- An individual or legal entity, residing or domiciled abroad, whose equity interest in the Brazilian company makes it a controlling shareholder or affiliated company
- A legal entity domiciled abroad which is a controlling or affiliated company
- A legal entity domiciled abroad when itself and the company domiciled in Brazil are under corporate control or common administration or when at least 10% of the capital of each belongs to the same individual or legal entity
- An individual or legal entity, resident or domiciled abroad that, together with the legal entity domiciled in Brazil, hold interests in the capital of a third legal entity, which considered jointly makes them a controlling or affiliated company of the third legal entity
- An individual or legal entity, resident or domiciled abroad, which is the Brazilian party's associate, under the legal form of a consortium or co-ownership as defined in Brazilian law in any enterprise
- An individual resident abroad who is a relative or spouse of any of the Brazilian party's members of management, partners, shareholders or controlling shareholder directly or indirectly
- An individual or legal entity, resident or domiciled abroad that enjoys exclusive rights as the Brazilian party's agent, distributor or concessionaire for buying or selling goods, services or rights
- An individual or legal entity, resident or domiciled abroad, for which the legal entity domiciled in Brazil enjoys exclusive rights, as its agent, distributor or concessionaire for buying or selling goods, services or rights

When the interest is paid to a related party resident or domiciled outside Brazil, the interest will only be deductible for corporate income tax purposes if the debt does not exceed the following 2 limits:

- Twice the equity interest value held by the relevant related company in the Brazilian legal entity, considering each debt separately
- Twice the net worth value of the Brazilian legal entity, considering each debt separately
- In both cases mentioned above, twice the total value of equity interest held by all related companies in the Brazilian legal company, considering the sum of debt transactions

When interest is paid to an individual or legal entity that is resident or domiciled in a favourable tax jurisdiction or in a jurisdiction under a privileged tax regime, that interest will only be deductible for corporate income tax purposes if the debt does not exceed 30% of the legal entity's net worth, considering the sum of debt transactions when the interest becomes due.

In all cases the amounts of debt and net worth of the Brazilian legal entity shall be calculated by the weighted monthly average.

Expenses are not deductible for corporate income tax purposes if they reflect payments made to parties resident or domiciled in a favourable tax jurisdiction or in a jurisdiction under a privileged tax regime, unless the following requirements are cumulatively met:

- The beneficial owner of the proceeds located abroad is identified
- Operational capacity of the party located abroad is proven
- Payment for the service and delivery of goods and rights or use of the service is proven

The requirements related to the operational capacity mentioned above are not applicable to the following transactions:

- Transactions not made for the sole or main purpose of tax savings
- At the time interest is remitted abroad, the beneficiary is a subsidiary or branch of a controlling entity domiciled in Brazil subject to taxation of its foreign income

Transfer pricing rules

Parties subject to thin capitalisation rules are also subject to transfer pricing rules.

As from January 2013 the following rates apply for the calculation of the deductible amount of interest paid or credit to these parties:

- The market rate for sovereign debt securities issued by the Federative Republic of Brazil in the international market in US dollars, in the case of transactions in US dollars with a prefixed rate;
- The market rate for sovereign debt securities issued by the Federative Republic of Brazil in the international market in Reais, in the case of international transactions in Reais with a pre-fixed rate

- The 6-month London Interbank Offered Rate (LIBOR) applies in all other cases. The limits described above are compulsory for contracts made, renewed, or renegotiated after 31 December 2012

In addition to the rates mentioned above a spread to be determined by the Brazilian government based on the market's average margin and pro-rated according to the interest accrual period must be included in calculating the deductible amount of interest. The Brazilian lender must record, as financial revenue related to the loan granted to a foreign related party at least, the amount calculated in accordance with the rules mentioned above.

The amount of interest exceeding the limit mentioned above will be added to the taxable income subject to corporate income tax.

5. What are usual strategies to push-down the debt on acquisitions?

In most situations where the purchaser intends to push-down debt on acquisitions (ie perform leveraged buy-outs) the entity that acts as the borrower is a Brazilian company. Following the purchase this entity is merged into the acquired entity.

Other structures may involve (i) back-to-back loans on the same terms and conditions or (ii) obtaining a new loan at the level of the acquired company, transferring the proceeds to the parent company (eg via dividends, capital reduction or otherwise) so that it can pay off the original loan. These structures may be feasible if all shares of the entity are purchased. Others may also be feasible subject to a case-by-case analysis.

6. Are losses of the target company/ies available after an acquisition is made?

Taxation in Brazil considers each individual entity separately (ie there is no consolidation for tax purposes). Tax losses are linked to the entity that generated them. If that entity is merged, tax losses of the merged entity cannot be used by the entity surviving the merger.

In case of a spin-off, the spun-off company's losses are cancelled in the same proportion that the assets and liabilities transferred represent of the total net asset value of the spun-off entity.

If there is a change in control and change in the acquired entity's line of business, its tax losses can no longer be used. There are no percentage thresholds to qualify a change in control. It may be deemed to occur even in situations where the purchaser buys less than 50% of the target company's total equity interest. A case-by-case analysis is necessary to ascertain if there is change in control consideration.

7. Is there any indirect tax on transfer of shares (stamp duty, transfer tax etc)

There is no Brazilian inheritance or gift tax applicable to the ownership, transfer or disposition of interest, except for gift and inheritance tax imposed by Brazilian states on gifts by individuals or entities not domiciled or residing in Brazil to individuals or entities domiciled or residing within such Brazilian states. There is no Brazilian stamp, issue, registration, or similar tax or duties payable by shareholders.

The conversion into Brazilian Reais of proceeds received in foreign currency by a Brazilian entity or the foreign currency conversion of funds held in Reais is subject to the tax on foreign exchange transactions (IOF/Fx).

The general rate IOF/Fx rate is 0.38%, which can be increased at any time up to 25% by the Brazilian Government. But this is only with respect to currency exchange transactions carried out after the rule that increases the IOF /Fx rate enters into force.

8. Are there any particular issues to consider in the acquisition of foreign companies?

A Brazilian company that acquires foreign companies must comply with Brazilian legislation on taxation of Controlled Foreign Companies (CFC) rules. According to such rules, profits, earnings and capital gains earned abroad through a foreign subsidiary a foreign controlled or affiliated entity or a branch establishment of the Brazilian company must be included in calculating corporate income tax owed by the Brazilian entity, which applies at a combined rate of 34%.

Such profits must be included in the 31 December financial statements of the Brazilian entity. Therefore it is included in calculating corporate income tax in the year when they were earned or accrued. This foreign income is deemed available to the Brazilian entity as of 31 December, regardless of whether it is effectively paid or remitted.

All kinds of income (active and passive) generated by the foreign controlled or affiliated entity must be added to the taxable basis of the Brazilian entity and not just its active earnings.

Losses incurred by the foreign controlled or affiliated company cannot be offset against profits generated by the Brazilian entity in Brazil. Nevertheless Brazilian legislation allows for offsetting of such losses against future profits of the same foreign entity, without quantitative or qualitative limitations. For example the domestic rule on net operating loss (NOL) limitation, ie 30% of net profit, does not apply.

In addition for purposes of determining the foreign taxable income of the Brazilian entity, the controlled foreign company must also consolidate the results of entities in which it holds direct or indirect equity interests (second and further tiers).

Even in the presence of Treaties to Avoid Double Taxation (DTT) between Brazil and foreign countries Brazilian tax authorities apply the CFC rules. The tax authorities argue that even though article 7 of such treaties as rule establishes that the profits of a company may be taxed in only the country in which such company is located, the applicable distributive rule set forth in article 10 should apply. Brazilian tax authorities argue that article 10 of the treaties, which refers to dividends and in most cases gives partial taxation rights to Brazil, would be the applicable distributive rule. This is given that the CFC rules deem a dividend distribution by the foreign subsidiary or affiliate to have occurred.

It is not clear under current legislation whether or not the goodwill rules mentioned above could be applicable in case the target is a foreign entity.

9. Can the group reorganise after the acquisition in a tax neutral environment? What are the main caveats to consider?

When mergers, consolidations and/or spin-offs are carried out at book value, taxable capital gains are not triggered in principle. The main caveat in the context of corporate reorganisations relates to maintenance of net operating losses recorded at the level of the acquired company and the transfer of tax credits. (For more information on treatment of net operating losses, please see section 6.)

It should be noted that corporate reorganisations in Brazil may be performed at book or market value.

10. Is there any particular issue to consider in case of companies whose main assets are real estate?

Assuming that consideration refers to companies whose main activities involve the purchase and sale of real estate properties besides regulatory and other tax matters, the main tax issues in principle refer to liability for the Municipal Real Estate Transfer Tax (ITBI).

The ITBI is a municipal tax payable by the buyer on the acquisition of real estate. The ITBI rate varies between municipalities, but is usually fixed at a rate of 2%. The ITBI is calculated on the basis of the market value of the property or its appraised value whichever is higher.

It is common practice for real estate companies to structure their holdings in a group of different companies, with each company holding 1 or more properties for operational and tax efficiency purposes. Therefore each transfer of property held inside the group would be subject to ITBI.

The acquisition and transfer of a company that owns real estate in contrast is not subject to ITBI, since it involves only a share deal and not an asset deal. Furthermore the transfer of a real estate property to an entity as a capital contribution is not subject to ITBI if the recipient entity is not a company that has the purchase and sale of real estate as one of its corporate purposes. The recipient entity's operational revenues evidence this for 2 years preceding and 2 years following the transfer.

An M&A transaction involving a multi-company real estate group could result in a transfer of tax liabilities (or even potential tax liabilities, if no tax assessment has been issued) to the acquirer.

11. Thinking about payment of dividends out of your country and a potential exit, is there any particular country that provides a tax efficient exit route to invest in your country?

From an income tax perspective Brazilian legislation provides that payment of dividends (including out-of-yearly net profits, post-1995 profit reserves or post-1995 accumulated profits) is neither subject to any withholding tax in Brazil, nor subject to income tax at the beneficiary level, regardless of its nature and domicile.

In addition to dividends on profits, Brazilian legal entities may also pay interest on equity (JCP) to their shareholders or quota holders. JCP refers to remuneration on the capital contributed by a quota holder or shareholder to the invested company. The amount of JCP that can be paid by a company to its quota or shareholders is equal to the balance of that company's net equity accounts (including capital, capital reserve, profits reserve or retained earnings). This amount is then multiplied by the pro-rata Long Term Interest Rate (TJLP), which is normally about 6% per year and is limited to (i) 50% of current year's net profits or (ii) 50% of the company's total retained earnings accounts. The payment of JCP is subject to withholding income tax WHT at a rate of 15% or 25%, if the beneficiary is domiciled in a favourable tax jurisdiction.

It is therefore possible that tax efficiencies would vary according to the tax treatment given to dividends and JCP by the country. This depends on where the recipient is located and requires analysis by tax experts of that jurisdiction.

12. How is foreign debt usually structured to finance acquisitions in your country?

Typically, an acquisition financed with foreign debt is structured through the incorporation of a vehicle company in Brazil. Alternatively, if the acquiring and acquired entities do not merge, the interest expense payable by the vehicle company may be added to the cost of acquisition of the acquired company, making it possible to reduce capital gain in the event of a sale of the acquired company.

Attention must be paid to the Brazilian thin capitalisation and transfer pricing rules when calculating deductible interest paid to related parties abroad or parties located in favourable tax jurisdictions or jurisdictions under privileged tax regime (see section 4). Brazil recently enacted legislation providing for tax advantages to foreign financing of infrastructure projects in the country.

The tax on financial transactions (IOF) is levied at an increased rate of 6% in the case of loans having a term of up to 360 days (1 year), as demonstrated by loan registration information lodged with the Brazilian Central Bank. The 6% IOF is levied over the amount of the loan in Brazilian Reais. Loans with more than 360 days are not subject to the IOF.

From a Seller's Perspective

13. What are the main differences between share and asset deals?

Asset deals

The sale of individual assets is taxable. At a federal level the seller's income (including any capital gain from the sale) will be subject to corporate income tax, generally at a combined rate of 34% after adjustment for deductible expenses. Sales revenue is subject to the Social Contributions on Gross Revenues (PIS/COFINS) unless the sale involves fixed assets that are not subject to PIS/COFINS generally at combined rates of 9.25% although credits may apply.

The exit of assets from the seller's establishment may be subject to Federal Excise Tax (IPI) levied on manufactured products the moment they leave their point of manufacture or importer's premises. As a value-added tax IPI applies to the value of the transaction at rates that vary according to the essential nature of the products. But credits from previous transactions (including acquisitions or importations) can be used to offset the amount of IPI owed.

At the state level state VAT (ICMS) also applies to transactions for the sale of goods at rates that vary from 7% or 12% to 18% or 25%, depending on the nature of the goods, the state and whether the transaction occurs within that same state or between states. It should be also noted that as VAT, credits from previous transactions are generally also allowed. Finally at the municipal level, if real estate assets are involved in the sale, ITBI is levied on the property's market value, usually at a 2% rate, although it can vary from municipality to municipality.

Share deals

Any capital gain earned on the sale of shares held by a Brazilian seller will be subject to corporate income tax at 34% if the seller is a legal entity and income tax at 15% if seller is an individual.

14. How are capital gains taxed in your country? Is there any participation exemption regime available?

There is no participation exemption regime in Brazil. Capital gain is defined as the positive difference between the purchase price and acquisition cost of a determined asset. That is when earned by:

- A Brazilian legal entity, the gain is subject to corporate income tax at a combined rate of 34% (but in some cases expenses and tax losses carryforward can be considered)
- A Brazilian individual is subject to income tax at 15%
- Non-residents who sell assets located in Brazil are subject to Withholding Income Tax at 15% or 25% if the resident or domiciled at a tax favourable regime (where a black list is issued by the Brazilian Federal Revenue)
- Non-residents who sell shares on the Brazilian stock exchange (including the organised over-the-counter market) are exempt from income tax when it is a portfolio investment (registered under Resolution No. 2,689/01 of Brazilian Central Bank). If however the non-resident seller is resident in a tax favourable jurisdiction, 25% WHT applies

15. Is there any fiscal advantage if the proceeds from the sale are reinvested?

Brazilian legislation does not provide for any fiscal advantage if the proceeds from sales are reinvested in Brazil.

Exhibit I

According to Brazilian legislation, a favourable tax jurisdiction fulfils 1 of the following requirements:

- A country or place that does not tax income or it taxes income at a rate lower than 20%
- It imposes restrictions on disclosure of the investment owner's shareholding composition as the ultimate beneficiary of earnings that are attributed to non-residents or of the economic transactions carried out

A privileged tax regime is the 1 that:

- Does not tax income (that is income in general or specifically income derived from foreign sources), or taxes income at a rate lower than 20%
- Grants tax advantages to non-resident individuals or legal entities, provided these tax advantages either do not require any type of substantial activity in the jurisdiction, or are actually conditional on the absence of economic activity in the jurisdiction

- Imposes restrictions on disclosure of shareholding composition of the investment ownership of the ultimate beneficiary of earnings that are attributed to non-residents or of the economic transactions that are carried out

Instruction No. 1,037/10, issued by the Brazilian Federal Revenue Service, sets out the countries and locations that are deemed to be favourable tax jurisdictions and the regimes that fall under the concept of privileged tax regime.

The low-tax jurisdictions listed in Instruction No. 1,037/10 are as follows:

American Samoa, Andorra, Anguilla, Antigua and Barbuda, Aruba, Ascension Island, Bahamas, Bahrain, Barbados, Belize, Bermuda, British Virgin Islands, Brunei, Campione D'Italia, Cayman Islands, Channel Islands (Jersey, Guernsey, Alderney and Sark), Cook Islands, Costa Rica, Cyprus, Djibouti, Dominica, French Polynesia, Gibraltar, Grenada, Hong Kong, Isle of Man, Kiribati, Lebanon, Labuan, Liberia, Liechtenstein, Macau, Madeira Islands, Maldives, Marshall Islands, Mauritius, Monaco, Montserrat, Nauru, Netherland Antilles, Niue, Norfolk Island, Oman, Panama, Pitcairn Island, Queshm Island, Saint Helena Island, Saint Kitts and Nevis, Saint Lucia, Saint Pierre and Miquelon, Saint Vincent and The Grenadines, San Marino, Seychelles, Singapore, Solomon Islands, Swaziland, Tonga, Tristan da Cunha, Turks and Caicos Islands, United Arab Emirates, U.S. Virgin Islands, Vanuatu and Western Samoa.

The countries that have privileged tax regimes and the corresponding regimes deemed privileged by Instruction No. 1,037/10 are as follows

Country or location	Type of regime
Uruguay	Regime applicable to legal entities incorporated in the form of a Sociedade Financeira de Inversão (Safi) until 31 December 2010
Denmark	Regime applicable to legal entities incorporated in the form of a holding company with no substantial activity
Iceland	Regime applicable to legal entities incorporated in the form of an International Trading Company (ITC)
Hungary	Regime applicable to legal entities incorporated in the form of an offshore Korlátolt Felelõsségû Társaság (*KFT*)
United States of America	Regime applicable to legal entities incorporated in the form of a state Limited Liability Company (LLC) that is owned by non-residents and not subject to federal income tax
Malta	Regime applicable to legal entities in the form of an International Trading Company (ITC) and of an International Holding Company (IHC)

Your Taxand contact for further queries is:

Brazil

Jose Otavio Faloppa

T. +55 11 2179 5234

E. jof@bmatax.com.br

CHINA

China

From a Buyer's Perspective

1. What are the main differences among acquisitions made through a share deal versus an asset deal in your country?

The buyer will inherit historical tax risks under a share deal. There is no similar risk for asset deals.

2. What strategies are in place, if any, to step up the value of the tangible and intangible assets in case of share deals?

Both tangible and intangible assets will be based on market value due to the possible involvement of an independent value evaluation agent.

3. What are the particular rules of depreciation of goodwill in your country?

China tax regulation does not allow goodwill to be depreciated.

4. Are there any limitations to the deductibility on interest of borrowings?

Financial costs engaged during the usual course of business are deductible if they are not to be capitalised.

Interest on loans granted to persons other than shareholders is deductible if (i) the borrowing and lending is genuine or (ii) the enterprise and individual have concluded a loan contract.

Interest deductibility is limited to the market rate on similar loans, while interest paid to a related company is deductible if the debt-to-equity ratios are observed according to a 5:1 ratio for financial service enterprises or a 2:1 ratio for non-financial enterprises.

It should be noted however that these ratios do not apply if a company can prove that the loan is at arm's length; or the effective tax rate of the borrowing enterprise is not higher than that of the lending enterprise within China. Interest on the debts in excess of the ratios will be non-deductible.

Non-deductible interest cannot be carried forward and will be re-characterised as dividends subject to corporate income tax.

5. What are usual strategies to push-down the debt on acquisitions?

Transfer the debt to capital will reduce the tax basis for the buyer for future sales.

6. Are losses of the target company/ies available after an acquisition is made?

Under China tax law losses remain valid after a share deal.

7. Is there any indirect tax on transfer of shares (stamp duty, transfer tax etc)

The buyer will incur stamp duty at 0.05% on the transfer of shares.

8. Are there any particular issues to consider in the acquisition of foreign companies?

There are no specific tax concerns for the buyer when acquiring foreign companies. However from the legal side certain applications with China authorities are required before a Chinese legal entity can receive overseas investment.

9. Can the group reorganise after the acquisition in a tax neutral environment? What are the main caveats to consider?

The tax neutral will normally require a lock-up period for the investor's shareholding. This period could be 1 or 3 years, depending on different kind of restructuring cases.

10. Is there any particular issue to consider in case of companies whose main assets are real estate?

No specific tax issues apply solely to real estate.

11. Thinking about payment of dividends out of your country and a potential exit, is there any particular country that provides a tax efficient exit route to invest in your country?

The withholding tax on dividends could be lowered to 5% if it is repatriated to a direct shareholder in Hong Kong.

12. How is foreign debt usually structured to finance acquisitions in your country?

The foreign debt of a legal Chinese entity will be subject to foreign loan registration with the China foreign exchange administration authority. At the same time the maximum foreign loan registration limitation will depend on the debt-to-equity ratio of the Chinese entity.

From a Seller's Perspective

13. What are the main differences between share and asset deals?

As referenced in section 1 the tax risk passed from seller to buyer will be different. If the seller in an asset deal is also the China entity, and the seller in share deal is the holding company of the China entity, the tax implications will be different.

14. How are capital gains taxed in your country? Is there any participation exemption regime available?

Capital gains are taxed at 10% for non-residents and 25% for residents. Some preferential treatments on exemption of capital gain tax are available in Cai Shui.

Where enterprise restructuring complies with the following conditions simultaneously, special tax process provisions apply:

- It has reasonable commercial purpose and reduction, exemption or delay in tax payment is not its primary purposes
- The proportion of acquired, merged or separated assets or equities conforms to that stipulated herein
- The original real operating activities of the restructured assets are not changed in the 12 months consecutive following the enterprise restructuring

- The equity payment amount involved in the transaction consideration of the restructuring conforms to the proportion stipulated
- The original major shareholders to whom the equities are paid in enterprise restructuring may not transfer equities obtained in the 12 consecutive months after restructuring

In the event that the enterprise engages in equity and asset acquisition transaction between, within and beyond the borders of China (including Hong Kong, Macau and Taiwan regions), special tax process cannot be applied unless the following conditions are met, in addition to the conditions stipulated above:

- When a non-resident enterprise transfers resident enterprise equity in its possession to another non-resident enterprise with 100% of its direct holdings, no change in income withholding tax of the future transfer of such equity is caused
- The transferring non-resident enterprise also undertakes to the competent taxation authority in writing that it will transfer equities it possesses of the transferred non-resident enterprise within 3 years (including those 3 years)
- A non-resident enterprise transfers to a resident enterprise with 100% of its direct holding equities it possesses of another resident enterprise
- A resident enterprise invests in a non-resident enterprise with 100% of its direct holdings with the assets and equities in its possession
- Other cases approved by the Ministry of Finance and the State Administration of Taxation

15. Is there any fiscal advantage if the proceeds from the sale are reinvested?

Before 2007 some preferential treatment on the reinvestment of dividends was available. No effective tax policy is currently available.

Your Taxand contact for further queries is:

China

Dennis Xu

T. +86 21 6447 7878 ext 506

E. dennis.xu@hendersen.com

COLOMBIA

Colombia

From a Buyer's Perspective

1. What are the main differences among acquisitions made through a share deal versus an asset deal in your country?

Asset deal

Under Colombian tax law in an asset deal the seller's pre-closing tax liabilities are not, as a general rule, assumed or transferred to the buyer of the assets.

An exception to this rule has been established in Bogotá in connection with the industry and commerce tax applicable in this municipality. In this case the buyer of a commercial establishment or ongoing concern (*establecimiento de comercio*) is jointly and severally liable with the seller for the seller's pre-closing industry and commerce tax liabilities (associated to industry and commerce tax to do with the commercial establishment's activities).

On the other hand in an asset deal the purchase price paid by the buyer and allocated to each asset will be the tax basis of such assets. In this manner the tax basis of the assets are stepped up to their fair market value. This step-up would increase the depreciation or amortisation deductions corresponding to the acquired assets.

Existing tax attributes of the seller, such as net operating losses do not carry over the buyer of the assets.

Investors in productive assets are entitled to a special deduction for income tax purposes equivalent to 40% of the value of such assets. The deduction is applicable only if the investment is made in tangible assets (new or used) subject to depreciation or amortisation. This deduction is not applicable if the acquisition of the assets takes place between related parties (Article 158-3 of the Colombian Tax Code).

The sale of movable assets not excluded or exempted from value added tax are subject to this tax, generally at rate of 16%. The sale of used fixed assets is not subject to VAT.

In addition if the buyer is an income tax withholding agent, it will have the obligation to apply a 3.5% income tax withholding on the amount paid or accrued for the acquisition of the assets.

Share deal

As a general rule the transfer of shares of Colombian companies generates Colombian source income for the seller. As of January 2013 the capital gain generated in the transfer of such shares is taxed in Colombia at a rate of 10%.

The alienation of shares of a Colombian company as a consequence of a merger or a spin-off of the foreign holding company abroad is not subject to taxes in Colombia provided that the value of the assets located in Colombia, owned by the group of companies to which the companies participating in the merger or spin-off belongs, represents less than 20% of the total value of the assets of such group of companies. In a shares deal the target company remains in existence and, therefore, the tax liabilities of the target remains with it after the closing of the transaction.

In addition in a shares deal the target company maintains its tax attributes such as net operating losses and tax credits without any modification or limitation due to the change in its control.

The acquisition of shares does not have immediate implications for the buyer. The tax basis of the shares is the purchase price and the tax basis of the assets of the target company remains the same and is not stepped up; however the difference between the book value of the target company and the purchase price paid for it (so-called goodwill or *credito mercantil*) may be amortised by the buyer for income tax purposes subject to the conditions described below.

The sale of shares of a Colombian company is not subject to VAT, stamp or registration tax. The sale of social quotas of limited liability companies is subject to registration tax at a rate of 0.7% on the transfer value.

2. What strategies are in place, if any, to step up the value of the tangible and intangible assets in case of share deals?

Under Colombian legislation there are no rules that allow the stepping up of the value of the tangible and intangible assets of the target company in case of share deals.

3. What are the particular rules of depreciation of goodwill in your country?

The amortisation of the goodwill resulting from a shares acquisition is deductible for income tax purposes provided that the deduction complies with general deductibility rules and the goodwill impairment is evidenced by the taxpayer with a technical study. As an exception Article 143-1 of the Colombian Tax Code establishes that entities subject to supervision of the Financial Superintendency are able to amortise goodwill according to methods established in regulations applicable to financial institutions.

The amortisation of goodwill cannot be deducted by the same company whose shares, quotas, or outstanding interest have been acquired, or by any company resulting from a merger, spin-off or liquidation of that same company. The goodwill where amortisation is not deductible will make up part of the corresponding investment's tax basis. This prohibition does not apply to entities subject to the supervision of the Financial Superintendency, provided that the merger, spin-off, settlement or any kind of corporate reorganisation occurs by virtue of a mandatory provision.

The rules described above are applicable to:

- Goodwill generated in acquisitions performed after 1 January 2013
- Goodwill generated in acquisitions agreed before 1 January 2013, which perfection is subject to approval by any competent governmental agency under applications filed before 31 December 2012

4. Are there any limitations to the deductibility on interest of borrowings?

The interests paid on loans obtained for the acquisition of assets different from shares are as a general rule deductible.

Regarding interest paid on loans obtained in order to finance the acquisition of shares, it is important to take into account that under Colombian law costs and expenses related to non-taxed income or exempted income are not deductible. In addition dividends that correspond to profit subject to income tax at corporate level are considered for Colombian income tax purposes as non-taxed income. According to this provision the Colombian tax authority has stated interest paid on loans obtained for shares acquisition is not deductible if the borrower has obtained non-taxed dividends in the corresponding taxable year. If during the corresponding taxable year the borrower has obtained dividends subject to income tax (ie dividends that correspond to profits not taxed at corporate level) or has not obtained dividends, the interest paid is deductible.

In addition it is important to note that Law 1607 of 2012 introduced a thin capitalisation rule to the Colombian tax system. According this rule interests generated by liabilities of which the total average amount during the year does not exceed the amount resulting from 3 times the net worth on 31 December of the previous year, are fully deductible for income tax purposes. On the contrary interests that exceed this limit must be treated as non-deductible expenses.

Corporations, entities or special purpose vehicles incorporated with the purpose of building social interest housing projects and priority housing projects have the right to deduct the interests generated by liabilities of which the total average amount during the year does not exceed the amount resulting from 4 times the net worth of the taxpayer on 31 December of the previous year.

The thin capitalisation rules are not applicable to entities that are subject to supervision of the Financial Superintendency and corporations, entities or special purpose vehicles that obtain financing to carry out public services infrastructure projects.

5. What are usual strategies to push-down the debt on acquisitions?

One of the strategies that is used to push-down debt on acquisitions is the use of a special purpose company for the purposes of obtaining a loan to carry out the acquisition of a Colombia target company. After acquisition the special purpose company may be merged with the target company, where the target company is the surviving entity, in order to push-down the debt into the target company.

6. Are losses of the target company/ies available after an acquisition is made?

Generally, net operating losses of the target company can be offset against target's taxable income obtained during future years without any time limitation. Colombian tax law does not provide for a carryback rule.

7. Is there any indirect tax on transfer of shares (stamp duty, transfer tax, etc)?

Under Colombian law there are no indirect taxes derived from the transfer of shares.

The transfer of shares is not subject to VAT or any other transfer tax.

In regard with stamp tax, Article 530 of the Tax Code establishes that the transfer of shares is exempted from stamp tax.

As mentioned the transfer of social quotas of limited liability companies is subject to registration tax at rate of 0.7%.

8. Are there any particular issues to consider in the acquisition of foreign companies?

There are no particular issues that arise from the acquisition of a foreign company. Nevertheless where a Colombian buyer acquires a foreign target it is important to mention that dividends derived from such shares would be taxed under Colombian fiscal law – the buyer, as a Colombian resident, is levied in regard to its worldwide income.

If the Colombian buyer sells the shares, income perceived from such sale would be subject to Colombian income tax, if the buyer, as a Colombian resident, is levied in regard to its worldwide income. If the Colombian buyer is levied abroad in regard to the dividends or capital gains he or she will be entitled to a tax credit in Colombia in an amount equivalent to the income tax applicable in Colombia to such income.

9. Can the group reorganise after the acquisition in a tax neutral environment? Which are the main caveats to consider?

Prior to 1 January 2013 all kinds of mergers and spin-offs were income tax, capital gain tax and value added tax free in Colombia.

By virtue of Law 1607 of 2012 mergers and spin-offs between Colombian companies, or between Colombian and non-Colombian companies and the transfer of goods located in Colombia as a result of off-shore mergers or spin-offs will not be subject to income tax, capital gain tax nor value added tax, provided that certain requirements are met and subject to certain limitations.

Cross-border mergers or spin-offs where the absorbing or beneficiary company is non-Colombian will always be taxed.

Under Colombian commerce law, a merger occurs when 2 or more companies dissolve and, without liquidating, are absorbed by an existing company, or create a new company. A spin-off occurs through 1 of the following events:

- When a company, without dissolving, transfers 1 or more portions of its equity to 1 or more existing companies, or use them to create a new company
- When a company dissolves and without liquidating divides its equity in 2 or more portions that are transferred to already existing companies or are used for creation of new companies

10. Is there any particular issue to consider in case of companies whose main assets are real estate?

No there are no particular issues to consider in case of acquisition of the shares of companies whose main assets are real state.

In accordance to the general rule capital gains obtained from the transfer of shares of companies whose main assets are real state are deemed to be Colombian source income and therefore are subject to taxes in Colombia.

No specific transfer tax arises from the transfer of the shares of a company whose main assets are real estate.

It is necessary however to take into account specific dispositions of Double Taxation Treaties (DTTs) mentioned above in connection with capital gains obtained in a sale of shares of companies whose main assets are real estate.

11. Thinking about payment of dividends out of your country and a potential exit, is there any particular country that provides a tax efficient exit route to invest in your country?

Under Colombian law dividends that correspond to profits subject to income tax at the corporate level are not subject to withholding tax. If the dividends correspond to profits not taxed at the corporate level, such dividends are subject to a withholding tax at rate of 33%.

The tax treaties with Spain and Chile do not change the abovementioned general rule. Under the treaty with Switzerland the withholding tax is reduced as follows:

- To 0% if the beneficial owner of the dividends is a company owning directly at least 20% of the company that pays the dividends
- To 15% in all other cases

Under the treaty with Canada the withholding tax is reduced as follows:

- To 5% if the beneficial owner of the dividends is a company owning directly or indirectly at least 10% of voting shares of the company that pays the dividends
- To 15% in all other cases

As already mentioned under the tax treaties with Spain and Switzerland capital gains derived from the alienation of Colombian shares are subject to tax in Colombia only if the value of the shares is derived, directly or indirectly in more than 50% from real estate located in Colombia.

12. How is foreign debt usually structured to finance acquisitions in your country?

Interest income earned by foreign investors or foreign financial institutions resulting from a foreign currency loan granted to a Colombian entity, will be subject to 14% income tax withholdings if the loan agreement term is equal or higher than 1 year. If the term of the loan agreement is less than 1 year, 33% income tax withholdings will apply.

Only the following foreign loans granted to residents or domiciled entities in Colombia will not generate Colombian source income as per Article 25 of the Colombian Tax Code and therefore the respective interest income earned under these loans will not be subject to income tax or tax withholdings in Colombia:

- Short term loans (maximum term of 24 months) originated in the import of goods or in bank overdrafts
- Loans to finance or pre-finance exports
- Loans to financial corporations, financial cooperatives, financing companies, BANCOLDEX and banks, incorporated in accordance with Colombian laws
- Loans for foreign trade transactions, carried out through financial corporations, financial cooperatives, financing companies, BANCOLDEX and banks incorporated in accordance with Colombian laws

In spite of the above conditions under the Double Taxation Treaty (DTT) entered into between Spain and Switzerland, interests earned by beneficial owners who are residents in Spain/Switzerland will be subject to 10% income tax withholdings in Colombia, except in the case of:

- Interest which the beneficial owner is the Spanish/Swiss state or one of its political subdivisions or one of its local entities
- Interest earned by an enterprise resident in Spain/Switzerland in connection with the sale of goods or equipment
- Interest originated on loans granted by a bank or other credit institution resident in Spain/ Switzerland. In these 3 cases the interests will not be subject to income tax withholdings in Colombia (Colombia-Spain DTT, Article 11)

Under the DTT entered into between Colombian and Chile interest earned by a Chilean resident will be subject to 15% income tax withholdings, except in the case of interest earned by a bank or an insurance company, which will be subject to 5% income.

In the same way under the DTT entered into between Colombian and Canada Interest income can also be subject to income tax in Colombia, as per local regulations, but the respective tax will not exceed 10% of the gross amount whenever the effective beneficiary of such income is a resident of Canada.

From a Seller's perspective

13. What are the main differences between share and asset deals?

Share deals

As a general rule the transfer of shares of Colombian companies generates Colombian source income. The capital gain generated in the transfer of such shares is taxed in Colombia at a rate of 10%.

On the other hand profits obtained from the sale of shares listed on the Colombian stock exchange will not be subject to income tax neither capital gains tax provided the sale fails to exceed 10% of outstanding shares of the respective company in a taxable year (according to Colombian Tax Code, Article 36-1).

Under the tax treaties with Spain and Switzerland capital gains derived from the alienation of Colombian shares are subject to tax in Colombia only if the value of the shares is derived, directly or indirectly, in more than 50% from real estate located in Colombia.

Under the tax treaty with Canada the capital gain obtained from the alienation of Colombian shares is subject to tax in Colombia (i) if the value of the shares is derived, directly or indirectly, in more than 50%, from real estate located in Colombia, or (ii) if the seller has owned at any time during the 12 months prior to the sale, directly or indirectly, 25% or more of the capital of the Colombian company.

Under the tax treaty with Chile the capital gain obtained from the alienation of Colombian shares is subject to tax in Colombia (i) if the value of the shares is derived, directly or indirectly, in more than 50%, from real estate located in Colombia, or (ii) if the seller has owned at any time during the 12 months prior to the sale, directly or indirectly, 20% or more of the capital of the Colombian company.

Asset deals

Gains derived from the alienation of fixed assets owned for more than 2 years are considered as capital gains (*ganancias ocasionales*) subject to a capital gains tax at a rate of 10%. Gains obtained by a Colombian company derived from the alienation of fixed assets owned for less than 2 years are ordinary income subject to income tax at a rate of 25% and to income tax for equality (*impuesto de renta para la equidad*) at a rate of 9%. Gains obtained by a foreign investor derived from the alienation of fixed assets owned for less than 2 years are ordinary income subject to income tax at a rate of 33%.

Losses derived from the alienation of fixed assets owned for more than 2 years are considered as occasional losses and can only be offset against capital gains (*ganancias ocasionales*). Capital gains can only be offset by occasional losses (*pérdidas ocasionales*). Therefore the loss derived from the alienation of fixed assets owned for more than 2 years does not reduce the ordinary net taxable income of the taxpayer.

Transactions between local related parties are not subject to transfer pricing rules. However the sale price cannot be lower than 75% of the fair market value of the sold assets.

As a general rule the tax basis of real estate property is the sum of the acquisition cost (plus the inflation adjustments) less the depreciation. However for income tax purposes the tax basis may be:

- The real estate valuation used by the municipalities for purposes of the real estate tax of the year prior to the sale
- The real estate valuation used by the taxpayer also for purposes of the real estate tax of the year prior to the sale (this is applicable only in certain municipalities that have adopted the taxpayers valuation as the real estate tax base, eg Bogotá)

For income tax purposes in case of alienation of real estate the price cannot be lower than:

- The tax basis (fiscal cost)
- The valuation made by the municipality for real estate tax purposes (*avalúo catastral*)
- The self-valuation made by the taxpayer for real estate tax purposes (*autoavalúo*)

In the case of sale of intangible property created by the seller (eg trademarks, patents, trade names etc) the seller may use for income tax purposes and under certain conditions as tax basis an amount equivalent to 30% of the purchase price.

14. How capital gains are taxed in your country? Is there any participation exemption regime available?

Under Colombian legislation capital gains are taxed at a 10% income tax rate. In Colombia there is no participation exemption regime applicable.

15. Is there any fiscal advantage if the proceeds from the sale are reinvested?

Currently under Colombian legislation there are no fiscal advantages in case proceeds from the sale of assets are reinvested.

Your Taxand contact for further queries is:

Colombia

Mauricio Pineros Perdomo

T. +571 31 92 900

E. mpineros@gpzlegal.com

CYPRUS

Cyprus

From a Buyer's Perspective

1. What are the main differences among acquisitions made through a share deal versus an asset deal in your country?

Share deal

In an acquisition of shares no direct taxes are triggered for the buyer. In situations where the relevant share purchase agreement is found to be subject to stamp duty in Cyprus, the tax obligation rests with the buyer, unless the contract provides otherwise. A contract is exempt from stamp duty when the acquisition is effected as a result of company reorganisation.

The stamp duty varies from 0.15 to 0.20% and is capped at €20,000.

Asset deal

In an acquisition of immovable property the buyer is liable for a transfer fee. Transfer taxes range from 3% to 8% depending on the property value. The tax is:

- 3% on amounts up to €85,430.07 of the sale price or market value
- 5% on amounts between €85,430.08 and €170,860.14
- 8% on any amount exceeding €170,860.14

On 2 December 2011 a new law came into effect repealing transfer fees for immovable property owned by individuals. The law is applicable in situations where VAT is not applicable. In these cases the bill provides that transfer duties shall be reduced by 50%.

Immovable property situated in Cyprus is taxed on an annual basis on the market value of the property as at 1 January 1980. As of 1 January 2012 the following tax rates are:

- Nil on property up to a value of €120,000
- 0.40% for value between €120,001 and €170,000
- 0.50% for value between €170,001 and €300,000
- 0.60% for value between €300,001 and €500,000

- 0.70% for value between €500,001 and €800,000
- 0.80% for values above €800,000

Approval of the new bill, which foresees the increase in immovable property tax rates, is expected from parliament by the end of June 2013.

Agreement to acquire property or any other asset may be also be subject to stamp duty in Cyprus. Stamp duty is imposed on contracts relating to activities in Cyprus. If provisions of a reorganisation are applied, as defined under Cypriot law (which is in line with the provisions of the EU Merger Directive), such a purchase would be tax neutral. Depending on the assets' nature transfer fees may apply.

The purchase of company's assets – unlike the purchase of shares – may be subject to VAT, which is currently rated at 18%.

In terms of utilisation of tax losses, such losses are not allowed in the case of a share deal and given that profits from share sales are generally exempt from tax.

In the case of a taxable sale of immovable property, any losses realised may be offset against similar profits that may arise in the future. The same principle applies to gains and losses resulting from the sale of other assets – where gains are taxable the deductibility of losses may be allowed.

2. What strategies are in place, if any, to step up the value of the tangible and intangible assets in case of share deals?

A re-evaluation of assets can be effected via an independent valuator. Any increase or decrease in the value of assets is reflected accordingly.

The increase in value is recorded as a capital reserve. Generally, there is no tax obligation with respect to that reserve. However depending on the nature of the assets, corporation tax or capital gains tax may be imposed in the case of sale.

3. What are the particular rules of depreciation of goodwill in your country?

Goodwill is not subject to depreciation or amortisation. Since Cyprus applies International Financial Reporting Standards (IFRS), goodwill is tested for impairment (comparing recoverability with carrying amounts) annually or whenever there is an indication of a possible reduction in value.

For impairment testing goodwill is allocated to the relevant cash-generating unit (the lowest level within the entity for internal management purposes) and this cash-generating unit is tested for impairment.

Impairment loss on goodwill cannot be carried back.

Goodwill does not appear on individual statutory statements, only in consolidated financial statements. The goodwill is treated as a fixed asset and as such gains are excluded from tax.

4. Are there any limitations to the deductibility on interest of borrowings?

According to Cypriot tax law expenses may be deducted if they have been incurred wholly and exclusively for the production of income. In line with this interest paid on a loan that has been used or will be used by the company for trading purposes or for the acquisition of trading fixed assets is fully deductible.

Interest paid on borrowings used by a holding company to acquire a fully owned subsidiary is treated as interest used for acquisition of trading fixed assets.

Any other interest income not classified as part of trading or related to company's trading activities may not be treated as a deductible expense. Non-trading assets for which interest may not be deductible include:

- Investments in shares that do not represent stock (as stocks are considered shares used for trading purposes)
- Passenger cars not used for trading
- Land that does not represent stock (as stock is considered land used for trading purposes)
- Buildings that do not generate income

Since the rules above provide only a general overview proper advice should be sought on a case-by-case basis.

Non-trading assets are considered those that are not readily convertible into cash.

No withholding taxes are imposed on interest paid out of Cyprus to non-resident creditors.

5. What are usual strategies to push-down the debt on acquisitions?

With a properly designed tax structure debt push-down can be easily achieved.

Cypriot law has an absolute prohibition on financial assistance given by a company whether directly or indirectly for the acquisition of its own shares. It also prohibits the holding company's shares in the case of a subsidiary company. In line with this, in a transaction with multiple dealings, share acquisition financing may not be linked to debt push-down given that this may be treated as an indirect financial assistance. However express exclusions from the scope of this provision are included in the law.

The application of the provisions of EU Merger Directive incorporated into Cypriot law may prove beneficial in achieving debt push-down. An intermediary company may be incorporated in order to acquire the target. The intermediary company can subsequently be merged with the target company. To implement this plan proper advice should be sought. Generally if the structure and the transaction have sufficient underlying substance any risks of avoiding taxation are effectively minimised.

Deferment of the debt (ie debt to be carried forward by postponing the payment of future liability) is also possible, allowing allocation of obligations according to annual profits.

From a Cypriot perspective any losses that would have been subject to tax, had they been gains, may be offset against other sources of income in the same tax year. When income is not sufficient, losses may be carried forward and offset against profits in subsequent years. In the case of change of ownership of a company, as well as change in the nature of the activities of a company, previous losses may not be carried forward and used by the new owners.

A company may also surrender tax losses to another company from the same group. On the claim by the group company (claimant company) group losses may be offset provided certain following conditions are met:

- 2 companies are considered to belong to the same group for group relief purposes if 1 is controlled directly or indirectly by the other by at least 75% or both are controlled directly or indirectly by a third party also by at least 75%
- A company will be considered a subsidiary of another company if and so long as not less than 75% of its ordinary share capital with voting rights is owned directly by that other company and that other company is entitled to not less than 75% of (i) any profits available for distribution to the equity shareholders and (ii) any assets of the subsidiary company that would be available for distribution to its equity holders on a winding-up
- Both companies must be Cypriot tax residents
- Both companies must be members of the same group for the entire year of assessment
- It is only possible to offset the loss of 1 company against the profit of another where the loss and profit are attributable to the same year of assessment
- Any payment for offsetting the tax losses of a group will not be taken into account in the tax computation of the surrendering or claimant company, nor will it be considered to be a dividend or an allowable expense

In the case of reorganisation, any of the transferring company's accumulated losses are transferred to the receiving company and the provisions of the Cypriot law relating to the offset and the carryforward of losses apply.

6. Are losses of the target company/ies available after an acquisition is made?

Tax losses incurred in any 1 year that cannot be wholly offset against other income may be carried forward for 5 years and offset against profits resulting in subsequent years.

However according to the law losses incurred by a company cannot be carried forward if:

- Within any 3 year period there is a change in share ownership of the company and a substantial change in the nature of the company's business (a significant change can be interpreted as a drastic change in the types of activities offered by a company – ie originally sells computers and then stops to commence trading in pharmaceuticals)
- At any time since the scale of the company's activities has diminished or has become negligible and before any substantial business reactivation there is a change in ownership of the company's shares

Losses can be carried forward provided that the reorganisation process complies with all legal requirements.

7. Is there any indirect tax on transfer of shares (stamp duty, transfer tax etc)?

Stamp duty at nominal rates is payable on a variety of legal documents and may apply in the case of a transfer of shares. Generally stamp duty is imposed on contracts relating to activities and immovable property located in Cyprus. As of 1 March 2013, the applicable rates that are payable on contracts are zero on sums up to €5,000 and €1.50 for every amount of €1,000 or part of the amount of €1,000 on contracts with value between €5,001-€170,000. On contracts in excess of €170,000 the levy is €2 for every amount of €1,000 or part of the amount of €1,000 with a maximum amount of €20,000. In practice it is advisable the agreement to be sent to the Cyprus stamp duty authority before their execution in order to receive a written confirmation on whether it shall need to be stamped or not.

Contracts are exempt from stamp duty in cases where the transaction falls within the provisions of a corporate reorganisation.

8. Are there any particular issues to consider in the acquisition of foreign companies?

Cyprus is renowned as a jurisdiction for holding companies. In the majority of cases its domestic legislation allows a tax-free treatment of incoming dividends from foreign subsidiaries. It also allows distribution of dividends to non-resident shareholders free from withholding taxes.

Equally from a financing perspective any interest payments to non-residents can also effectively be free from withholding taxes.

In any case transactions between the Cypriot company and other group companies should follow transfer pricing regulations. In Cyprus, transfer pricing regulations are fairly limited: the arm's length principle applies in line with the provisions of the OECD.

To mitigate tax effects in the cases of acquisitions an important parameter that should be taken into consideration is the provisions of relevant agreement for avoidance of double taxation (if any) between Cyprus and the country in which the subsidiary will be located.

9. Can the group reorganise after the acquisition in a tax neutral environment? What are the main caveats to consider?

Cyprus has implemented the EU Merger Directive provisions in its national income tax legislation, enabling tax neutral reorganisations.

According to Cypriot law the transfer of assets and liabilities in the course of reorganisation does not give rise to any taxable profits at the transferring company level. Accumulated losses of the transferring company moved to the receiving company may be offset and relevant provisions for the consolidation of losses are applied.

Equally profits derived at the receiving company level as a result of the cancellation of its participation in the transferring company do not give rise to any taxable obligations. The issue of shares in the receiving company to the transferring company's shareholder in consideration of shares in the transferring company does not give rise to any taxation on gains or losses at the shareholder level.

Corporate reorganisations include mergers, divisions, partial divisions, transfers of assets, exchange of shares and transfer of registered seat. In order to qualify for tax exemption, corporate reorganisation should not involve a cash payment exceeding 10% of the shares' nominal value. Stamp duty exemption on relevant contracts is also allowed.

In the reorganisation process, losses generated at the transferring company level can be carried forward to the receiving company subject to the provisions of the Cypriot law relating to the offset and carrying forward of losses. Any losses of the receiving company are in turn transferable.

10. Is there any particular issue to consider in case of companies whose main assets are real estate?

According to Cypriot tax legislation a capital gains tax at the rate of 20% may be triggered by the sale of shares in companies that derive their value from real estate situated in Cyprus. In this case, possible application of a Double Taxation Treaty (DTT) should be considered especially when the treaty includes favourable provisions for the taxation of capital gains. Capital gains tax will be triggered only when such shares derive their value from real estate situated in Cyprus.

The capital gains tax is not extended to immovable property situated outside Cyprus. Therefore when a Cypriot company acquires a foreign subsidiary owning real estate situated outside Cyprus, and in turn sells the shares of that subsidiary, no taxes should be triggered in Cyprus. In some cases however, DTTs allow for the taxation of such gains at the subsidiary level.

Acquisition of real estate property by non-Cypriot residents, other than those coming from EU countries, requires the approval of the Ministry of Interior, a process that takes between 1 and 4 months.

Immovable property situated in Cyprus is taxed on an annual basis on the market value of the property as of 1 January 1980. The rates for legal entities are the same as for individuals and vary from 0.40% to 0.80%. For properties with value less than €120,000, no tax is due.

In the case of a transfer of immovable property, applicable transfer taxes are a liability of the buyer. Transfer taxes are rated between 3% and 8%.

11. Thinking about payment of dividends out of your country and a potential exit, is there any particular country that provides a tax efficient exit route to invest in your country?

Cyprus tax legislation offers a number of benefits to foreign investors. One of the most important being that it does not impose any withholding taxes on dividends paid to foreign shareholders. As a result this favourable regime will be applied irrespective of the existence of a DTT.

The benefits of Cyprus's tax regime may be used in the course of various tax structuring, including as a good exit route. Cypriot companies are most commonly used as holding and financing companies. Accordingly the gains derived from a potential sale of a shareholding in a subsidiary are generally exempt from Cypriot tax. Any available profits can be distributed to the shareholders free from any withholding tax in Cyprus. Interest payments to non-resident creditors are also exempt from withholding tax in Cyprus.

12. How is foreign debt usually structured to finance acquisitions in your country?

The lack of thin capitalisation rules in the form of debt-to-equity restrictions makes Cyprus a favourable jurisdiction for financing structures.

Accordingly foreign debt-to-finance acquisitions may take the form of a loan. Alternatively it may take other forms of debt instruments such as debentures, convertible or not. Based on the domestic tax legislation of Cyprus, any interest payment to the non-resident creditor would be free from withholding tax.

Interest is deductible if it is incurred wholly and exclusively for the production of income. The arm's length principle should also be taken into consideration. In cases of back-to-back financing the Commissioner of Inland Revenue Department has identified minimum acceptable interest margins based on the loan amount (see below).

Loan amount	Minimum interest margin
Up to €50,000,000	0.35%
From €50,000,000 to 200,000,000	0.25%
Over €200,000,000	0.125%

Interest-free loans would be subject to a deemed interest margin of 0.35% applicable irrespective of the amount.

The above margins are applicable for the tax year of 2008 onwards. For the years 2003-2007 the acceptable margin is 0.3% irrespective of the amount and whether it is interest bearing.

The above margins are subject to the following conditions:

- The intermediary company should be a Cyprus resident company
- The write-off on the loans, either the loans received by the Cyprus company or loans granted by the Cyprus company, should not create any tax liability or benefit for the company. In the case that the Cyprus company also writes off a loan granted then any interest expense relating to that loan received is not an allowable expense for tax purposes
- The time elapsed from the date that the company receives a loan and the date it grants the loan should not exceed 6 months
- For the purpose of calculating profit margins, any expenses (except exchange differences) relating to acquiring and granting the loans should be deducted

The above rules are applicable if the Cyprus company borrows funds from a bank and it grants the loan to a related company on which the bank holds collaterals from other related companies. These rules will also apply if other financial products are used instead of a loan. In this case prior approval of the tax authorities is required.

Since the deductibility of interest is subject to various conditions, seeking expert advice can help reduce the taxable base and the effective tax burden. If interest is not accounted for properly the Cypriot tax authorities may challenge a deduction.

From a Seller's Perspective

13. What are the main differences between share and asset deals?

Share deals

Assuming that the seller is a Cypriot resident, the gains from the sale of shares will not give rise to a profit subject to corporate income tax. Also the gains do not trigger capital gains tax, unless the assets of the company whose shares are being disposed of include immovable property situated in Cyprus.

Asset deals

The gains from the disposal of immovable property situated in Cyprus give rise to capital gains tax in Cyprus at a rate of 20%.

14. How are capital gains taxed in your country? Is there any participation exemption regime available?

The imposition of capital gains tax on transfers of immovable property is subject to exceptions including among others:

- Gains from the sale of shares in listed companies that are exempt from capital gains tax whether or not they own Cypriot immovable property
- Gains from the disposal of shares other than those identified above that are exempt from capital gains tax scope
- Gains resulting from qualifying company reorganisations, whether related to share transfers or transfers of ownership

No capital gains tax is imposed in Cyprus on gains from the disposal of immovable property situated outside Cyprus.

Gains deriving from the sale of assets other than immovable property are exempt from capital gains tax. They may however be subject to corporate income tax, depending on the nature of the assets. Generally gains from the sale of trading assets are subject to corporate income tax, while gains from the sale of fixed assets are exempt from tax.

Gains from the sale of securities are generally exempt from both capital gains and corporate income tax.

15. Is there any fiscal advantage if the proceeds from the sale are reinvested?

There is no fiscal advantage in Cyprus of reinvesting proceeds from a sale. The proceeds from the sale of shares are generally exempt from tax and, as such, no tax obligations are anticipated to arise. Gains deriving from the sale of assets are taxed accordingly.

Your Taxand contact for further queries is:

Cyprus

Chris Damianou

T. +357 22 699 222

E. chris.damianou@eurofast.eu

DENMARK

Denmark

From a Buyer's Perspective

1. What are the main differences among acquisitions made through a share deal versus an asset deal in your country?

The main difference between acquisitions made through share deals and acquisitions made through asset deals in Denmark is that no deductions are possible on share deals. When acquiring assets however it is possible to depreciate the purchase price according to specific rules.

The basic principle established in the State Income and Net Worth Tax Act (*statsskatteloven*) is that all expenses necessary to acquire and earn income are deductible (ie costs incurred for the purpose of earning, preserving or maintaining income). On the other hand expenses necessary to safeguard investments or income sources already made are not deductible. A loss computed for tax purposes may be carried forward and offset against income in any following year. There are however recently adopted provisions limiting how much a year's profit can be reduced by offsetting losses carried forward from previous tax years. These rules are described below. No carryback is permitted.

Expenses deductible for tax purposes are only those related to current income as referred to above. Therefore formation, merger and liquidation expenses are as a rule not deductible. Donations and gifts are also non-deductible expenses, unless they are regarded as public relations expenses. Interest paid on loans and royalties qualifies for deduction.

For a business expense to be deductible it must be accrued to the relevant fiscal year. Therefore provisions for bad debts are only allowed when legal collection has proved impossible or the taxpayer has a large number of debts of which, based on prior experience, a certain number will not be collectable.

Rental income, licence fees, technical assistance fees and copyright fees are deductible, provided that they are reasonable and relate to the taxpayer's business. Generally only 25% of the total amount of entertainment expenses is deductible.

Depreciation deducted for tax purposes need not conform to depreciation shown in the annual accounts. The rate and method of depreciation for tax purposes depends on the asset group being depreciated.

A general prerequisite for depreciation is that the relevant asset is in fact subject to deterioration when in use. Land is not depreciable.

The method of declining balance depreciation is allowed for commercial operating equipment, ie machinery, vehicles, ships, aircraft, certain buildings, fixtures, furniture and other equipment used exclusively for business purposes.

The depreciation balance is the balance at the beginning of the year with the addition of acquisitions made and less proceeds from assets sold during that year. The maximum permitted rate of depreciation is 15% to 25% (depending on the specific type of assets included under the depreciation balance) and the taxpayer is free to apply a lower rate and a different rate every year. Until 31 December 2013 there is a special temporary provision in force, whereby the taxpayer can choose to include 115% of the purchase price of new commercial operating equipment on a separate balance and depreciate this balance by 25% annually.

Information technology software and assets with an estimated useful life not exceeding 3 years or a value below DKK12,300 (applicable to 2013 and corresponding to approximately €1,650) may be written off in full when paid for. The rate for real estate is discussed below.

Sales of commercial operating equipment may result in a loss or a gain compared to the depreciated value, with consequent effects on the depreciation balance. A negative depreciation balance is taxed as income for the year or carried forward to the following year, to be either offset against the cost of machinery and equipment purchased during that year or taxed.

When equipment is used for both private and business purposes, the share of the balance relating to commercial activities may be depreciated subject to the same principles.

The method of straight-line depreciation applies for commercially used buildings and installations that may be depreciated at any rate of 4% per year. However the following commercially used buildings are not subject to depreciation:

- Office buildings
- Buildings used for a financial purpose such as banking, insurance, stock brokering
- Post offices
- Residential homes except hotels
- Hotels that have been split into apartments
- Hospitals and certain other buildings and installations with health care as their purpose

Office buildings connected with an eligible building are depreciable (ie a commercially used building subject to depreciation). A connection is established if the office building is located in the eligible building's vicinity and serves as an integrated part of the business conducted from the eligible building.

Each building is depreciated individually. The taxpayer may choose a depreciation rate of between 0% and 4% per year. Special rates of depreciation may apply for buildings subject to abnormal deterioration (ie if the building, despite normal maintenance, will have lost its value within 25 years from construction).

Installations in depreciable buildings may be depreciated at any rate up to 4%. Costs of improvements and alterations to depreciable buildings and installations are depreciable in the same manner as the buildings or installations to which they relate. Costs however may be fully written off in the year they were incurred if they do not exceed 5% of the building or installation's remaining value (after tax depreciation) at the beginning of the relevant year.

If the nominal acquisition price reflects credit and financing to terms, it is adjusted to reflect the cash price. Acquisition and sales costs (ie legal fees, broker fees and stamp duties) can be taken into consideration.

Retrieved depreciation or loss on sold buildings and installations is taxed as income in the year of sale.

The cost of purchased intellectual property or goodwill may be written off at up to 14.3% per year.

Write-offs at up to 14.3% per year include:

- Amounts paid by a taxpayer to an agent upon termination of an agency agreement
- Lump sums awarded to employees as compensation for agreements not to compete with the taxpayer
- Pension liabilities not covered by a pension insurance company

If the total of such amounts is 5% or less of the taxpayer's total payroll in the year, the payments may be written off in full when paid.

Aside from the deductibility of expenses, a second main difference between share deals and asset deals in Denmark is that real estate is subject to a transfer tax of DKK1,400 (approximately €200) plus 0.6% of the transfer amount. Declarations on mortgage deeds are subject to a 1.5% transfer tax of the assured amount.

2. What strategies are in place, if any, to step up the value of the tangible and intangible assets in case of share deals?

No step up is available if the transaction is carried out as a share transfer. This is often a disadvantage with share transfers compared to asset deals.

Normally a buyer would investigate whether the target company has tax capacity in the form of a loss carryforward that can be utilised to offset any subsequent taxable gains realised by the acquired company on the assets in this company. This investigation is relevant to assess whether an asset deal is preferential to a share deal.

3. What are the particular rules of depreciation of goodwill in your country?

Goodwill can generally be depreciated over 7 years. However in a share deal, financial goodwill (the portion of purchase price that cannot be allocated to the target's assets) cannot be amortised.

4. Are there any limitations to the deductibility on interest of borrowings?

The deduction of interest expenses is limited by the following 3 rules (in chronological order):

- A limitation based on debt-to-equity ratio: Thin capitalisation limitations with a debt-to-equity ratio of 4:1 are in force
- A limitation based on value of assets: Net financing expenses are limited to an amount corresponding to 3% of certain assets (the asset limitation). The rate of 3% is adjusted annually
- A limitation based on annual profits: Net financing expenses must not exceed 80% of earnings before interest and tax (the EBIT limitation)

These limits apply simultaneously.

5. What are usual strategies to push-down the debt on acquisitions?

Given the Danish interest limitation rules push-downs should be avoided.

In Denmark joint taxation is obligatory for national groups. All Danish companies and permanent establishments in a group must be included in the joint taxation calculation. Each group company prepares its own tax return and then the results are consolidated for overall group taxation purposes. To determine which companies are in a group, the general rule is that a company is within the group if it is controlled itself by a group entity. There are 5 specific provisions listed in the rules where this would be the case:

- Where an entity has a voting majority through equity
- Where an entity can appoint a majority of directors

- Where through provisions in the articles of association or similar agreement with the subsidiary, an entity exercises a decisive influence
- Where an entity has decisive influence through a shareholders' agreement or similar
- Where an entity has shares and exercises a decisive influence over its operations

These provisions are quite specific, but the basic rules can be summarised as a company being in the group where control is exercised through voting, the board of directors or contracts (either with the subsidiary itself or other shareholders). The definition in this regard is the same as the definition under consolidation for accounting purposes. Therefore groups that are already forced to consolidate for accounting purposes should know which companies' consolidation is relevant for. Groups are obliged to provide the tax authorities with an overview of the group structure that includes sufficient information to demonstrate whether the correct companies have been included. Where an individual owns 2 Danish companies, these companies are not treated as jointly taxed.

6. Are losses of the target company/ies available after an acquisition is made?

In Denmark, companies are granted an unlimited carryforward of tax losses. No carryback exists.

With effect from July 2012, new legislation has been adopted, whereby the annual permitted offset with losses stemming from previous tax years is maximised. Offset is always available up to a base amount of DKK7.5 million (approximately €1 million). It should be noted that this base amount applies at group level in the way that companies that are jointly taxed have a mutual base amount of DKK7.5 million for the group as a whole.

If the loss carried forward exceeds DKK7.5 million, the remainder of loss can be offset against up to 60% of the year's profit. There is no time limit for how many years losses can be carried forward.

Loss carryforward restrictions exist in relation to control of ownership (more than 50%) of a company.

The main Danish loss limitation rule applies when more than 50% of the shares (or voting rights) in a company are transferred within 1 tax year. If this is the case then the net operating losses (NOLs) are limited to be offset against future operating income. Therefore the NOLs may not be used to offset net capital income, which includes:

- Net interest income
- Net income realised on the transfer of bonds and other debt instruments
- Dividends

- Net income realised on the transfer of shares
- Leasing income

If triggered the loss limitation rules referred to above apply to the company's income in the year in which the transfer of more than 50% of its shares takes place. Therefore the loss limitation rule also applies to income realised before the transfer of the shares in the company took place, if such income is realised in the same taxable year as the taxable year in which the transfer took place.

Additionally, a loss limitation rule applies to the transfer of more than 50% of the shares (or voting rights) in companies without any active trade or business.

Therefore when more than 50% of the shares (or voting rights) in companies without any active trade or business are transferred, then all of the NOLs are lost. A look-through rule applies to holding companies in that the activities of the subsidiaries are taken into consideration when determining whether the holding company has a trade or business.

Loss limitation rules only apply to the extent that more than 50% of the shares are transferred within 1 tax year. However to the extent that an agreement to transfer is entered into prior to the transfer (eg 50% in year 1 and 50% the following year) then the Danish tax authorities would probably apply the substance-over-form principle and disallow the carryover of NOLs to the extent of net capital income or all income, whichever is applicable.

Additionally for Danish tax purposes NOLs and other tax attributes are generally lost following a merger or other reorganisations.

7. Is there any indirect tax on transfer of shares (stamp duty, transfer tax, etc)?

There is no indirect tax (such as stamp duty or transfer tax) on the transfer of shares in Denmark.

8. Are there any particular issues to consider in the acquisition of foreign companies?

The only particular issue to consider when acquiring a foreign company is whether a Double Taxation Treaty (DTT) is in place between Denmark and the other country.

9. Can the group reorganise after the acquisition in a tax neutral environment? What are the main caveats to consider?

After an acquisition, a group can reorganise in a tax neutral environment. The decisive factor is whether 10% or more of the shares are owned or not. If that is the case, there are a number of possible tax regimes. If this threshold is not met, it's a more complicated affair.

If these regimes are applied, no taxes will be triggered as a consequence of the event. Generally, the original acquisition values will be reflected in the values carried forward. If for example the rules on tax-exempt transfer of assets are used, the acquisition price of the shares will correspond to the depreciated value of the assets in question. If no depreciated value is available or applicable, it will be the original acquisition price.

10. Is there any particular issue to consider in case of companies whose main assets are real estate?

When acquiring a company whose main asset is real estate, a buyer must consider Denmark's complicated rules on the depreciation of real estate.

The sale of shares in a company whose assets are mainly composed of Danish real estate assets is subject to the same rules as the sale of other shares as regards corporate income tax (application of the participation exemption regime under the standard conditions) and transfer tax (absence of transfer tax).

11. Thinking about payment of dividends out of your country and a potential exit, is there any particular country that provides a tax efficient exit route to invest in your country?

Denmark has DTTs covering approximately 95 jurisdictions. The beneficial ownership issue and the interpretation of the term beneficial owner is becoming a battlefield in a number of jurisdictions including Denmark DTTs.

12. How is foreign debt usually structured to finance acquisitions in your country?

Given the Danish interest limitations rules described above, the current trend is to finance the Danish entity with equity rather than debt and keep the loan-financed part of the financing outside Denmark.

From a Seller's Perspective

13. What are the main differences between share and asset deals?

See the section 1 above on share and asset deals from the buyer's perspective.

14. How are capital gains taxed in your country? Is there any participation exemption regime available?

Asset sales

Intellectual property and other assets are not taxed as capital gains but they may be subject to ordinary taxation because the transfer of any asset is a tax event and a gain or loss computation has to be made. Real estate gains are also subject to ordinary taxation.

Share sales – distribution of dividends

Shareholdings are divided into 2 groups, depending on the ownership percentage.

Tax exemption is granted for dividends received by and capital gains realised on the transfer of shares in companies where the shareholding constitutes at least 10% or more of the share capital (subsidiary investments).

By contrast where the shareholding constitutes less than 10% of the share capital (portfolio investments) and shares are listed (ie shares that are listed on the stock exchange or similar regulated markets), dividends received by and capital gains realised on the transfer of shares are subject to tax at ordinary corporate tax rate of 25%.

Certain anti-avoidance rules have been introduced to prevent investors from pooling their shareholdings together in holding companies. Tax-exempt treatment of capital gains realised on the transfer of shares is no longer subject to a 3-year holding period requirement.

As of 1 January 2013 capital gains realised by companies on portfolio investments, are tax free if the shares are unlisted and certain other conditions are fulfilled. Losses realised on these share are not deductible.

It should be noted that the tax exemption is extended only to capital gains on these portfolio shares. Dividends continue to be taxable at the ordinary tax rate of 25%. Due to the asymmetry arising from these new provisions, a set of anti-avoidance rules have been introduced governing unlisted portfolio shares.

Losses on financial instruments

The ringfencing restrictions applicable to losses incurred on financial instruments that contain a certain right or obligation to sell shares now applies only to financial instruments relating to subsidiaries or group-related companies. Additionally, losses incurred on portfolio investments subject to the mark-to-market principle are deductible in other income.

15. Is there any fiscal advantage if the proceeds from the sale are reinvested?

Aside from certain rules that apply to investments in real estate, there are no fiscal advantages to reinvesting the proceeds from a sale.

Your Taxand contact for further queries is:

Denmark

Anders Oreby Hansen

T. +45 7227 3602

E. aoh@bechbruun.com

FINLAND

Finland

From a Buyer's Perspective

1. What are the main differences among acquisitions made through a share deal versus an asset deal in your country?

Asset deal

An asset deal is generally preferable from the buyer's perspective. The acquisition cost is allocated to the acquired assets often resulting in a step-up in the booked values of the assets in question. The buyer may begin to make depreciations on these new values (in accordance with general depreciation rules). The purchase price may also be allocated to goodwill, which may also be depreciated.

However a transfer tax of 1.6% for Finnish non-listed securities, 2.0% for housing or real estate companies and similar and 4.0% for Finnish directly-owned real estate is levied in cases where these assets are included in the acquired assets. In the case of real estate, transfer in a form of shares is therefore more advantageous than transferring directly the real estate, if it is possible to choose between these alternatives.

Another drawback is that tax losses may not be transferred in an asset deal.

If all of the following conditions are met, there is no VAT due on an asset deal:

- The assets constitute a business unit as defined by tax legislation
- The assets are sold to be used in the buyer's business activities that are subject to VAT
- The buyer continues to pursue the business activities

Even when the exemption from VAT applies, the VAT included in costs incurred in the transaction process may be deductible.

Share deal

A share deal may be less preferable from the buyer's perspective for 2 reasons. Firstly the transfer tax of either 1.6% or 2.0% of the acquisition price is levied on the transfer of other than publicly traded shares in Finnish companies. If the value of the company is mainly based on other things than the securities or real estate it owns, then the basis for transfer taxation can be significantly higher in comparison to an asset deal.

Secondly the buyer cannot depreciate the acquisition cost of shares. However the depreciation of target assets may be continued within the company according to the depreciation plan applied by the seller.

In a share deal, previous losses of the target company may be lost (or retained) after a qualified change in ownership. Please see section 6 below for further details regarding this aspect.

Under Finnish VAT legislation, there is no VAT due on share deals.

2. What strategies are in place, if any, to step up the value of the tangible and intangible assets in case of share deals?

No special provisions in the Finnish tax law provide for a step-up in the value of the target's underlying assets upon the acquisition of its shares. The acquisition cost of the shares is deductible from sales proceeds if the shares are later sold by the purchaser (unless a participation exemption applies – see section 14 below for further details).

3. What are the particular rules of depreciation of goodwill in your country?

For tax purposes, goodwill (ie the difference between the target's book value and the purchase price paid for it that cannot be specifically allocated to other assets) is regarded as an intangible asset that cannot be separately disposed of or sold. In an asset deal the possible purchase price paid for goodwill is depreciable during the probable economic impact period of goodwill (maximum 10 tax years). The value of the goodwill is allocated to the number of years and the depreciated amount remains the same each year.

In a share deal the goodwill cannot be amortised or depreciated in taxation – the entire shares acquisition cost usually becomes deductible only in a subsequent transfer.

4. Are there any limitations to the deductibility on interest of borrowings?

Currently Finnish legislation does not provide for formal thin capitalisation rules or any fixed debt-to-equity ratios concerning third party or related-party debt. As a consequence interest expenses accrued by Finnish companies are generally deductible provided the interest rate is at arm's length level, unless the interest barrier rules explained below are triggered.

New limitations concerning the tax deductibility of interest payments will be applicable to corporations, partnerships, corresponding foreign entities and their permanent establishments as of the fiscal year

2014. The limitations will be applied only if the interest expenses exceed the interest income received by the company. A general safe haven of €500,000 will be applied; if net interest expenses (including third party and related party interests) exceed €500,000 the interest limitation will nevertheless be applied to the entire amount.

Interest may become non-deductible if such net interest expenses exceed 30% of the company's adjusted business profits, which include:

- Taxable business profits added with the aggregate amount of interest costs
- Depreciations
- Change in value and write-downs of financial assets
- Group contributions received, deducted with the amount of group contributions granted

Interest payments for third party loans will not be affected. However third party loans will be deemed as intra-group loans if a related party pledges a receivable to an unrelated party as security for the loan and the unrelated party provides a loan to another related party, or the loan from an unrelated party is de facto a back-to-back loan from a related party. Further interest expenses will remain fully deductible if the equity ratio of the company is equal to or higher than the consolidated equity ratio of the group. Furthermore the limitations will not apply to financial, insurance and pension institutions. The interest limitations also only apply to profits classified as business profits.

The regulation allows an indefinite carryforward of interest expenses that cannot be deducted based on the above-mentioned restrictions.

In addition to the rules limiting the deductibility of interest payments, general anti-avoidance provision and the provision on hidden profit distributions in Finnish domestic law may be applied to deny tax deductibility of interest taking into account individual circumstances. However in every case valid arguments should exist at least to prove that the interest rate is at arm's length level.

In most cases no withholding tax is levied in Finland on interest payments to non-resident companies based on domestic law.

5. What are usual strategies to push-down the debt on acquisitions?

The use of a Finnish special purpose vehicle (SPV) by a foreign buyer to acquire a Finnish target is the preferred strategy to push-down debt for most acquisitions. The SPV is financed by a loan from a foreign group company, which is often located in a jurisdiction with a corporate income tax rate much below the current Finnish rate of 24.5%. (Should the interest deductions be restricted, the financing may have to be taken from third parties or some other arrangements may have to be considered.)

Following the acquisition, the target's profits may be offset against the SPV's losses under Finnish group contribution rules. Alternatively the target may be merged with the SPV (or liquidated) to consolidate profits and losses.

According to Finnish group contribution rules, eligible contributions from an affiliated company are deducted from taxable profit of the contributing company and are added to the recipient company's taxable profit. Same rules apply to a Finnish permanent establishment of a foreign head office if it is tax resident in a EU Member State or in a country with which Finland has concluded a tax treaty and the treaty contains a non-discrimination article. Such a transfer of profit is allowed between a parent company and an affiliated company or between 2 affiliated companies if the following requirements are met:

- Both companies (or a permanent establishment) are Finnish
- The parent company owns directly or indirectly at least 90% of the share capital of the affiliated company during the whole tax year
- Both companies are engaged in business and are not savings banks or financial, insurance or pension institutions
- The accounting year of both companies ends on the same date
- The contribution is recorded in the accounts of the contributing company as well as in the accounts of the recipient company
- The transfer is not a capital investment
- The contribution does not exceed the amount of the contributing company's profit from business activities

All these strategies have to be carefully analysed to avoid the application of anti-abuse provisions in Finland or in some other countries, as well as to comply with transfer pricing rules.

6. Are losses of the target company/ies available after an acquisition is made?

If the taxpayer's sources of business income, agricultural income or other income (each separately) show a net loss, this loss is carried forward and is offset against income from the same source in the subsequent 10 tax years. Losses are deductible in the order in which they are incurred.

If more than 50% of the shares, interests in a company or a business partnership have changed ownership (for reasons other than inheritance or bequest) during the year in which a loss is recorded or thereafter, the right to carryforward is forfeited. Also if a corresponding majority share transfer has taken place in a company or partnership owning at least 20% of the shares in the loss-making company or partnership, the shares in the loss-making company or partnerships are deemed to have been transferred, resulting in forfeiture of the losses.

Regional tax offices may upon application by the taxpayer grant exceptions to this rule under certain conditions. However the European Court of Justice (ECJ) is evaluating the possible state-aid nature of this exception procedure, therefore the current system's future is unclear. In addition the tax practice concerning the exception grounds is currently inconsistent and it seems the criteria for maintaining the losses are being applied more strictly. Exceptions can still be applied for and granted.

In any case even if a permit for retaining the losses is obtained, the deduction of losses is restricted to an amount corresponding to the difference between the taxable income for the tax year (before deducting the losses) and the received group contributions, if any (ie group contributions cannot be utilised to offset losses after a change of ownership).

For a listed company the right to carryforward losses is not forfeited unless more than half of the non-listed shares have changed hands (ie changes in the listed shares do not result in forfeiture of losses). Changes in listed shares do not affect the losses of companies owned by listed companies either.

No special provisions allow for the losses of one company in a group to be deducted from the profits of other companies in the same group (however group contributions may be used to achieve a similar effect, as described in section 5 above).

The receiving company can deduct the losses of a merged or a divided company, provided that the receiving company, together with its shareholders, has owned more than 50% of the shares in the loss-making company at least from the beginning of the year during which the loss was incurred.

If a Finnish permanent establishment of a foreign corporate body becomes a Finnish corporate body (a subsidiary), that Finnish corporate body is entitled to deduct from its income the confirmed loss of the Finnish permanent establishment according to the general rules (10-year period, subject to rules concerning change of ownership as explained above).

If a Finnish permanent establishment of a corporate body resident in another EU Member State in the context of a merger, division or transfer of assets becomes a permanent establishment of another corporate body resident in that or a third member state, the confirmed loss of the Finnish permanent establishment remains deductible in the taxation of the permanent establishment according to the same general rules.

It is not possible to carry back losses according to Finnish tax rules.

7. Is there any indirect tax on transfer of shares (stamp duty, transfer tax, etc)?

A transfer tax of 1.6% of the acquisition price is levied on the transfer of shares and other securities in Finnish companies. For Finnish housing or real estate companies or similar companies (like companies the activities of which de facto consist mainly of owning or possessing directly or indirectly Finnish real estate), the transfer tax is 2%. The tax even applies to foreign securities under certain circumstances (provided eg that more than 50% of the total assets consist directly or indirectly of Finnish real property, and at least 1 party to the transaction is resident in Finland for tax purposes). The transfer of shares is tax exempt if it is carried out through public trading on a stock exchange or on a multilateral trading facility. The purchaser is liable to pay the tax. However if the purchaser of shares is non-resident, the seller is responsible for the tax. (The seller can then collect the tax from the purchaser.) If neither of the parties is a resident of Finland for tax purposes, the transfer of shares is exempted from Finnish transfer tax unless the subject of the transfer (either direct or indirect) is a Finnish housing or real estate company or similar.

Separate rules apply to transfers of Finnish real property.

Apart from transfer tax and VAT, no stamp duty or other indirect taxes related to corporate restructurings are due.

8. Are there any particular issues to consider in the acquisition of foreign companies?

The consequences of acquiring a foreign company are generally the same as when a Finnish taxpayer acquires a domestic company. However Finnish transfer tax applies only rarely to acquisitions of foreign companies, and the profits and losses cannot be balanced between domestic and foreign entities.

Most Finnish tax treaties assign the taxation right for dividends and capital gains in connection with such shareholding to Finland (and the right of the source country to levy withholding tax is in many cases restricted). In many cases foreign source dividends are tax exempt for Finnish corporate shareholders and dividends may be partially or wholly taxable. For example, if they are received from a listed company, or based on shares that are classified as investment assets (and the share of ownership is less than 10%), or if the distributing company is resident outside the EU or in a country with which Finland has not concluded a tax treaty.

Under certain conditions, the participation exemption for share disposals also applies to foreign subsidiaries (see section 14 below).

Interest income is taxable for the Finnish recipient. On the other hand interest expenses are generally deductible (however see section 4 above for further details on this topic).

Taxes paid in the source country may generally be credited in Finnish taxation, although the withholding tax remains as a final cost if the income in question is tax-exempt in Finnish taxation.

In addition the following should be considered when acquiring a foreign entity:

- The acquisition structure in the light of international tax law
- International transfer pricing requirements
- Finland's controlled foreign corporation rules, according to which income earned by a foreign company located in a low tax jurisdiction is under certain conditions allocated directly as income of a Finnish shareholder (irrespective of actual distributions)

9. Can the group reorganise after the acquisition in a tax neutral environment? What are the main caveats to consider?

As an EU Member State, Finland has harmonised its tax provisions for tax neutral corporate transactions in accordance with EU Council Directive 90/434/EEC on a common system of taxation applicable to mergers, divisions, transfer of assets and exchanges of shares concerning companies of different Member States (known as the Merger Directive, as amended).

These rules also apply to domestic transactions; however not to transactions with companies outside the EU/EEC. With the exception of exchanges of shares, the same rules apply to corporate bodies other than limited companies and the rules on mergers also apply to domestic business partnerships. Tax neutral mergers, divisions and transfers of assets are commonly utilised as pre or post-acquisition measures. An exchange of shares is mostly used as a means of carrying out the acquisition itself.

In a merger one or more companies dissolve and simultaneously transfer their assets and liabilities to another company, ie a receiving company which usually, as a consideration, issues new shares or transfers own shares to the shareholders of the merging company or companies. The following rules apply to a qualifying merger (ie a merger that fulfils the criteria for a tax neutral merger):

- The transferring company is not deemed to be dissolved for the purposes of taxation
- The expenses and costs of the merging company are deductible for the receiving company as they would have been deducted in the taxation of the merging company. The maximum depreciations of the receiving company for the merger year are decreased by the amount of depreciations allowed in the taxation of the merging company for that tax year
- Expenses and gains arising from the merger are not recognised in taxation
- The receiving company and the merging companies are treated as separate taxpayers until the merger enters into force

- In the taxation of the shareholders of the merging company, the exchange of the shares in the merging company for the shares in the receiving company is not treated as a taxable event
- Cash compensation may be used as a partial consideration, but it shall not exceed 10% of the nominal value of the shares given as consideration (or, in the absence of a nominal value, 10% of the proportional amount of the paid-in capital corresponding to the amount of shares given as consideration). In any case, the transaction is deemed to be a taxable event to the extent that cash compensation has been used
- The deductible acquisition cost of shares received as consideration by shareholders of the merging company is equal to the acquisition cost of shares in the merging company

In a division a company dissolves and transfers its assets and liabilities to 2 or more companies. The shareholders of the transferring company receive (in proportion to the ownership of shares in the transferring company) shares issued by the receiving companies or such companies' own shares. The rules presented for tax neutral mergers above also apply to tax neutral divisions. The deductible acquisition cost of the shares in the receiving company is equal to the proportional part of the net asset value of the transferring company, which is transferred to the receiving company. A partial division is also possible (ie only a part of a company – a business entity – is carved out, whereas the company otherwise remains existing).

As with a partial division and also in a transfer of assets, a part of a company's assets may be separated in a tax neutral transaction under a separate company. However as a result of a transfer of assets, a group structure will be formed.

The rules for mergers, divisions and transfers of assets also apply to the transferring company when the receiving company is resident in another EU Member State. This is on condition that the transferred assets remain effectively connected with a permanent establishment the receiving company has in Finland. If this condition is not fulfilled or if the assets cease to be effectively connected with such a permanent establishment, the likely fair value of the assets becomes taxable income (resulting in an exit tax for the difference compared to book values in taxation).

In an exchange of shares a company acquires a sufficient number of shares in another company to receive the majority of the voting rights and, as a consideration, issues new shares or transfers its own shares to the other company's shareholders. Cash compensation may be used as a partial consideration but it shall not exceed 10% of the nominal value of the shares given as consideration (or in the absence of a nominal value 10% of the proportional amount of the paid-in capital corresponding to the amount of shares given as consideration). It is necessary to meet these conditions in order for the exchange of shares to be tax neutral. The transaction is in any case deemed to be a taxable event to the extent that cash compensation has been used.

The exchange of shares is not treated as a taxable transaction, except when a natural person receiving new shares becomes resident outside the EEA within 5 years of the end of the tax year in which the exchange took place (or if resident within the EEA, during the said time period transfers the shares received in the exchange of shares). Based on these exit tax provisions the originally exempted amount is then treated as taxable income for that person.

If it can be established the main purpose of the transaction has been to avoid or evade tax, the rules for mergers, divisions, transfers of assets and exchanges of shares do not apply. Due consideration must therefore be taken, for example, if a partial division or a transfer of assets has been carried out, shortly after which the new entity is planned to be disposed of in a tax exempt share sale.

When a company is being dissolved, the market value of the assets is applied and taxation may be realised for both the dissolving company and its shareholders. The liquidation gain formed as a difference of book values and market values of assets is generally tax exempt and the corresponding liquidation loss non-deductible, provided that the shares of the liquidated company would have qualified for the participation exemption. Under certain circumstances, the carryforward of losses may be forfeited following the transaction (see section 6).

The corporate restructurings described above are exempt from asset transfer tax (with the exception of the exchange of shares and liquidation), as long as the transaction is carried out according to specific tax and corporate legislation.

10. Is there any particular issue to consider in case of companies whose main assets are real estate?

The term real property has the same meaning for tax purposes as in general law in respect of property on land. However a building or an installation on a landlord's real property (by virtue of a contract of land lease) is also regarded as real property if the ownership of the building or installation together with the right to occupy the ground can be transferred to a third party without the consent of the landlord. A real estate company is not a specific legal term even though it is commonly used in practice; real estate companies can be organised eg as ordinary limited liability companies, residential housing companies or Mutual Real Estate Companies (MRECs).

In many of its Double Taxation Agreements (DTAs), Finland has included a paragraph where it reserves the right to tax the income received based on shares or other corporate rights entitling to use real property in a company, the main purpose of which is to own real property as income from real property. This principle also applies to capital gains derived from the disposal of shares in real estate companies the assets of which mainly (eg 50% or 75%) comprise of directly or indirectly owned real property located in Finland. Unless more than 50% of the total assets consist of Finnish located real property (or if it is a question of residential housing company), Finland cannot tax the capital gains of such real estate company (based on a domestic law provision).

Residential housing companies and MRECs are taxed under the Income Tax Act. In practice residential housing companies do not pay tax. The purpose is only to provide residence to the shareholders who pay all costs of the company through a monthly maintenance charge. Therefore these companies usually do not yield taxable profit. They are also entitled to create a deductible residential house reserve should they otherwise yield profit.

MRECs are limited companies whose purpose (as stated in the Articles of Association) is to own and manage at least one building or a part of a building. Its shares also entitle it to use certain premises or real property possessed by the company. MREC is a transparent entity for tax purposes. Its costs are usually covered by monthly charges that the shareholders pay to the mutual real estate company. The yield of the rental activity is taxed in the shareholder's hands.

Ordinary real estate companies (RECs) operate just as any limited liability companies – ie there is no flow-through of income to the shareholders and taxable profits are expected to be incurred on the REC level.

Capital gains derived by Finnish and foreign corporations (provided Finland is allowed to tax the capital gains) from the sale of REC are subject to the general corporate income tax rate (currently 24.5%). Specific attention shall be paid to recently amended transfer tax provisions explained under section 7 above.

11. Thinking about payment of dividends out of your country and a potential exit, is there any particular country that provides a tax efficient exit route to invest in your country?

Dividend distributions made by a Finnish company to a foreign corporate recipient are generally subject to withholding tax at 24.5%. However this rate may be reduced in situations such as the following:

- Situations covered by the EU Council Directive 2011/96/EU (the Parent-Subsidiary Directive)
- Situations where a tax treaty provides for a lower withholding tax rate
- With regard to dividends paid to other EEC member states, where the dividend would be tax exempt in similar domestic relations, assuming an agreement concerning exchange of information (or the Directive 77/799/EEC) is applicable between the countries, and assuming that the dividend recipient does not have the possibility of full tax credit in its home country

Since dividends are tax exempt in most domestic relations between limited companies, the exemption actually applies to dividends paid to most EU Member States even if the Parent Subsidiary Directive is not applicable.

Capital gains derived from the sale of shares are not regarded as Finnish source income according to domestic legislation, as long as the company's assets do not essentially consist of real estate property. However many tax treaties also exempt the sale of shares in companies holding real estate property (see section 10 above). Therefore non-resident taxpayers are usually not liable for tax in Finland on a capital gain arising from the sale of shares, also in the absence of a tax treaty.

12. How is foreign debt usually structured to finance acquisitions in your country?

Financing for an acquisition is usually put into a Finnish SPV, which then carries out the acquisition. Interest payments to a non-resident entity are only rarely subject to a withholding tax in Finland. See section 4 concerning the limitations to interest deductions of the Finnish debtor entity.

From a Seller's Perspective

13. What are the main differences between share and asset deals?

From the seller's perspective a share deal may be preferable especially if the participation exemption can be applied. Please see the following section for details on the conditions for the tax-exempt sale of shares. If the seller is a private individual who has held the target shares for a long time (especially at least 10 years) and the value of the shares has significantly risen, the possibility of using a so-called presumed acquisition cost (40%) as a schematic deduction from the sales price may also support a share deal.

However in some cases an asset deal may also be interesting for the seller. For example, if the seller is not profitable and there is a risk of losing previous losses an asset deal will enable the seller to use those losses against the purchase price. Alternatively if the transaction itself is loss-making, the seller might be able to deduct the loss (which would not be possible if the transaction were carried out as a tax exempt share sale).

14. How are capital gains taxed in your country? Is there any participation exemption regime available?

Finnish tax law includes a participation exemption regime. Capital gains derived by companies (corporations) from the transfer of shares are not taxable income, and acquisition costs of shares are not tax-deductible, if the following conditions are met:

- The transferor of the shares is a limited liability company, a co-operative, a savings bank or a mutual insurance company taxed in accordance with the Business Income Tax Act

- The transferor is not engaged in venture capital or private equity activities
- The shares belong to the transferor’s fixed assets
- The transferor has owned at least 10% of the share capital of the target company without interruption for at least 1 year during a period that has ended no more than 1 year prior to the transfer. The transferred shares must also be among the shares which have been owned in this way
- The target company is not a residential housing company, a real estate company or a limited company the activities of which *de facto* mainly consist of real estate holding or managing
- The company to be transferred is:
    - A Finnish resident company
    - A company referred to in Article 2 of the EU Parent-Subsidiary Directive (2011/96/EU)
    - A company resident in a country with which Finland has a tax treaty, which is applied to dividends distributed by that company

Financing costs related to the acquisition of these fixed assets are not included in the acquisition costs. This means that costs relating to financing or refinancing of the target company should be deductible, although the acquired shares are not subject to depreciations.

Capital losses accruing from the transfer of shares that are fixed assets but that cannot be transferred tax exempt are only deductible from taxable capital gains derived from transfers of fixed asset shares in the same tax year and the subsequent 5 tax years. Similarly when a company transfers interests in a partnership the difference between the acquisition cost and the transfer price can only be deducted from taxable capital gains from disposals of fixed asset shares or interests. This limitation is not applied to the transfer of shares in residential housing companies, real estate companies and real estate holding or management companies. However if the taxpayer has not owned the transferred shares uninterruptedly for at least 1 year the deductible loss is decreased by any dividends, group contributions or comparable items paid by the target company to the taxpayer, which have reduced the target company’s assets.

The capital loss is not deductible when the target company is not a company referred to in Article 2 of the EU Parent-Subsidiary Directive. This is the case provided there is not in force such tax treaty between Finland and the country of residence of the target company that is applicable to a dividend distributed by the transferred company.

It may be mentioned that based on recent case law the seller may be entitled to deduct the expert and auditing fees relating to the sale of shares for the part these exceed the tax exempt sales price. If that price is low in special situations this may provide a means to deduct costs even when such costs are directly related to a tax exempt sale.

15. Is there any fiscal advantage if the proceeds from the sale are reinvested?

There is no specific tax advantage provided for reinvesting the sale proceeds.

Your Taxand contacts for further queries are:

Finland

Janne Juusela

T. +358 9 6153 3431

E. janne.juusela@borenius.com

Sami Tuominen

T. +358 9 6153 3585

E. sami.tuominen@borenius.com

FRANCE

France

From a Buyer's Perspective

1. What are the main differences among acquisitions made through a share deal versus an asset deal in your country?

The main difference between share deals and asset deals is that the target company's historical liabilities are transferred when the transaction is structured as a share deal (with a normal 3-year statute of limitation, which can in some circumstances be extended to 10 years). Assets deals (ie straight sales of assets or going concerns) do not result in the transfer of pre-closing liabilities relating to the assets or going concern transferred (except for the going concern's taxes on assets or activities transferred in year the transaction occurs, for which the buyer may become jointly liable for a limited period of time).

Assets deals generally trigger a higher tax cost for the buyer. Indeed acquiring shares of a target company is subject to reduced registration duties, the rate of which depends on the target's corporate form (ie for *société anonyme* – SA or *société par actions simplifiés* – SAS – shares, the rate is 0.1%of the sale price). For other company shares, except for real estate companies (see 'special considerations for companies whose main asset is real estate' below) the rate is 3% of the sale price (or of the fair market value if higher than the price agreed). An allowance is deductible from the basis assessment of registration duty. This allowance is equal to the ratio of number of shares purchased divided by total number of shares issued by the acquired company, multiplied by €23,000.

Some operations can be exempted from registration duty, in particular the acquisition of shares between companies forming part of the same group (controlled companies as defined by article L 233-3 of the Trade Code or tax-consolidated group), acquisition of shares further to operations (such as contribution of shares for shares and mergers) carried out under merger neutrality regimes, or acquisition of shares in companies placed under a safeguard procedure or judicial restructuring.

Asset deals, if the assets qualify all together as a going concern, are subject to transfer tax at:

- 0% up to €23,000
- 3% from €23,000 to €200,000
- 5% of the sale price exceeding €200,000
- Or for real estate assets (at a rate of 5.09% plus additional duties)

From a VAT standpoint both deals should be neutral, provided the assets sold form all together a going concern. It should be noted VAT implications may arise for sales of isolated assets or real estate assets.

From a corporate income tax standpoint, share deals do not impact the ability of the target company to carryforward net operating losses (NOLs), which remain available in normal circumstances (see section 6 below).

In asset deals, only assets are transferred – any NOLs remain with the target company. In addition share deals (structured as straight sales) do not allow, in principle, any step-up in basis value and do not impact the target company's amortisation plan of its assets (in terms of duration and depreciation value). But asset deals mechanically imply a step-up in the assets' amortisation basis, which then corresponds to the purchase price paid allocated to each asset. However in both cases no goodwill may be amortised. It should also be noted that, in the case of an acquisition mainly from treated parties at a price higher than the fair market value, the tax authorities could challenge further allowance but not the amortisation basis.

Finally there are other slight differences between share deals and asset deals. For instance, in share deals, the target company's business tax (so-called *contribution économique territoriale*) liability is not impacted in any way. But asset deals could allow the buyer, subject to certain circumstances, to fall outside the scope of the business tax if the buyer was not the owner of the assets or going concern transferred on 1 January of the year the transaction occurs.

2. What strategies are in place, if any, to step up the value of the tangible and intangible assets in case of share deals?

As a general principle share deals do not allow any step up in value of any of the target company's assets. Prior to sale however the target company may consider a global step-up of all its tangibles and financial assets. It should be noted capital gains are booked as a non-available reserve and trigger taxation at the normal corporate income tax rate (of 34.43% globally).

Tax-free restructurings (ie merger favourable or merger neutrality regimes allowing benefiting from deferred taxation on capital gains on assets transferred by the merged or the contributing company) may be also contemplated. Such operations generally do not offer step-up opportunities when implemented between related parties. However such operations are performed at fair market value and therefore allow a step-up in basis when implemented between 2 independent parties (subject to additional conditions).

In parallel a contribution of an isolated asset (such as real estate property or trademarks under conditions) to the target company prior to the sale is treated for tax purposes as a straight sale and allows a transaction at fair market value. In that case the value of shares of the target company that has benefited from the contribution corresponds to the fair market value of isolated assets contributed. But such an operation triggers capital gains subject to tax at the normal corporate income tax rate and may not benefit from the merger-favourable regime and can imply registration duty exposures.

Operations such as straight sales or contributions of isolated assets within a tax-consolidated group are made at fair market value, while the relating taxation is postponed until the end of the tax-consolidated group, the exit of the tax-consolidated group of one of the 2 companies, or the assets sale to a company that is not member of the tax-consolidated group (correlatively amortisation on the re-evaluated value is not possible).

3. What are the particular rules of depreciation of goodwill in your country?

The amortisation of goodwill is not allowed in France, either in share deals or asset deals.

4. Are there any limitations to the deductibility on interest of borrowings?

Apart from the general principle that a debt is tax-deductible provided it is carried in the company's interest (it must not be considered an abnormal act of management), the main deductibility on interest limitations in France are the thin capitalisation rules that limit both the interest rate and the volume of intra-group loans.

Under the interest rate limitation when interest expenses are paid to a direct shareholder, the annual deductible interest rate is capped to a rate determined by the Tax Administration (eg 3.39% for the full year closed on 31 December 2012). However when interest is paid to a related-party company (whether shareholder or not), the annual tax-deductible interest rate can be higher, provided the borrowing entity may demonstrate, with the provision of a dedicated supporting file, that this rate is arm's length (ie a rate the company could have obtained from third party financial institutions in similar circumstances).

Under the loan amount limitation, interest expenses on related-party loans (whether shareholder or not) are tax-deductible to the extent that 1 of the following thresholds is satisfied:

- The related party loans do not exceed a 1.5:1 debt-to-equity ratio
- The interest expense does not exceed 25% of the earnings before intra-group interests, tax, depreciation and a fraction of the financial lease payments (interest coverage limit)
- The interest expense does not exceed the interest income received from related parties

The third party loans guaranteed (i) by a company related to the French borrower or (ii) by a third party whose commitment is in turn secured by a company related to the French borrower have to be considered as related-party loans for the application of the 3 above thresholds. In addition it should be noted that only the debtor has to consider the amount of interest paid to non-related parties with regard to loans guaranteed by related parties for the purposes of this ratio.

If none of these 3 thresholds are satisfied, the exceeding portion of interest expenses, computed from the higher criteria, is not immediately deductible, but may be carried forward indefinitely (subject to a yearly 5% discount as from the second fiscal year following the one where interest has been disallowed).

As an exception French thin capitalisation rules would not result in the deferral of the excess interest if (i) the exceeding interest portion is lower than €150,000 or (ii) if the borrower can prove that its group's debt-to-equity ratio is higher than or equal to its own ratio.

Specific rules apply in a tax-consolidated group in order to allow, subject to specific conditions, the group level deduction of taxable income interest expenses which would be deemed to be non-tax deductible at the level of the group member companies because of the above thin capitalisation rules. In that respect the implementation of an intra-group cash pooling agreement managed by a group member company may allow a limitation of the impact of the thin capitalisation rules. Thin capitalisation rules are not fully applicable to cash-pooling companies.

Loans granted by a third party, eg bank loans, and not guaranteed by a related party, are not in scope of the above limitations but are subject to the general limitation depending on the company's corporate interest (ie the absence of abnormal act of management) and of the new general limitation to the deductibility of financial expenses (see section 6 below).

5. What are usual strategies to push-down the debt on acquisitions?

The deductibility of financial expenses linked to acquisition of shares qualifying on as controlling interest is limited. Financial expenses are only deductible if the purchaser can demonstrate that it (or a company incorporated in France and belonging to the same economic group) actually makes the decisions relating to these shares and that it exercises a control or influence over the acquired company.

If the company fails to provide such evidence, a fraction of the expenses must be added back to its taxable income for the acquisition accounting period and the following 8 years.

However the limitation does not apply when:

- The value of shares held by a company is less than €1 million
- The acquisition has not been financed by a loan
- The debt ratio of its group is higher or equal to the purchaser's own debt ratio

6. Are losses of the target company/ies available after an acquisition is made?

Deduction of financial expenses of companies is now subject to a general limitation. For the accounting period ended as of 31 December 2012 companies may only deduct up to 85% of their net financial expenses and up to 75% for accounting period open as of 1 January 2014.

Net financial expenses are defined as the difference between the total amount of financial expenses incurred as a consideration for financing granted to the company and the total financial income received by the company in consideration for financing granted by the latter. Rents incurred under a moveable properties rental agreement between related parties or a leasing agreement are included in financial expenses after deduction of the amortisation, financial amortisation of the lessor and all costs invoiced by the lessee.

In a tax-consolidated group, this limitation applies at the level of the tax result of the group.

There is no carryforward mechanism of disallowed interest.

This limitation will not apply if the company's net financial expenses (or net financial expenses of the group for tax consolidation) are lower than €3 million.

The 15% (25% as from 2014) limitation applies after application of the other mechanisms for limiting deductions of financial expenses (ie limitation of the deductibility of the interest paid to shareholders, thin capitalisation rules, the Charasse amendment in a tax-consolidated group, the deductibility of interest limitation expenses related to the acquisition of shares).

Financial expenses related to the acquisition or building of assets within the framework of public utilities' delegation, concession of public engineering and public-private partnership agreements or an administrative long-term lease concluded before 28 December 2012 are all excluded from this mechanism.

7. Is there any indirect on transfer of shares (stamp duty, transfer tax, etc)?

The most straightforward solutions to push down debt consist of a dividend distribution up to the target company's distribution capacity or the relocation of assets between the target company and an affiliated company. Both operations would be financed by a loan granted by an affiliated company or third party (eg a bank).

As a consequence the strategy in a debt push-down could consist of the creation of or increase in dividend distribution capacities (based on accounting rules) without triggering tax consequences. Such an outcome may be reached through operations made at fair market value with a limited tax impact, such as the straight sale of shares benefiting from the participation exemption regime (ie with an effective tax rate of 3.44%).

Another solution could be a relocation of assets (eg shares) held by the target company under the target company's subsidiary. Such an acquisition could be financed by debt. Further to this operation, the target company could distribute the capital gain realised to the holding company. In order to be tax neutral, the relocation of assets other than shares benefiting from the participation exemption regime could be contemplated between company members of the same tax-consolidated group (see section 2 above and section 9 below).

French tax authorities try to deny the deduction of the interests related to the acquisition of a company if the holding company decides to merge the target company in a short period of time after the acquisition. However the French tax authorities recently decided to allow the realisation of a quick merger between 2 holding companies, namely in case of a secondary leveraged buyout.

In any case these schemes have to be analysed in the light of the French Commercial Law, which prohibits a company from financing its own acquisition.

8. Are there any particular issues to consider in the acquisition of foreign companies?

The acquisition of the target company's shares does not have any impact on the amount of the available losses carried forward by the target company. As a general principle, losses carried forward are not available only if the target company changes its activity.

An addition of business activity can characterise a change in activity when, during the fiscal year during which it occurs or the following fiscal year in comparison with the fiscal year preceding the change, there is an increase of more than 50% of:

- The company's turnover
- The average number of staff and the gross amount of fixed assets

A surrender or transfer, even partial, of a business activity can also characterise a change in activity if there is a decrease of more than 50% of the previous requirements.

However if the target company, which owns losses, is merged into another company, the losses can be transferred to the merging company only if an agreement is given by the French tax authorities. In particular the activity of the merged company has to be maintained for at least 3 years. The transfer of tax losses is not allowed if the merged company is a holding company. Attention also has to be paid to the consequences of such merger on the merging entity's right to carryforward its own standalone tax losses further to the merger (ie impact on its own activity).

9. Can the group reorganise after the acquisition in a tax neutral environment? What are the main caveats to consider?

The acquisition of shares is subject to reduced registration duties. The rate depends on the target company's corporate form. For SA or SAS companies, the rate is 0.1% of the sale price. For other company shares, except for real estate companies (see section 8 below), the rate is 3% of the sale price. An allowance is deductible from the basis of assessment of the registration duty. This allowance is equal to the ratio of number of shares purchased divided by total number of shares issued by the acquired company, multiplied by €23,000.

10. Is there any particular issue to consider in case of companies whose main assets are real estate?

In France, the tax consolidation regime is allowed only for companies established or having a French permanent establishment subject to corporate income tax. As a consequence there is no possibility to tax consolidate interest expenses paid in France by a holding company and have the benefit income generated by a foreign target company.

The European Court of Justice decided in *Papillon* (27 November 2008, C418/07) that a French holding company can set up a tax-consolidated group with French subsidiaries of an EU-affiliated company. The French tax group relief rules have been modified to take this case law into account.

In addition domestic legislation provides for controlled foreign corporation rules whereby the profits of foreign subsidiaries (holding more than 50%) established in a tax haven (ie with an effective local tax burden of less than half the effective tax burden that the company would have borne in France in the same situation) can be subject to tax in France upon realisation. Controlled foreign corporation rules do not apply to subsidiaries established within the EU, provided the overall scheme may not be deemed to be tax driven or without any substance. Similar rules apply to subsidiaries established outside the EU subject to specific conditions.

11. Thinking about payment of dividends out of your country and a potential exit, is there any particular country that provides a tax efficient exit route to invest in your country?

Under the Charasse amendment, anti-debt push down regulations provide for a partial recapture of the financial expenses borne by a tax-consolidated group in case of transactions deemed to qualify as self-purchases.

The Charasse amendment applies:

- When the shares of a company have been purchased by another company from parties who also directly or indirectly control (*de jure* or *de facto*) the acquiring company at the time of acquisition
- Where both the acquired company and acquiring company become members of the same tax-consolidated group after the transaction (including by way of merger)

This rule leads to the non-deductibility of the interest expense within the tax-consolidated group up to an amount equal to:

- Financial expenses x [(acquisition price – amount of contribution in cash)/average group debt]

This reinstatement applies to the acquisition accounting period and the following 8 years.

The Charasse amendment no longer applies to cases involving a change in control of the acquiring company. Moreover the Charasse amendment is no longer triggered when a subsidiary held by a company directly acquired by the investor is immediately sold to a French holding company that elects to set up a tax-consolidated group.

Mergers, spin-offs or split-offs may benefit from tax neutrality and are generally made within a group at book value.

12. How is foreign debt usually structured to finance acquisitions in your country?

For capital gain tax purposes a real estate company is a company with assets made up of more than 50% of French real estate assets at the date of the transfer or at the closing date of the last fiscal year. Properties used for the purpose of a commercial activity are not deemed to be real estate assets for capital gain purposes.

Capital gains on the transfer of shares in real estate companies subject to corporate income tax are taxed at the normal corporate income tax rate (ie maximum effective rate of 34.43%). The favourable regime of participation exemption (ie effective tax rate of 4.13%) does not apply to the transfer of shares in real estate companies.

The acquisition of shares in a real estate company is subject to transfer duties at the rate of 5% of the fair market value of the shares.

13. What are the main differences between share and asset deals?

As a general principle outbound dividends are subject to a domestic withholding tax at a rate of 30%. However France has concluded many tax treaties to reduce withholding tax rates for dividends distributed to parent companies established in contracting states.

Furthermore no withholding tax is due if the dividend is paid to a company established in another EU Member State, if the parent company has held, or will hold a 5% stake for at least 2 years in a French subsidiary company.

Anti-treaty shopping rules are provided for by domestic law.

It should also be noted that an additional contribution to corporate income tax of 3% of any amounts distributed is now borne by French distributing companies. The main exceptions to this measure concerns:

- Distributions made within a French tax group
- Distribution made through distribution of its own shares by the distributing company (under conditions)
- Distributions made by small or medium companies (PME *communautaires*)
- Distributions made by French Real Estate Investment Trusts (SIIC)
- Distributions made by French Undertakings for Collective Investment in Transferable Securities (OPCVM)

14. How are capital gains taxed in your country? Is there any participation exemption regime available?

A 75% withholding tax is levied on interests paid by a French company to a non-resident company established in a non-cooperative State.

For 2012 the list of non-cooperative States is updated annually and composed of:

- Botswana
- Brunei
- Guatemala
- Marshall Islands
- Montserrat
- Nauru

- Niue
- Philippines

All other interest payments are withholding tax exempt in France.

Interest payments made under contracts concluded before 1 March 2010 are withholding tax exempt whether the creditor is established in a non-cooperative state or not.

From a Seller's Perspective

13. What are the main differences between share and asset deals?

The sale of shares can benefit from the participation exemption regime. This regime applies to gains on shares qualifying as controlling interest (ie qualifying for the participation exemption or acquired in the framework of a public takeover bid, provided that they were held for at least 2 years). The regime provides that long-term capital gains on shares qualifying as controlling interest are exempt from tax and that 12% of the gross amount are subject to corporate income tax at the normal rate (ie maximum effective tax rate of 4.13%).

The taxation is postponed when the 2 companies are members of the same tax-consolidated group until the group ceases or one of the companies involved in the transaction leaves the group.

If a French company sells assets, the capital gain is taxable at the normal corporate income tax rate (ie maximum effective rate of 34.43%).

14. How are capital gains taxed in your country? Is there any participation exemption regime available?

For non-French tax resident companies subject to the provisions of relevant tax treaties having a substantial shareholding provision (eg those with Spain, Italy, Hungary, etc.), capital gains on shares held in a French company are subject to tax at a rate of 45% provided the foreign selling entity has held, at any time during the 5 years preceding the sale, directly or indirectly, more than 25% of the French company's share capital of the French company (Section 244 bis-B of the French Tax Code).

In the same situation French companies may be exempted from paying tax on the capital gains realised upon the sale of stake, except on 12% of the gross amount, provided there was a holding of at least 5% for a 2-year period.

According to the new French tax guidelines the foreign seller is allowed to claim, under certain conditions and through formal claim, for a refund of the paid tax exceeding the effective tax burden the company would have paid should it have been a French resident company (ie 4.13% effective taxation if the participation exemption regime has applied).

15. Is there any fiscal advantage if the proceeds from the sale are reinvested?

There is no specific advantage to reinvesting the proceeds of a sale if the transaction price of the sale of shares is reinvested by the seller company. If the seller is a fund, subject to conditions, no taxation arises at the level of the fund's interest holders as long as no cash is distributed.

Your Taxand contact for further queries is:

France

Denis Andres

T. +33 17 03 88 804

E. denis.andres@arsene-taxand.com

GERMANY

Germany

From a Buyer's Perspective

1. What are the main differences among acquisitions made through a share deal versus an asset deal in your country?

Asset deal

An asset acquisition is always a tax-effective event for buyers and sellers in Germany. From a buyer's perspective one advantage is the possibility to step up the acquired assets, including goodwill, up to the acquisition price. An asset deal provides the possibility that the buyer can select the most profitable business parts. Furthermore most of the selling company's liabilities and risks remain with the seller.

From a pure tax perspective in an asset deal most of the tax risks from former years remain with the seller. However if the asset deal qualifies as a transfer of a going concern (meaning the transfer of the whole business), there is a special directive that the acquirer has to take on some liability for taxes resulting from the pre-acquisition period, known as secondary liability. The new owner of the business acquires a secondary liability for the business's trade tax, VAT and wage tax (but not for corporate income tax). In other words the new owner can be held liable for the vendor's unpaid taxes with respect to these tax types. The secondary liability is limited to taxes, which were accrued from the start of the calendar year prior to the year in which the transfer of the business takes place (and the required notice that the business has been transferred is made to the authorities). It is limited to taxes incurred in connection with the transferred business.

Debt push-down is not an issue as financing can be easily provided to the acquiring company. Deductibility of interest expense depends on the general requirements (see section 4 below). Further the acquisition of assets is generally not tax-exempt for VAT purposes. This has to be carefully considered in case the input VAT is not fully deductible. In cases where the acquisition qualifies as a transfer of a going concern, it is not subject to VAT at all. Risks connected to the seller's former input VAT position are then assigned to the purchaser.

Share deal

In a share deal generally all risks including tax risks from prior years are acquired together with the company's shares. Further no step-up of assets in the acquired company is possible without further restructuring (please see the following section). Debt push-down might require some restructuring as described below in section 5.

Share acquisitions generally are not VAT liable or are VAT exempt. Depending on the VAT situation of the seller and the purchaser, the seller can opt for regular VAT in order to improve the deductibility of input VAT on transaction costs.

Further if the target company owns German real property with considerable value, a share deal might offer the possibility of avoiding real estate transfer tax (please see section 10 below).

2. What strategies are in place, if any, to step up the value of the tangible and intangible assets in case of share deals?

In the case of an acquisition of shares in a corporation, there is no tax neutral way to step up the value of tangible and/or intangible assets. In principle German tax law has no rules that allow a tax neutral step-up after a share deal.

However the German merger tax act includes rules allowing the step-up of assets up to their fair market value after a merger (and also after other transactions which fall under the merger tax act). Therefore a merger after a share deal is a possible solution to stepping up asset value. The downside is that such a step-up is not tax neutral and therefore generally triggers corporate income and trade tax. After a share deal all loss carryforwards and current losses up to the transfer date of the target company are basically lost if no exception applies (see section 6 below). In such case only current losses incurred after the transfer date can be used to settle a gain from the step-up. Therefore there are few situations where a merger after a share deal is a practical option. As a result, in most cases, a tax neutral step-up of considerable extent cannot be achieved in the course of a share deal.

Another possible way to achieve a step-up in connection with a share deal is to contribute the entire business to a new company prior to the sale of the new company's shares. The contribution can be made at fair market value for tax purposes and the capital gains resulting from the step-up can be neutralised with loss carryforwards or current losses that are basically still available prior to the share transfer. However minimum taxation rules have to be considered in cases where the taxable profit from the contribution exceeds €1 million and no sufficient current year's losses are available. Anti-abuse rules would have to be checked separately.

The rules for the acquisition of partnership interest are different. The acquisition of partnership interest is seen as if the acquirer bought a portion of the assets owned by the partnership so that, in fact, the acquisition of partnership interest is treated like an asset deal. Therefore when acquiring partnership interest, the proportionally acquired assets are stepped up automatically. The step-up is only available for the acquiring partner and is shown in a supplementary balance sheet. Depreciation from the step-up is allocated directly to the acquiring partner.

3. What are the particular rules of depreciation of goodwill in your country?

German tax law allows a straight-line depreciation of goodwill over 15 years. An extraordinary depreciation of goodwill is only possible in borderline cases, eg if the profitability of the enterprise is decreased sustainably or, if at the time of the acquisition of the goodwill, overstated profit expectations were applied for the purchase price calculation. If such indications of an overstated goodwill are given different calculation methods can be applied to ascertain the amount of extraordinary goodwill depreciation. However such proof is only possible in exceptional cases.

4. Are they any limitations to the deductibility on interest of borrowings?

Transfer pricing

The interest rate on borrowings from related persons must meet arm's length principles. Further loan contracts must be concluded in writing and beforehand. Otherwise all or a portion of the interest could be denied.

Earnings stripping

Since 2008 the interest deduction limitation (also called the earnings stripping rule or interest barrier) has been applicable. This rule replaced the German thin capitalisation rules that were applicable until 2007.

According to the earnings stripping rule, a taxpayer will only be able to immediately deduct net interest expenses (interest expenses minus interest income) up to 30% of the earnings before interest, taxes, depreciation and amortisation (EBITDA). This EBITDA is a figure calculated under special German tax rules and does not necessarily match with the normal EBITDA as shown in commercial books. For example, dividend income can only be considered at 5% when calculating the EBITDA for the earnings stripping rule because of the 95% tax exemption for dividend income under German tax law.

Further earnings stripping rules apply to all interest and not only to interest on intra-group loans. Also interest on secured or non-secured bank loans, whether they are short term or long term, is caught. Any interest not deductible in the respective year can be carried forward for utilisation in following years.

However the 30% limitation does not apply if 1 of the following conditions is fulfilled:

- The annual interest burden (interest expenses minus interest income) is less than €3 million (exemption limit, no allowance)

- The taxpayer is not part of a group of companies and the interest expense paid to a material shareholder or a related party or a back-to-back lender does not exceed 10% of the company's total net interest expense
- The taxpayer proves that the borrower's equity ratio (equity divided by balance sheet total, not to be confused with the term debt-to-equity ratio which was relevant for former thin capitalisation rules) is at least as high as the worldwide group's equity ratio. It is tolerable if the German entity's equity ratio is 2% below the group's ratio. But this escape clause only applies if the taxpayer or any other group company is not shareholder-financed to a harmful extent, that is, if the taxpayer or any group company pays more than 10% of its interest expense to a material shareholder or related party outside the group or to a third party secured by the material shareholder or related party. Generally the equity comparison has to be made based on the group balance sheet and the borrower's balance sheet set up under International Financial Reporting Standards (IFRS) principles, although in certain circumstances accounts set up under European local Generally Accepted Accounting Principles (GAAP) or US GAAP may be acceptable. Furthermore the equity and the balance sheet total are subject to several corrections. For instance the borrower's equity must be reduced by short-term equity injections (ie equity contributed in the 6 months before the balance sheet date, if distributed within 6 months after that date)

Further the earnings stripping rules allow EBITDA carryforwards (broadly speaking, unused EBITDA from 1 year can be used to achieve interest deduction in future years) and interest carryforwards (non-deductible interest might be deductible in future years if there is sufficient EBITDA in such a year), although interest carryforwards are subject to change-of-ownership rules and EBITDA carryforwards elapse after 5 years.

5. What are usual strategies to push-down the debt on acquisitions?

Acquisition of shares in a corporation

A usual debt push-down strategy is to set up a German acquisition vehicle (usually a corporation) that acquires the shares in the target corporation. The acquisition vehicle is financed with debt. After the acquisition, a tax group (*Organschaft*) can be established between the acquisition vehicle and the newly acquired corporation, which allows the settlement of profits and losses between the two. Alternatively, the two corporations can be merged.

However when determining the level of debt financing, the German earnings stripping rules have to be considered. Further Germany has strict anti-abuse rules. Generally the taxpayer must prove substantial non-tax reasons for the chosen structure. So far there has been no case law indicating the above-mentioned structuring might be seen as abusive.

Acquisition of interest in a partnership

An acquisition of interest in a partnership is treated very differently from a share acquisition in a corporation. Debt taken out by the new (direct) partner is allocated to the partnership. In other words, interest paid by the new partner for the acquisition of debt is treated as a special purpose expense and can be effectively tax deducted at the partnership level even if it is not pushed down.

6. Are losses of the target company/ies available after an acquisition is made?

The direct or indirect transfer (or a similar issue, like a capital increase or an internal group-restructuring at the level of a direct or indirect shareholder) of more than 25% or 50% of the shares in a loss company to any 1 shareholder or a group of shareholders with similar objectives within a 5-year period leads to a partial or complete forfeiture of all tax loss carryforwards. Current losses incurred up to the transfer date are also forfeited.

There are several escape possibilities to avoid the forfeiture of the loss carryforwards:

Restructuring escape extended (currently suspended)

The restructuring escape rule says that loss carryforwards are not affected by changes in ownership of a corporation if the change of ownership is part of a restructuring measure. This rule was established mid-2009 with a limitation to the end of 2009 and then later introduced without time restrictions. However it was suspended at the end of April 2010, as the European Commission (EC) was of the opinion that it might constitute an impermissible state aid. The German tax authorities therefore introduced the suspension with retroactive effect even for cases where the taxpayer was granted a binding ruling.

German government appealed against this decision of the EC. But the European Court dismissed the action as inadmissible with its 18 December 2012 decision. The reason was that the Federal Republic of Germany submitted its document a day late. Therefore the Court did not have to comment on any substantial aspects of the restructuring escape rule.

Following this Court decision the implications of the EU Commission’s opinion are now fully applicable. Germany must recover all state aids granted since January 2008. From a current point of view it is unlikely that the escape rule will become applicable again. Finally it is supposed that financial authorities will decide soon about the currently suspended restructuring escapes.

Intra-group escape

The acquisition of shares no longer results in the loss (or partial loss) of accrued tax losses if the same taxpayer indirectly or directly holds 100% of the shares in both the transferring and the acquiring entity. Therefore restructuring measures affected within a consolidated group, which is exclusively headed by a single individual or company are excluded from the restrictions on the deductibility of tax losses (under the consolidated group clause). Therefore loss carryforwards would survive such intra-group reorganisations. The consolidated group clause application is limited to reorganisations in which the transfer of tax losses to a third party is impossible. As a result the consolidated group clause does not apply when new shareholders join in or third party shareholders participate in the transaction.

Hidden-reserve escape

In addition a corporation's unused tax losses are preserved to the extent they are compensated by hidden reserves that have been built in those business assets of the corporation that are subject to German taxation. In this regard if between 25% and 50% of shares in the corporation are sold, the corresponding portion of hidden reserves are considered. In a sale of more than 50% of the shares, the entire hidden reserves can be taken into account.

Generally the evaluation of the hidden reserves has to be made by comparing the portion of the equity of the shareholder(s) that corresponds to the portion of the transferred shares with the fair market value of these shares. If more than 50% of the shares are sold, the total equity is compared with the fair market value of all shares.

As a general rule, the fair market value will correspond to the paid consideration in a monetary acquisition. However if value cannot be derived from the consideration, a valuation of the company is required to substantiate the amount of hidden reserves. It should be noted that, although this rule seems simple enough, there are often major problems in calculating the amount of hidden reserve in practice in cases where not only one single company but also a group of companies is acquired. This is especially the case where partnerships are part of the acquired group or a German tax group exists. In such cases it is often not clear how to calculate and allocate the hidden reserves within the group.

7. Is there any indirect tax on transfer of shares (stamp duty, transfer tax etc)?

Germany does not impose any stamp duties or transfer tax on share transfers. Further a share transfer generally is not subject to VAT or is VAT exempt. Depending on the VAT situation of the seller and the purchaser, the seller can opt for regular VAT to improve input VAT deductibility.

However if the target company owns German real estate, Germany levies real estate transfer tax on a specially assessed property value (see section 10 below for more details).

8. Are there any particular issues to consider in the acquisition of foreign companies?

The consequences of the acquisition of a foreign company are generally the same as when a German taxpayer acquires a German company:

- For the interest expense deductibility on acquisition debt, the general earnings stripping rules and transfer pricing requirements have to be considered
- Most German Double Taxation Treaties (DTTs) assign the taxation right for dividends and capital gains in connection with such shareholding to Germany. Dividends are tax-exempt for corporate shareholders under the general rules: German tax law grants a 95% participation exemption for the dividends received. The same applies for capital gains
- Passive income earned by a foreign company located in a low-tax jurisdiction is – under certain circumstances – allocated to the German shareholder under German Controlled Foreign Corporation (CFC) rules. The income is subject to German taxation at normal tax rates irrespective of its distribution. In such cases a foreign corporation loses its tax shelter function

9. Can the group reorganise after the acquisition in a tax neutral environment? What are the main caveats to consider?

A transfer of shares generally leads to the denial of loss and interest carryforwards and current losses incurred up to the transfer date if none of the exceptions is applicable. Therefore in a loss situation, restructuring requires careful planning. Further if German real estate is owned anywhere in the group, there is a risk that German real estate transfer tax can be triggered, even in the case of intra-group transactions (see the following section for an explanation of this rule and its exceptions).

Considering the above there are multifaceted possibilities for a tax neutral restructuring in Germany. The German merger tax act includes several possibilities for tax neutral mergers, demergers, contributions of shares and businesses, and the change of legal form. Further when partnerships are involved, there is also the possibility of a tax neutral collapsing of the partnership into one of its partners. The rules of the Merger Tax Act are complete, and the facts of each individual case determine which kind of restructuring is possible without triggering German income taxes (corporate income tax and municipality trade tax). As a general rule as long as Germany keeps the taxation right and no remunerations are paid other than the granting of shares, a tax neutral restructuring should be possible.

Germany’s merger tax act also includes general possibilities for a cross-border restructuring. However in practice there are various handicaps to achieving this in a tax neutral way. Tax-neutral mergers of domestic corporations with German or EU corporations are possible but they are subject to certain restrictions. The most crucial requirement is that even under an applicable DTT, Germany keeps its taxation right for future disposals of the assets transferred to the merged company. This is basically the case to the extent the merged company continues to constitute a German tax presence, eg through a permanent establishment. However there is uncertainty as to the scope of the former entity's assets that can be tax-efficiently allocated to the German permanent establishment after the merger. While tangible assets used in the permanent establishment are usually allocable to the permanent establishment, this is unclear in practice for intangibles and goodwill, so there is a risk that inherent capital gains connected to such assets will be taxed at the cross-border merger. The risk very much depends on the individual case facts. Consequently a cross-border merger must be carefully analysed and planned.

10. Is there any particular issue to consider in case of companies whose main assets are real estate?

The main issue to consider when acquiring companies whose main asset is real estate is that Germany levies Real Estate Transfer Tax (RETT) on real estate located in Germany. This tax can be a significant expenditure.

German real estate transfer tax applies if 95% or more of the shares in the property-owning company are directly or indirectly sold to any one purchaser or to a group of related parties. The tax can be avoided by selling only 94.9% to a single purchaser and having the shareholder either retain the remaining 5.1% shareholding or sell it to a second purchaser that is not related to the majority shareholder.

German real estate transfer tax is also triggered by the transfer of partnership interest if 95% or more of the partnership interest is transferred directly or indirectly within a 5-year period. Further RETT might also be triggered if 95% or more of the interest in the partnership is directly or indirectly pooled by any one person or a group of related parties. However this is a complicated area and exceptions might apply.

In an asset deal real estate transfer tax is always triggered (no avoidance strategies are available).

In a share deal, real estate transfer tax is levied on a specially assessed value. In an asset deal, the purchase price is the assessment base. The rate is between 3.5% and 5%, depending where the real property is located.

In most cases where the tax is triggered, the transaction is not subject to German VAT or is VAT free. However it is possible to opt for regular VAT under certain conditions. And the option for VAT does not impact the real estate transfer tax liability.

There is a relief from real estate transfer tax in company reorganisations. The tax is not levied in the event that both of the below criteria are met:

- Transfer of the German real estate or the shares in the German real-estate owning company, respectively, is effected as part of a reorganisation transaction in the form of a merger (*Verschmelzung*), split-up (*Aufspaltung*), spin-off (*Abspaltung*), hive-down (*Ausgliederung*) or transfer of property (*Vermögensübergang*) as described in the reorganisation tax act
- The controlling company holds indirectly or directly at least 95% of the shares of the controlled company involved in the reorganisation within 5 years prior to the above-mentioned transaction and at least 5 years after this transaction

11. Thinking about payment of dividends out of your country and a potential exit, is there any particular country that provides a tax efficient exit route to invest in your country?

Most of Germany's Double Taxation Treaties (DTTs) assign the capital gains taxation to the country where the seller is resident. For dividend payments, the same applies. However Germany levies a withholding tax on dividend payments (currently 26.375%), which can be reduced to 0% under the EU Parent-Subsidiary Directive or down to the respective treaty percentage under a DTT. The parent company has to full massive substance requirements to achieve a dividend withholding tax exemption. Therefore from a German tax perspective, it is advisable to choose a company with sufficient substance.

12. How is foreign debt usually structured to finance acquisitions in your country?

There is generally no difference for interest expense paid to a domestic or to a foreign lender. Further there is in general also no withholding tax for interest payments to a foreign lender (there are exceptions for profit participating loans).

However a foreign lender might become liable to limited German taxation if the loan is secured by German real estate (and then subject to the double taxation treaty provision).

When structuring the financing of acquisitions, the general earnings stripping rules and transfer pricing issues have to be considered.

To achieve a tax deduction in Germany, a debt push-down is necessary.

From a Seller’s Perspective

13. What are the main differences between share and asset deals?

From a (corporate) seller’s perspective, the main difference between share deals and asset deals is that the capital gain of a share deal is 95% tax exempt. But on the downside, losses carried forwards and current losses up to the transfer date might be denied. Therefore a tax-optimised structuring requires a careful balancing of benefits and downsides in cases where the target company is in a loss situation. In a share deal, existing loss carryforwards might be denied, whereas in an asset deal, it might be advantageous to settle them with profits arising in the course of the deal. That said exceptions in the anti-loss tracking rules that might apply should be carefully reviewed.

If the losses were forfeited in a share deal, the seller can consider an asset deal. In an asset deal, inherent capital gains are taxable, but can often be offset against the losses. Then however the seller should take into account Germany’s minimum taxation rules. These rules only allow the deduction of loss carryforwards in 1 fiscal year in the amount of €1 million fully plus 60% of the profits exceeding this €1 million. Therefore a combined share-asset deal might lead to a tax optimised result.

Further in an asset deal the seller should consider that all risks remain with the corporation shell. However since a share purchase agreement in a share deal generally also provides for a solution where the seller has to bear economically most of the risks from prior years, this is usually not an actual disadvantage over a share deal.

The seller should also consider that a share deal is generally VAT exempt. Therefore input VAT in connection with selling costs is non-deductible.

14. How are capital gains taxed in your country? Is there any participation exemption regime available?

Under German tax law 95% of the capital gains received by a German corporation at the disposal of its shares are tax-exempt if a 10% minimum participation is fulfilled.

If a German individual taxpayer receives the gain taxation depends on the holding percentage and on whether the participation is held as a private property or as a business property. For participations of at least 1%, 40% of the capital gain is tax-exempt while 40% of selling costs are non-deductible and 60% of the capital gain is taxable at the standard individual rate. The same applies irrespective of the holding percentage if the participation was held as a business asset. For private participations of less than 1%, a capital gain is fully subject to tax, but at a beneficial lump-sum tax of 26.375% where connected costs are not tax-deductible at all. A tax exemption applicable in the past to private participations of less than 1% for holding periods of more than 1 year no longer applies for newly acquired participations but still applies to participations acquired before 31 December 2008.

If a foreign corporation or individual receives the capital gain, most German DTTs assign the taxation right to the seller's resident country.

If a partnership receives the capital gain it generally depends on the partner how the gain is taxed.

15. Is there any fiscal advantage if the proceeds from the sale are reinvested?

Subject to certain conditions there are some tax advantages to reinvesting proceeds from an asset sale in cases where real estate or buildings are sold and new real estate and buildings are acquired. The capital gain from the sale is not subject to direct taxation but can be deducted from the acquisition costs of the new assets to be capitalised. As a result the depreciation base of the newly acquired assets is decreased. If there is no direct acquisition of new assets, the capital gain can be parked tax-free as reserve and deducted from new acquisitions at a later stage. However if no new acquisitions take place in a certain period of time, the reserve has to be dissolved leading to a retroactive taxation.

There is no tax advantage to the reinvestment of sale proceeds from a share deal made by corporations. But individuals selling shares can benefit from rules similar to those described for real estate (applicable to capital gains of up to €500,000).

Your Taxand contact for further queries is:

Germany

Nicole Froehlich

T. +49 69 27229 24830

E. nicole.froehlich@luther-lawfirm.com

GREECE

Greece

From a Buyer's Perspective

1. What are the main differences among acquisitions made through a share deal versus an asset deal in your country?

The main difference between share deals and asset deals from a tax point of view is that, contrary to share deals, asset deals are burdened with indirect taxes. Specifically stamp duty is levied at a 2.4% rate in Greece if the transferred business's assets qualify as a transfer of a business as a going concern. Stamp duty is in principle paid by the acquirer, but the parties may agree otherwise. If a taxpayer sells assets in the context of a single asset deal, VAT is due at 23%. Moreover the transfer of real estate is subject either to VAT at 23% if it qualifies as new for VAT purposes or to transfer tax in the range of 10%.

However the buyer is entitled to depreciate the acquisition value of assets under Greek tax law, contrary to share deals.

2. What strategies are in place, if any, to step up the value of the tangible and intangible assets in case of share deals?

Taxpayers cannot step up the value of the tangible and intangible assets in a share deal. A step-up of values could be achieved by the seller through internal restructuring that takes place prior to the sale of shares, to the extent possible. Such restructuring could be tax neutral to the extent that it qualifies for the application of Greek tax incentives under law 1297/1972.

3. What are the particular rules of depreciation of goodwill in your country?

Goodwill may be realised in an acquisition of a business as a going concern, an acquisition of separate intangible assets of a business or a merger following the shares acquisition of the company being merged.

From an accounting perspective if that goodwill is invoiced separately (eg in a transfer of a business as a going concern or an acquisition of separate intangible assets), it is subject to amortisation either one-off or in equal parts within a period of 5 years. From a tax perspective, goodwill is amortised at a rate of 10%.

In mergers goodwill is considered to be the amount that reflects the difference between the shares' acquisition cost and the net asset value of the company being merged. As per an opinion of the National Accounting Council, if that difference represents goodwill, it should be recorded in a special account under the title goodwill and be amortised either as a one-off or in equal parts within 5 years. Otherwise and if the difference constitutes a loss it should be recorded as a loss in the respective profit and loss accounts of the surviving company. Although not stated in the above-mentioned opinion, a financial study should determine whether the difference constitutes goodwill or loss. Goodwill is also amortised for accounting purposes either in a lump sum or within a 5-year period and is not tax deductible.

In an acquisition of shares either Greek or foreign the difference between the amount paid and the net asset value of the company is included in the shares' acquisition value and is recorded in the respective accounts of participations held by the company. The difference is therefore neither recognised nor recorded as goodwill in the buyer's accounting books. Moreover at the end of each year Greek and/or foreign listed and not listed shares are evaluated in the corporation's inventory. From a tax perspective any loss realised upon such evaluation may be offset against amounts recorded in special reserves, such as the reserve from capital gains on securities or from profits from the sale of listed shares. Any amount of loss that may not be offset is not tax deductible but should be recorded in a special account to be further offset against the reserves.

4. Are there any limitations to the deductibility on interest of borrowings?

Interest paid by a company is in principle deductible from its gross income, provided the loan relates to and is used for business purposes and subject to:

- Thin capitalisation rules
- Some restrictions applicable to companies generating tax-exempt income (eg dividends distributed by Greek corporations or profits of Greek partnerships)

Under these restrictions a proportion of the interest corresponding to tax-exempt income is not tax deductible. In addition interest on loans granted for the purpose of financing the acquisition of shares is not deductible if these shares are transferred within a period of 2 years following their acquisition. Finally there are restrictions on the deductibility of interest paid to companies residing in non-cooperating countries and in countries with favourable tax regimes.

According to thin capitalisation rules, which were introduced in Greece in 2009 for the first time, interest arising from loans paid to associated enterprises may only be deductible for corporate income tax purposes if the debt-to-equity ratio does not exceed 3:1 on average over the accounting year. Any interest exceeding this said ratio does not qualify as tax-deductible. Third party loans guaranteed by associated enterprises and bond loans are taken into account for the calculation of the debt-to-equity ratio.

The notion of associated enterprises is quite broad and covers cases of direct or indirect significant managerial or financial control. This is particularly a participation of 1 enterprise in the share capital or management of the other or due to the fact that both enterprises have the same shareholders or common members in their management body. Following recent amendments of the law the notion of associated enterprises has been further extended so as to potentially apply also in the case of an enterprise having the authority to influence another enterprise even in the absence of participation in that other enterprise's share capital or management. Exemptions from the scope of these provisions are provided, eg for leasing corporations, factoring companies and credit institutions operating in Greece.

Furthermore the tax-deductibility of expenses such as interest may be challenged on the basis of various grounds, eg productivity. In intra-group transactions, transfer pricing rules also apply, which may lead to the disallowance of expenses that are not arm's length.

5. What are usual strategies to push-down the debt on acquisitions?

Intercompany financial assistance is allowed under strict conditions under Greek Corporate Law 2190/20 governing corporations (*anonymes etairies* or AE). In this context a subsidiary is in principle prohibited to grant loans to its parent company for the financing of the acquisition of shares by the parent into the target or subsidiary company. Such a transaction is possible only exceptionally and under strict conditions. In practice, a debt push-down is achieved through the incorporation of a new Greek company in the form of an AE to be used as the holding company which is financed in order to acquire the shares of the target company, followed by the subsequent merger of the 2 companies.

Since the target company carries the operational activities it is more desirable to effect an upstream merger than a downstream one. From a tax perspective the upstream merger seems less risky than the downstream merger given that to date the Greek tax administration has issued private rulings confirming the deductibility of interest on loans granted to the holding or parent entity (ie the new Greek company) for financing the acquisition of the target company's shares, which is subsequently merged to the holding or parent company. A merger could in principle be implemented without triggering income taxes, provided that the prerequisites for the application of 1 of 2 Greek incentive laws (2166/1993 and 1297/1972) are met (see section 9).

6. Are losses of the target company/ies available after an acquisition is made?

Changes at the shareholder level do not impact the entitlement of the target company to carryforward its tax losses.

Under general rules losses are fully carried forward for a period of 5 years. No carry back is available. It is noted that the losses carryforward right will be affected in a merger as regards the absorbed companies.

7. Is there any indirect tax on transfer of shares (stamp duty, transfer tax etc)?

Acquisitions of shares should not raise any special VAT issues, as an exemption is expressly provided for transactions concerning sales of shares. In addition no stamp tax is imposed on share sales.

Further the 0.20% transfer tax on sales of shares listed on the Athens Stock Exchange does not burden the buyer of the shares (see section 13).

8. Are there any particular issues to consider in the acquisition of foreign companies?

In principle the same rules apply as in the case of an acquisition of a Greek company.

No participation exemption regime for dividends exists for foreign companies in general (with the exception of dividends received by Greek companies from participations in other Greek companies or in companies qualifying as subsidiaries under the rules transposing the EU Parent-Subsidiary Directive. According to the Directive subsidiary qualification conditions stipulates that:

- Greek parent holds more than 10% of the share capital of the EU-seated subsidiary for more than 2 consecutive years prior to dividends' distribution
- Both Greek parent and subsidiary have the legal form and are subject to the taxes (provided in the above-mentioned Directive).

In addition no controlled foreign corporation legislation exists in Greece. Therefore the interposition of a foreign holding company does not raise any specific tax issues and could be, in certain cases, a tax efficient way to defer the imposition of Greek taxes as long as no distributions to the Greek shareholder take place.

9. Can the group reorganise after the acquisition in a tax neutral environment? What are the main caveats to consider?

There are several possibilities for achieving a tax neutral restructuring in Greece under Greek tax incentive laws (2166/1993 or 1297/1972) or law 2578/1998 transposing the EU Merger Directive into national legislation, depending on the specific case. Available options are mergers, spin-offs, contributions of businesses or business sectors, share exchanges and changes in the legal form of the company. Following an acquisition however the most relevant scenario is that of an upstream or downstream merger.

The most commonly applied law for group internal restructurings is law 2166/1993. A precondition for its applicability is, however, that at least 1 balance sheet covering a 12-month or longer fiscal period exists prior to the merger.

Law 1297/1972 does not provide such a condition. However its applicability presupposes that a special expert committee (ie a public committee of the Ministry of Development) evaluated the assets and liabilities of the company to be absorbed. Pursuant to a ministerial decision, 2 chartered auditor-accountants or 2 chartered valuators may alternatively perform such a valuation. The valuation requirement renders this option more time-consuming. In addition law 1297/1972 restricts:

- The dissolution of the company prior to the lapse of 5 years following the merger, unless such dissolution results from certain forms of reorganisations
- The disposal of real estate property for 5 years following the merger. If these restrictions are not complied with, the tax incentives granted upon the merger or the exemption from real estate transfer tax, as the case may be, is revoked

If real estate property is disposed of within the 5-year period, the benefit of exemption from the real estate transfer tax granted under the tax incentive law is revoked except if the proceeds are used within 2 years to:

- Purchase other assets of equal value to those sold
- Pay debts to banks arising from loans
- Pay tax, duties or social security contributions

Apart from the real estate transfer tax, a merger by absorption under either of the tax incentive laws (2166/1993 or 1297/1972) is exempt from any direct or indirect tax including capital gains tax. The only tax to be imposed is capital accumulation tax calculated at a 1% rate on the amount by which the absorbing entity's share capital is increased, provided that such amount exceeds the share capital of each of the absorbed entities.

10. Is there any particular issue to consider in case of companies whose main assets are real estate?

Based on a recent amendment, real estate companies qualify for the application of both Greek tax incentive laws (2166/1993 or 1297/1972) and are therefore currently eligible for a tax neutral merger. Moreover there are special tax incentives for companies that either contribute their real estate assets or are merged into real estate investment companies.

In all other cases, the transfer of real estate property is in principle subject to real estate property transfer tax of 8% for real estate property up to a value of €20,000 and of 10% on any excess (with the exception of mergers, where reduced rates apply). A surtax of 3% is also levied on the value of the real estate tax in favour of the municipalities. An exemption from real estate property transfer tax applies to transfers of new buildings, which are subject to VAT.

In addition restrictions on real estate assets transfer apply in cases of tax neutral mergers under incentives in law 1297/1972.

11. Thinking about payment of dividends out of your country and a potential exit, is there any particular country that provides a tax efficient exit route to invest in your country?

A 25% withholding tax is imposed on dividends distributed by Greek corporations (AEs, Greek limited liability companies known as ‘EPE’ and other similarly taxed entities) approved by ordinary general shareholders meetings that took place as of 1 January 2012 and up until 31 December 2013. The applicable tax rate is reduced to 10% in respect of profit distributions approved as of 1 January 2014. A similar withholding tax also applies to profits of branches of foreign corporations, which are remitted to their head offices.

To the extent that dividend or profit distributions from an AE or EPE to EU holding companies are concerned, the above withholding tax is subject to the provisions of the EU Parent-Subsidiary Directive and to the relevant double tax convention. Specifically no tax is imposed if the receiving EU parent company has a minimum 10% shareholding participation in the Greek AE for an uninterrupted 2-year period and has a legal form qualifying for application of the Parent-Subsidiary Directive (see Annex A1 to law 2578/1998 transposing the Parent-Subsidiary Directive into national legislation, which corresponds to the Annex to Council Directive 90/435/EEC as in force). In addition certain double tax conventions provide for rates that are lower than those in the national legislation (eg conventions with Albania, Georgia, Kuwait, Uzbekistan). A number of double tax conventions provide for a reduced 5% rate if certain conditions are met.

In terms of exiting a Greek holding structure, foreign companies tax resident in countries that have signed a double taxation treaty with Greece are in principle exempt from the 5% corporate income tax imposed on the transfer value of Greek shares, provided they comply with the procedure for the application of the relevant treaty. The Greek Ministry of Finance has taken the position that the revenue from the transfer of shares is business income. Therefore foreign tax residents that do not maintain a permanent establishment in Greece and benefit from the application of the treaty may be exempt from such tax, depending on the relevant provisions in the treaty.

12. How is foreign debt usually structured to finance acquisitions in your country?

Foreign debt to finance acquisitions can be structured is such a way to minimise direct and indirect taxes.

In terms of direct taxes, foreign debt structures aim to minimise local withholding taxes on interest. Entities that qualify for the application of double tax conventions and of the EU Interest and Royalties Directive are preferred.

In terms of indirect taxes, loans executed outside Greece may fall outside the scope of stamp tax (that would otherwise be imposed at 2.4% with the exception of loans granted by banks) in view of the territoriality rules applicable to stamp tax. According to the current market practice in Greece, the majority of medium-to-long-term corporate financing agreements with Greek companies taking the form of an AE are structured as bond loans issued under law 3156/2003 because of the tax exemptions provided therein. Namely no withholding tax should be triggered if the debt is structured as a bond loan under Greek law, given that non-Greek bondholders are exempted from Greek withholding on bond interest, provided that they can show evidence that they are permanently resident outside Greece. Furthermore bond loans are also exempt from stamp tax.

From a Seller's Perspective

13. What are the main differences between share and asset deals?

The main difference between share deals and asset deals lies in the field of indirect taxation. Contrary to share deals, assets deals – both single asset transfers and transfers of a business as a going concern – are burdened with indirect taxes, ie stamp duty at the rate of 2.4% or VAT (currently at 23%). Although the buyer generally pays these taxes, the parties to the deal may agree otherwise. Also since these taxes affect the buyer's overall costs they affect what the buyer is willing to pay the seller.

In the field of direct taxation, no significant differences exist between share deals and asset deals. Gains from the transfer of the shares or assets are included in the selling company's corporate income and taxed at the ordinary corporate income tax rate, ie of 26%, for income accrued as of 1 January 2013 and onwards.

However in the case of asset deals, a 20% tax prepayment is due (i) on the goodwill if the transferred assets qualify as a going concern or (ii) in the case of single asset transfers, on the gain from the sale of intangibles, such as trademarks, patents, leasing rights and any other rights pertaining to the operation of the enterprise. This tax is paid by the seller prior to the transfer and does not exhaust the seller's income tax liability. The gain is then added to the company's business income and the 20% tax is credited against the company's annual tax liability. (A refund position could be established in the existence of losses.)

On the other hand, transfers of non-listed shares trigger the imposition of a 5% corporate income tax prepayment or capital gains, depending on the time of acquisition of the shares being transferred. In particular, the 5% share transfer tax is payable for shares that have been acquired by the seller up to 1 July 2013 and are further being transferred. The share transfer tax is payable by the seller prior to the transfer and is offset against the seller's annual corporate income tax due.

The 5% tax is computed on the higher of:

- A minimum value determined by means of a formula set in the Greek Income Tax Code
- The consideration agreed for the transfer

When the selling company is loss-making a refund may in principle be obtained for the 5% income tax prepaid, provided that the sale was profitable. However if the sale results in loss, there are debated views as to the possibility of offsetting the 5% tax. Transfers of non-listed shares acquired after 1 July 2013 shall not be subject to the 5% share transfer tax. Instead they shall be subject to a 20% capital gains tax (see section 14 below).

If listed shares (either on a Greek or overseas stock exchange) are transferred, the seller is liable to pay a 0.20% transfer tax on the sale value. In addition, income taxation on capital gains from sales of listed shares shall also apply in respect of shares acquired on or after 1 July 2013. The applicable taxation rate is set to 20%. Capital gains will concur to the legal entities' taxable basis for income tax purposes with the 20% tax paid being deductible from the relevant tax due. Losses arising on sales within the same fiscal year shall be taken into account for purposes of calculating relevant profit. Sellers that carry on business activities will be entitled to carryforward any loss balance under the generally applicable provisions.

The above tax treatment of share deals is only for Greek companies with the legal form of AE, as these are the only Greek companies whose share capital is divided into shares. For the transfer of parts in EPEs any gain is taxed at the ordinary corporate income tax rate, whereas a 20% tax prepayment computed on the capital gain is due prior to transfer and is credited against the company's annual income tax liability (see section 14 below).

14. How are capital gains taxed in your country? Is there any participation exemption regime available?

Capital gains (or losses) are generally regarded as ordinary business income (or losses) and are treated accordingly for tax purposes. A 20% capital gains tax prepayment applies to gains from the transfer of participation in an AE in case its shares have been acquired following 1 July 2013. It also applies in the transfer of participations in an EPE, partnership or joint venture as well as in foreign limited liability companies. Moreover it applies on the capital gains from the transfer of intangible assets including goodwill, subject to the provisions of a potentially applicable double tax convention between Greece and the seller's country of residence.

The 20% prepayment tax is paid to the Greek state prior to the transfer of the participation and/or asset. If the seller is a corporate entity, the payment of the tax does not exhaust the income tax liability with respect to capital gains. More specifically the gain realised from such a sale increases the total revenues of the fiscal year. And the 20% tax already paid is offset against the taxpayer's final tax liability. The transfer of non-listed shares triggers the imposition of 5% or 20% corporate income tax depending on the time of original acquisition of shares being transferred, as noted above (see section 13 above).

However exemption from such taxes (ie capital gains tax and share transfer tax) may be achieved in cases where the transferor is tax resident of a country that has a convention for the avoidance of double taxation with Greece.

15. Is there any fiscal advantage in case the proceeds from the sale are reinvested?

No specific advantage exists if the transaction price of the sale of the shares is reinvested by the seller company.

Your Taxand contacts for further queries are:

Greece

Marina Allamani

T. +30 210 69 67 000

E. m.allamani@zeya.com

Maria Zoupa

T. +30 210 69 67 000

E. m.zoupa@zeya.com

INDIA

India

The tax regime in India is undergoing an overhaul under the Direct Tax Code (DTC), which has been the matter of debate over the last few years. No timelines have been proposed for its implementation yet. While the basic framework for taxation in India remains the same, some critical amendments proposed under the DTC have been provided below.

From a Buyer's Perspective

1. What are the main differences among acquisitions made through a share deal versus an asset deal in your country?

Asset deals

In asset acquisitions a company's assets and liabilities are transferred for a consideration specified separately for each asset or set of assets, typically in the form of cash or shares. In asset acquisitions the target company's historical business liabilities are not carried over to the buyer and the tax exemptions and incentives available to the seller are normally not available to the buyer after the assets acquisition. The assets acquired are recorded in the books of account at the amount actually paid for the particular asset.

VAT is levied on the transfer of movable or intangible assets. In India VAT rates range from 4% to 12.5% depending on the classification of the assets or goods. Subject to conditions, the VAT paid by the buyer may be offset against the buyer's future output VAT liability.

Stamp duty is levied on the transfer of movable and immovable assets. Stamp duty is a state levy and is imposed in the state where the assets being transferred are located. Transactions may be structured so as to minimise stamp duty, particularly in certain cases involving the transfer of movable assets. It is important to ensure that the entire transaction is carefully documented to support the valid legality of the transfer and the protection of the rights of the buyer and the seller. The transaction must also meet the requirements supporting the contention of a lower or nil stamp duty liability on the transfer.

Stamp duty may also be levied in the state where the agreement to sell is executed between the parties, in addition to the state in which the assets are located.

Other modes of transferring assets

A transfer of assets from one entity to another may be structured using other mechanisms in a more tax efficient manner such as a slump sale or a demerger.

Slump sale

In India a slump sale is a sale of a business undertaking as a going concern involving the transfer of the identified business by the seller to the buyer for a lump sum consideration. The transfer of a business by way of a slump sale is generally perfected with the execution of a business transfer agreement, which regulates the transfer of the business itself including its various components such as the assets, liabilities, employees, licences and existing contracts. The consideration for transfer may be discharged by way of a payment in cash or shares. It involves the transfer of the business as a whole without allocating values to individual assets. Accordingly the lump sum consideration would need to be split by the buyer among the various assets transferred for which a valuation of the transferred assets would need to be undertaken. This opens up some planning opportunities for the buyer in terms of ensuring that the assets' depreciable base is recorded in a tax efficient manner.

Further in a slump sale tax benefits and incentives available to the business undertaking may be transferred to the buyer, subject to the satisfaction of certain conditions.

Additionally transfer taxes are lower than in an asset acquisition. Since the entire undertaking is transferred as a whole in exchange for a lump sum consideration, the transaction may be held to be a sale of business and not a sale of goods and accordingly the transfer may be viewed as not subject to VAT.

Stamp duty implications are largely similar to those for asset acquisitions. In a slump sale structuring options may be adopted to lower the impact of stamp duty to bring in efficiency for the stamp duty on movable assets.

Demerger

A demerger means the transfer of an identified business division from one company to another on a going concern basis through a court-approved process. In a demerger the consideration for the transfer of business is discharged by issuing 'shares' to the shareholders of the seller entity in order for the transaction to be tax neutral. While the existing tax laws provide for issuance of shares (which could be equity or preferred) DTC proposes to restrict tax neutrality only where equity shares are issued.

In India a demerger process requires approval by the high court of the state in which the registered office of the company/ies is located. The entire process normally takes between 4 and 8 months, depending on the number of states involved and status of the company, ie whether the company is a listed or a closely-held company.

In a demerger the buyer has a compulsory obligation to record assets at their book value as per the books of the seller at the time of the demerger. Further the tax benefits and incentives available to the business division may be transferred to the buyer, subject to satisfaction of certain conditions. Planning avenues can be explored for the financial restructuring of the demerging company by adjusting the prior losses and expenses of the demerger against other capital reserve accounts, paid-in capital, capital revaluation reserve, share premium etc.

Typically no VAT arises in case of a demerger.

Where state law has a specific provision on the levy of stamp duty in an approved scheme of arrangement (as approved by the jurisdictional high court), the stamp duty will be levied using the mechanism provided in the law. Typically stamp duty is levied as a percentage of the market value of the shares issued under the scheme of arrangement or as a percentage of the market value of immovable property. In some states the possibility of a no stamp duty position may be explored. An amendment to Indian stamp duty laws to levy stamp duty on mergers and demergers was proposed but had not yet been passed by Parliament at the time of publication of this guide.

Where the demerger involves 2 states (ie the business division's assets are located in 2 states) and the stamp duty is levied under the stamp duty law of both states, a credit for the stamp duty paid in one state may be claimed in the other state, by carrying out the process prescribed under the state stamp duty law.

Stock acquisitions

In stock acquisitions, the transferee company acquires the shares of the transferor company from its existing shareholders for a consideration. The company's identity remains unchanged and the company continues to be responsible for all of its liabilities existing before the transfer of shares. In a stock acquisition the assets continue to be recorded at their book values, as they appeared prior to the transfer of shares. Further the tax incentives and benefits available to the company prior to the transfer of shares generally continue to be available after the transfer of shares, although the nature of each particular incentive or benefit would need to be analysed to determine its continuity. In certain cases the target company will not be allowed to carry forward any brought-forward tax losses (see section 6).

Gains arising on the sale of shares of an Indian company are normally liable to tax in India unless specifically exempt or sheltered under a tax treaty. Indirect stock acquisitions could also be liable to tax in India in some cases. Withholding tax obligations could also arise for the buyer. Certain international transactions involving indirect acquisitions and others claiming India tax exemption under the treaty are the subject matter of litigation and Indian revenue authorities are seeking to tax such transactions in India. The final outcome of this litigation has been recently announced and the Apex Court has ruled against the revenue authorities, to state that indirect acquisitions of Indian shares would, in normal circumstances, not be taxable in India. Interestingly in response the Indian Government passed a retrospective amendment (effective from 1961) for levy of tax on indirect transfers, where the overseas shares derive substantial value from the underlying Indian asset as also levy of tax on transfer of any rights pertaining to management or control of the Indian company. The term substantial value has not been defined and is generally debated from case to case.

Under the DTC also a specific provision has been proposed for taxability of indirect transfers of Indian assets in certain situations. One of the criteria is where the overseas company whose shares are being transferred derives greater than 50% of its value from Indian assets.

DTC has also proposed the concept of Controlled Foreign Corporations (CFC) for taxability of passive income earned by foreign subsidiaries of Indian companies, in certain cases.

Share transfers are also subject to stamp duty. It is possible however to reduce such costs by dematerialising the shares of the target company prior to the transfer of shares.

Other considerations

Foreign investments in India are regulated by the provisions of the Foreign Exchange Management Act 2000 and the related regulations and press notes issued by the Indian government. The regulations prescribe the upper limit for equity interests held by a foreign company in an Indian entity, depending on the industry in which the Indian entity operates. At the time of making the investment in India, the foreign company must adhere to the applicable limits. Further investment in certain selected industries requires the prior approval of the Foreign Investment Promotion Board (FIPB).

When the seller or buyer is an Indian resident and the counter party is a non-resident, the sale or acquisition of shares could also be subject to certain pricing guidelines and filing requirements.

2. What strategies are in place, if any, to step up the value of the tangible and intangible assets in case of share deals?

Under Indian law in share acquisitions the values of tangible and intangible assets continue to be recorded at the same values prior to the transfer of shares, for both accounting and tax purposes.

The value of tangible and intangible assets may be stepped up in asset acquisitions (either by way of an itemised sale or a slump sale) as discussed above.

3. What are the particular rules of depreciation of goodwill in your country?

Under Indian law different rules have been prescribed for depreciation and amortisation for accounting and income tax purposes:

Accounting

Under the prescribed Indian accounting standards, intangible assets (such as patents, intellectual property rights, copyright, trademark, etc) are amortised over the useful life of the asset. Further the standard presumes that the useful life of any intangible asset should generally not exceed 10 years unless a higher period is justifiable.

Goodwill may be self-generated or acquired as a part of acquisition transaction. Under the prescribed accounting standard, self-generated goodwill is not recognised in the books of account and, accordingly, no depreciation or amortisation can be claimed for it. Goodwill acquired as a part of an acquisition transaction is typically amortised over a period of between 5 and 10 years, though the final position also depends on the useful life and be subject to annual tests of impairment.

Income tax

Under Indian tax law depreciation is allowed on intangible assets such as know-how, patents, copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature. Although goodwill is an intangible asset, it is not specifically included in the list provided in Indian tax law.

While recent rulings have supported claiming of the amortisation of goodwill, it is unlikely that the revenue authorities at the lower level will yet allow them and this is likely to involve contentious litigation. Through appropriate purchase price allocation exercises, the goodwill can actually be split among the several business or commercial rights comprised. Subject to facts, depreciation can be claimed on some of these rights.

4. Are there any limitations to the deductibility on interest of borrowings?

Under Indian tax law there are no direct thin capitalisation rules and deductions for interest on borrowings are allowed in the year in which interest is paid or accrued. However interest paid or accrued on capital borrowed for the acquisition of an asset to extend an existing business (in the period between the date on which the capital was borrowed and the date on which the asset was first put to use) is not allowed as a deduction and instead is considered as part of the acquisition cost of the asset.

Tax withholding

Payments of interest are subject to withholding tax in India under the domestic law or the applicable tax treaty.

Transfer pricing

An international transaction between 2 related enterprises must be transacted at an arm's length price. Where the debt is taken by the Indian entity from a foreign related enterprise, the interest must be at an arm's length price. If the Indian revenue authorities are of the view that the interest is not at an arm's length price they may make an adjustment to the interest paid and reduce the deduction claimed.

Regulatory provisions

In the case of foreign debt the provisions related to external commercial borrowings are to be complied with. See the following section for further details.

5. What are usual strategies to push-down the debt on acquisitions?

The strategies for a push-down of debt on acquisitions have to be analysed under 2 scenarios: foreign debt and local debt.

Foreign debt

Foreign debt raised by an Indian company is governed by the external commercial borrowing (ECB) guidelines, which apply in the case of a push-down of the debt to the target company. Although foreign debt raised by an Indian company is subject to restrictions that do not typically enable a push-down of the debt to the Indian company, the position needs to be examined based on the facts of each case. Key conditions attached to the raising and utilisation of foreign debt include:

- Borrowers may raise foreign debt from internationally recognised sources such as international banks, international capital markets, multilateral financial institutions, export credit agencies, suppliers of equipment, foreign collaborators, foreign equity holders etc
- The foreign equity holder must have a minimum equity interest of 25% in the Indian company to qualify as eligible lender. Further in the case of foreign debt in excess of US$5 million from the foreign equity holder, the ECB liability-to-equity ratio must not exceed 4:1
- Borrowings from group companies (having the same parent as the Indian company) and indirect equity holders with more than 51% equity stake are also permitted with prior approval and subject to certain monetary limits

- Foreign debt may be raised totalling up to US$750 million during a financial year subject to prescribed restrictions
- Certain sectors are permitted to take the foreign debt without obtaining prior approval from a regulatory authority, although restrictions have been imposed on sectors such as financial institutions, services sector etc
- Under the existing regulations foreign debt is normally allowed for capital expenditure only and for making an investment outside India. Foreign debt cannot be raised to meet working capital needs and is specifically prohibited to be used for on-lending or investment in the capital market or acquisition of a company (or part of a company) in India for investment in real estate or repayment of an existing Rupee loan

The guidelines prescribe an all-in-cost ceiling on foreign debt sourced by an Indian entity. The all-in-cost ceiling includes interest, other fees and expenses in foreign currency, except for the commitment fee, pre-payment fee and fees payable in Indian Rupees. But it excludes any withholding taxes. The current all-in-cost ceiling varies between 350 and 500 basis points over the 6-month London Interbank Offered Rate (LIBOR), depending upon the loan tenure. These rates are regularly revised.

Local debt

A loan taken by an Indian entity from local sources may be pushed down to the target company either by way of the merger of 2 companies (ie the company taking the loan and the target company) or by passing the debt onto the target company. For a merger of the 2 companies, approval must be obtained from the jurisdictional high court by filing a scheme of arrangement. The entire merger process typically takes between 4 and 6 months, depending on the states involved and company status, ie whether the company is listed or closely held. Alternatively the company taking the debt may pass the debt onto the target company, subject to the satisfaction of conditions prescribed under corporate law.

6. Are losses of the target company/ies available after an acquisition is made?

Indian tax law allows tax losses to be carried forward and set off within the 8 years immediately following the tax year for which the loss was first computed. There is no limitation on carrying forward and setting off unabsorbed depreciation.

Certain restrictions have been imposed on carrying forward tax losses where the target company is a closely held company. In such a case, the carryforward and offset of business losses from earlier years are allowed only if the shares of the company carrying not less than 51% of the voting power are beneficially held by the same persons on the last day of the tax year in which the loss was incurred and on the last day of the tax year in which the loss should be offset.

The above rule does not apply however where the change in shareholder ownership of the Indian company, which is the subsidiary of a foreign company, is pursuant to a scheme of amalgamation or demerger of a foreign company and 51% of the foreign amalgamating company's shareholders remain as the shareholders of the resulting company.

The above restriction on the carryforward and offset of business losses does not apply to unabsorbed depreciation, which may continue to be carried forward and offset without any restrictions.

However in the case of an amalgamation of a specific company or demerger, accumulated losses and unabsorbed depreciation or amortisation of the amalgamating company or the business division being demerged are deemed to be the accumulated losses of the amalgamated or resulting company. This also applies to unabsorbed depreciation or amortisation of the amalgamated or resulting company for the tax year in which the amalgamation or demerger was effected. This is subject to the satisfaction of conditions prescribed under Indian tax law.

7. Is there any indirect tax on transfer of shares (stamp duty, transfer tax etc)?

The transfer of shares attracts stamp duty at the prescribed rates. These costs may be reduced however by dematerialising the shares of the transferee company prior to the transfer of the shares.

8. Are there any particular issues to consider in the acquisition of foreign companies?

Regulatory considerations

Overseas investments by an Indian entity are regulated by the Indian foreign exchange regulations. Under existing Indian regulations Indian companies are allowed to establish joint ventures as well as wholly owned subsidiaries overseas, subject to the satisfaction of certain conditions. The total investment by an Indian company in an overseas joint venture or wholly owned subsidiary should not exceed 4 times of its net worth (defined to include capital stock plus free reserves) as of the date of its last audited balance sheet. For computation of net worth of the Indian company, the net worth of its holding company (which holds at least 51% direct stake in the Indian company) or its subsidiary company (in which the Indian company holds at least 51% direct stake) could also be considered. Certain exclusions have been granted where the investment is made through funds held in specific foreign currency accounts or out of specified foreign currency proceeds earned by the Indian company.

To calculate the limit, the overseas investment includes:

- Contribution to capital
- Loans
- 50% of performance guarantees
- 100% of any financial guarantee issued to or on behalf of the joint venture or wholly owned subsidiary

However restrictions have been imposed on the investments to be made in the capital, loans and guarantees of certain entities. Further additional conditions have been imposed on overseas investments by an Indian company in the financial services and real estate sectors.

The acquisition can also be structured through an intermediate holding company.

Corporate law considerations

Under Indian corporate law the merger of an overseas company into an Indian company is permitted, but the merger of an Indian company with an overseas company is not. A proposed amendment to permit the merger of an Indian company with an overseas company has been passed by Lower House of Parliament; however it is yet to be passed by Upper House of Parliament at the time of publication of this guide. This amendment was proposed as a part of a comprehensive review of and amendments to existing Indian corporate law.

Under draft provisions of DTC however the tax neutrality otherwise available to domestic mergers may not be available to a merger of an overseas company with an Indian company.

9. Can the group reorganise after the acquisition in a tax neutral environment? What are the main caveats to consider?

A group may reorganise in a tax neutral manner after an acquisition by way of the following on a case-by-case basis:

- A merger of the group companies into a single company
- A demerger of non-core businesses of the group into a separate company to attain value for shareholders
- A capital reduction whereby a company can cancel its capital for consideration or against accumulated losses
- A buy-back of shares whereby the group company may reduce its capital by buying its own capital from the shareholders and subsequently cancelling it etc

However to ensure tax neutrality in the reorganisation, the conditions under Indian tax law must be satisfied.

10. Is there any particular issue to consider in the case of companies whose main assets are real estate?

Under the provisions of Indian tax law, no specific regulations apply to the transfer of assets or shares of a company whose main assets are real estate. However the transfer of real estate assets directly is subject to capital gains tax computed in the manner specified in Indian tax laws that are applicable to all types of capital assets. Similarly, the direct transfer of real estate is subject to stamp duty at the rates prescribed under the state stamp duty laws or the Indian Stamp Act where there is no state-specific law.

11. Thinking about payment of dividends out of your country and a potential exit, is there any particular country that provides a tax efficient exit route to invest in your country?

Under Indian tax law dividends are subject to dividend distribution tax to be paid by the company distributing the dividend. Dividend distribution tax is payable at the rate of 15% (exclusive of surcharge and education cess) on the distributed dividend amount. Once the dividend distribution tax is paid no tax is levied in India on the dividend recipient. Accordingly the payer is not required to withhold any taxes at the time of the dividend payment.

Certain countries with which India has tax treaties permit (subject to certain conditions) an underlying tax credit for the dividend distribution tax paid, ie the overseas company allows the tax paid by the Indian company as a credit against its tax liability for the dividend received from the India entity. For example, the tax treaty entered between India and Mauritius is one such treaty.

Finance Act 2013 has imposed a new tax on buy back of unlisted shares effective 1 June 2013. An Indian unlisted company undertaking a buy-back of shares will be required to pay tax on distributed income similar to dividend distribution tax at the rate of 20% (exclusive of surcharge and education cess).

Distributed income shall mean the difference between the consideration paid by the company on buy-back of shares and the amount received by the company on issue of such shares that are being bought back. The provisions shall be applicable to all unlisted companies irrespective of the residential status of shareholders. The amount received by the shareholder will not be subject to any further tax.

The availability of credit for tax paid in India on buy-back of Indian unlisted company shares discussed above would need to be examined in detail with respect to specific treaty.

To ensure a tax efficient divestment of the stake at the time of exit, the following points should be considered:

Listed shares

Under domestic tax laws long-term capital gains (gains on the sale of shares held for more than 12 months) earned on the sale of shares of an Indian listed company made on the stock exchange are typically exempt from tax, although a marginal securities transaction tax is payable.

Unlisted shares

For unlisted shares the treatment of capital gains under the domestic tax law applies. For a tax efficient divestment the investment can be structured through countries with whom India has a favourable tax treaty, wherein the liability on capital gains is in the country of residence of the seller. Therefore no capital gains liability is attracted in India. Countries with treaties that may be used to reduce the tax cost at the time of exit include, eg Cyprus, Mauritius, Singapore and the Netherlands.

However to ensure a tax efficient exit the conditions prescribed under the respective treaties need to be satisfied. Additionally a Tax Residency Certificate containing the prescribed particulars is required to be submitted as a condition for availing benefits of the provision of treaties. The protocol entered between India and Singapore for example contains a limitation-of-benefits (LOB) provision, which provides that the tax resident will not be entitled to capital gains tax exemptions if its affairs are arranged primarily to take advantage of the benefits under the tax treaty. Furthermore in recent times the tax authorities have been aggressively examining the possibility of renegotiating the tax treaties with Mauritius and Cyprus to remove beneficial capital gains provisions. Although there are no specific anti-abuse provisions in Indian law, there has been significant litigation on this subject and the validity of tax treaties has recently been upheld in an Apex Court decision.

DTC has proposed various provisions including treaty override and General Anti-Avoidance Rules (GAAR). Government has recently announced deferral of GAAR provisions and the same is now proposed to become effective from financial year start 1 April 2015.

12. How is foreign debt usually structured to finance acquisitions in your country?

Foreign debt raised by an Indian company is governed by Indian foreign exchange regulations (see section 5 above). Given restrictions imposed on foreign debt, it cannot be used to structure the financing of acquisitions in India. Foreign debt may be raised by an Indian entity for direct investment in an overseas company.

To fund acquisitions through foreign debt a holding company may be established outside India to invest in the Indian company, where the funds required by the holding company for investment in the Indian company may be financed through debt. In such a case the interest on the debt is normally born by the holding company and deduction for interest expense is not available against the income of the Indian operating company. This can however be overcome by using structured investment instruments between the holding company and the Indian operating company.

From a Seller's Perspective

13. What are the main differences between share and asset deals?

Asset deals

In asset acquisitions a company's assets and liabilities are separately transferred for a consideration and specified for each asset. The seller of the assets is liable for tax on capital gains arising at the time of the assets sale at the prescribed rates.

The transfer of assets may be structured as a slump sale, as a demerger or through stock acquisitions.

Slump sale

A slump sale is the sale of a business undertaking as a going concern involving the transfer of the entire business by seller to buyer for a lump sum consideration. In a slump sale the seller is liable for tax on capital gains earned at the time of undertaking the sale. The capital gains are computed for the business undertaking as a whole and not for individual assets. To compute capital gains the cost of acquisition of the undertaking is presumed to be its net worth, which is computed in the manner prescribed under Indian tax law. (Net worth is the value of total assets of the undertaking less total liabilities of the undertaking as appearing in the books of account. The value of total assets is the sum of the written-down value of depreciable assets and the book value of non-depreciable assets. In computing the value of total assets, any change in the value of assets on account of the revaluation of assets is ignored.)

Demerger

Demerger means the transfer of an identified business division from one company to another on a going concern basis. In a demerger the consideration in exchange for the transfer of a business is discharged by issuing shares of the buyer company to the shareholders of the seller entity. A demerger may be affected in a tax neutral manner when carried out using the method prescribed under Indian tax law.

Stock deals

In a stock acquisition the buyer acquires the shares of the target company from its existing shareholders for a consideration. The capital gains arising on the transfer of shares are taxable in India at the prescribed rates.

14. How are capital gains taxed in your country? Is there any participation exemption regime available?

Computation of capital gains

Under Indian tax law capital gains are computed by reference to the holding period for the capital assets by the transferee. There is no provision for participation exemption under Indian tax law.

To compute capital gains assets held for a period of 36 months or less are referred to as short-term capital assets. For shares of a company, any listed security, mutual fund unit or zero coupon bonds, the period of 36 months is replaced by 12 months. Assets other than short-term capital assets are referred to as long-term capital assets. Gains arising from the transfer of short-term capital assets are known as short-term capital gains. Gains arising from the transfer of capital assets other than short-term capital assets are known as long-term capital gains.

Short-term capital gains are calculated as the sale consideration less the cost of acquisition, less the cost of improvement and expenses incurred at time of sale.

Short-term capital gains are taxable at a rate of 30% (or 40% for non-residents), exclusive of the applicable surcharge and education cess (of 10% for Indian companies and 5% for foreign companies, where the company's total income is more than INR10 million). Short-term capital gains resulting from specified securities traded on a recognised stock exchange in India, and on which securities transaction tax is paid, are taxed at a fixed rate of 15% - exclusive of the surcharge and the education cess.

To calculate long-term capital gains, costs are adjusted for inflation based on indices issued by the Indian government. Long-term capital gains are calculated as the sale consideration less the indexed cost of acquisition, less the indexed cost of improvement and expenses incurred at the time of the sale. In case of non-residents, costs are adjusted for foreign currency fluctuation rather than inflation, while calculating long term capital gains.

Long-term capital gains are taxable for non-residents at a fixed tax rate of 10% (exclusive of surcharge and the education cess) in the case of unlisted securities without indexation and foreign exchange fluctuation benefit and at a rate of 20% (exclusive of surcharge and the education cess) in other cases.

Long-term capital gains resulting from the sale of specified securities traded on a recognised stock exchange in India (and on which securities transaction tax is paid) are exempt from tax.

Note that DTC proposes significant amendments to taxation of capital gains, in terms of classification of assets, applicable tax rates and removal of certain exemptions (including for listed securities).

15. Is there any fiscal advantage if the proceeds from the sale are reinvested?

Under Indian tax law exemption can be claimed for capital gains arising from transfer of long-term capital assets (including shares) if such gains are invested in a long-term specified asset within a period of 6 months from the date of transfer. However investment in the specified securities may be made up to INR5 million in 1 tax year. Furthermore the investments need to be locked in for the prescribed period (typically 3 years) to claim the exemption. If the investments are transferred or otherwise converted into cash, they are taxable in the tax year in which the conversion takes place.

Your Taxand contacts for further queries are:

India

Vivek Gupta

T. +91 124 339 5052

E. vivek.gupta@bmradvisors.com

Rohit Berry

T. +91 11 3081 5030

E. rohit.berry@bmradvisors.com

IRELAND

Ireland

From a Buyer's Perspective

1. What are the main differences among acquisitions made through a share deal versus an asset deal in your country?

Stamp duty

For the transfer of shares the stamp duty rate in Ireland is 1% of the consideration paid or of the market value if higher. However provided certain conditions are complied with, an exemption from stamp duty is available on the sale of shares where the amount or value of the consideration is €1,000 or less.

For asset deals stamp duty rates of up to 2% can apply. There is an exemption on the sale or transfer of certain intellectual property such as patents, trademarks, design rights, domain names, brands, brand names, copyright and goodwill directly attributable to the intellectual property. Where assets are capable of being transferred by delivery, and are transferred by delivery, then no stamp duty applies. Stamp duty is payable within 30 days of executing the asset transfer agreement (notwithstanding that the transactions it relates to) may be incomplete. Once the transaction has been completed and any relevant transfer documents have been executed, an online filing must be made for the relevant transfer document to be stamped exempt (assuming that all relevant stamp duty has been paid on the asset transfer agreement and that no further liability arises).

Stamp duty must be paid within 30 days of executing the stock transfer form(s) to avoid the imposition of interest, penalties and surcharges. Mandatory e-stamping was introduced in Ireland with effect from 1 June 2011. This means that all stamp duty returns and payments presented to Revenue must be filed electronically via the Revenue Online System (ROS), regardless of the date the instrument was executed. On receipt of the return and payment on ROS, the Revenue issues a paper stamp certificate for attachment to the instrument to show that it has been stamped. A self-assessment system was introduced for stamp duty purposes in July 2012. It applies to all documents executed on or after 7 July 2012. The adjudication process has been abolished under the self-assessment system.

VAT

The purchase of shares is a VAT-exempt activity. Therefore, a company that incurs costs in relation to the acquisition of shares in a newly acquired entity is not entitled to recover the VAT on such costs.

However there are specific circumstances where Irish Revenue accepts that a company that has acquired shares in a new entity can recover a portion of the VAT incurred on such costs. Where the purchaser plays an active part in the management of the newly acquired entity and provides services such as accounting, administration or marketing services, then a portion of the VAT incurred on the costs can be recovered by the purchaser. The Irish Revenue reviews each transaction on a case-by-case basis. Therefore each transaction should be reviewed individually to determine whether the shares' purchaser is entitled to an element of VAT recovery on costs incurred.

Generally assets transfer is subject to VAT. However where the assets transferred constitute a business or part of a business capable of being operated on an independent basis the transfer is deemed not to be a supply for VAT purposes. This exemption applies to the transfer of tangible and intangible assets. It also applies even if the business has ceased trading. For the exemption to apply the transfer must be between taxable persons.

Particular care should be taken to analyse the detailed rules that apply to immovable property.

Base cost and deferred gain

In an asset deal the purchaser's base cost in the assets will be the price paid for the assets. This will be relevant for any future sale of the assets.

In a share deal the purchaser's base cost is represented in the shares acquired. To the extent that the target company owns assets that have a base cost of less than their current market value, a deferred or latent gain exists. Such a deferred gain is often taken into account by purchasers in deciding on the price for the shares. However since stamp duty is less on a share sale than on an asset sale, this will also be taken into account in the pricing.

2. What strategies are in place, if any, to step up the value of the tangible and intangible assets in case of share deals?

In share deals in Ireland no step-up in value of any of the target company's assets is possible.

3. What are the particular rules of depreciation of goodwill in your country?

No specific tax depreciation is available for goodwill in Ireland. However tax relief is available in Ireland on capital expenditure incurred by companies on the acquisition of intangible assets, including goodwill that is directly attributable to these intangible assets.

The definition of an intangible asset that qualifies for this relief includes:

- Any patent, registered design, design right or invention
- Any trademark, trade name, trade dress, brand, brand name, domain name, service mark or publishing title
- Any copyright or related right within the meaning of the Copyright and Related Rights Act 2000
- Computer software or a right to use or otherwise deal with computer software (except in certain circumstances)
- Certain supplementary protection certificates
- Certain plant breeders' rights
- Any application for the grant or registration of any of the intangible assets above
- Secret processes or formulae or other secret information concerning industrial, commercial or scientific experience, whether protected or not by patent, copyright or a related rights, including know-how generally related to manufacturing or processing
- Sale authorisations in relation to medicines or products of any design, formula, process or invention
- Rights derived from research prior to authorisation, on the effects of medicines or products of any design, formula, process or invention
- Licences in respect of such intangible assets referred to above
- Any non-Irish right similar to those outlined above
- Goodwill to the extent that it is directly attributable to any of the above

The relief is designed to provide tax allowances broadly equal to the write-off to the profit and loss account available under normal accounting rules for capital expenditure incurred on provision of specified intangible assets.

Under the relief the capital expenditure incurred to acquire intellectual property can be written off either in line with the accounting write-off or over a 15-year period. If a company makes this election, a rate of 7% will apply for years 1 to 14 and of 2% for year 15. The Finance Act 2013 amends the legislation to provide that there is no clawback where the intangible asset is disposed of after 5 years.

The maximum deduction allowable in any year is restricted to 80% of the gross income arising from managing, developing or exploiting specified intangible assets. The profit from activities arising from managing, developing or exploiting specified intangible assets is treated as a separate trade for the purposes of claiming capital allowances. This income is ringfenced, and the allowances are capped at 80% of income from the relevant separate trade. Any unused allowances can be carried forward and used in future accounting periods against income from the same trade.

The Finance Act 2011 amended the legislation to ensure that research and development (R&D) tax credits and capital allowances under the intangible assets regime can no longer be claimed on the same expenditure (ie only one or the other can be claimed).

4. Are there any limitations to the deductibility on interest of borrowings?

In considering whether any limitations apply to the deductibility of interest on borrowings, it is necessary to look at the various bases upon which a deduction can be claimed:

Tax deduction against trading income

The general principle is that where interest is incurred wholly and exclusively for the purpose of a trade carried on by the company in the period in which the interest is paid, it is allowable as a trading expense.

Tax deduction against rental income

In general interest on money borrowed to purchase, improve or repair a rented property is allowed as a deduction against the related rental income in arriving at the taxable rental income under Case V of Schedule D of the Irish Taxes Consolidation Act.

The deduction is limited to 75% of the interest accruing on or after 7 April 2009 on loans for the purchase, improvement or repair of *residential* rental property, including foreign property loans. The deduction of interest on loans used to purchase, repair or improve rented commercial property is unrestricted.

Interest as a charge on total income (for companies and individuals)

Interest relief is available to a company or an individual on interest paid on monies borrowed to acquire shares in or loan money to a trading company or a company whose business consists wholly or mainly of holding stocks, shares or securities in such a company. The company whose share capital is acquired or to which the money is loaned should not be a quoted company. A quoted company is defined as a company whose shares or any class of whose shares are either:

- Listed on the official list of the Irish stock exchange or any other stock exchange
- Quoted on an unlisted securities market of any stock exchange.

Therefore the relief applies to investments in either a private limited company (Ltd) or a non-quoted public company (Plc).

A company can also claim interest relief on loans applied in acquiring an interest in or loaning money to a company whose income arises wholly or mainly in the form of rents or other income from property. However relief is not available to an individual in such circumstances.

Certain conditions need to be satisfied at the time of the acquisition (ie point-in-time tests). Ongoing conditions must also be satisfied throughout the loan duration in order to continue to claim tax relief for the interest expense.

Subject to a number of conditions being met (as set out below), interest relief is available and can be treated as a charge. This means it can be offset against the company's total profits or, in the case of an individual, against income for the year of assessment in which interest is paid. The charge can also be used against profits in other group companies subject to certain conditions.

The following conditions must be met before the interest paid can be deducted as a charge:

- The investing company or individual must hold more than 5% of the ordinary share capital (a material interest) in the other company at the time the interest is paid
- The interest must actually be paid before it can be allowed as a charge
- The company whose shares are being acquired must exist wholly or mainly for the purpose of carrying on a trade, or (in the case of a company investor only) its income must consist wholly or mainly of rental income. Alternatively its business must consist wholly or mainly of the holding of stocks, shares or securities of a trading or (in the case of a company investor only) rental company and the funds from the share subscription must be used in full for business purposes by the share-issuing company
- If the lending company simply lends money to the other company, the money must be used by that other company for the purpose of its trade or business
- During the period of the loan there must be no recovery of capital by the investing company or by an individual from the company or a connected company
- The 2 companies must have at least 1 common director from the date of purchase of the shares to the date of the payment of the interest during the period of the loan. In the case of an individual, the individual must have worked for the greater part of his or her time in the actual management or conduct of the company or a connected company's business (ie a full-time director throughout the period from the application for the loan proceeds to when the interest is paid)

As stated above relief is not available in any circumstances for an individual where the loan is applied in acquiring an interest in a company whose income arises wholly or mainly in the form of rents or other income from property. However in the case of individuals, relief may be available in certain instances where the material interest and/or the full-time director conditions are not met.

Anti-avoidance legislation

The taxpayer's right to deduct interest is subject to Irish anti-avoidance legislation which provides that if any capital is recovered by the investor within a 2-year period before the loan was granted, then interest relief is disallowed or restricted. The legislation provides for instances where capital is deemed to be recovered by the investor. Further if an investor company invests in a holding company which itself receives a recovery of capital from a relevant subsidiary (ie a holding of over 50%), then the relief is restricted pro-rata by the amount recovered as a proportion of the investors holding.

Anti-avoidance legislation also provides that interest does not qualify as a charge where the borrower is connected with the lender when:

- Using the funds to purchase the capital of a company from a company (including the company whose shares are being purchased) which, on or after the time of purchase of the capital, is connected with the borrower
- Using the funds to lend money to a company which is used directly or indirectly to purchase any part of the capital of a company from a company

Anti-avoidance legislation further provides that relief is not given for the payment of interest in the case of a scheme or arrangement, the sole or main benefit of which is to obtain a reduction in tax liability through the use of such relief. Finance Act 2011 introduced significant anti-avoidance measures in relation to interest deducibility as a charge, including restrictions for corporate borrowers, which broadly apply where:

- Intra-group borrowings are used to leverage a company to refinance certain group assets
- Interest as a charge relief is claimed on loans used to fund the financing of activities of foreign connected companies where the foreign return earned is not repatriated to Ireland

These amendments, which are detailed and complicated, represent a substantial change to our law regarding interest deductibility and professional advice should be sought in all cases.

The Finance Act 2011 also restricted deductibility of interest as a charge for individuals. The relief was abolished in the case of loans (including replacement loans) made after 7 December 2010. In the case of loans made on or before 7 December 2010, interest relief will continue to be available until 2013 but will be phased out over a 3-year period. In summary interest relief available to an individual will be restricted to 75% in year 2011, 50% in 2012 and 25% in 2013. No relief will be available for interest paid in 2014 and subsequent tax years.

5. What are usual strategies to push-down the debt on acquisitions?

In the case of a share purchase, assuming that the conditions set out above in relation to interest as a charge are satisfied, interest relief may be available as a charge in respect of the interest paid on the funds borrowed to acquire the shares. Such interest is deductible against the total profits of the company. However to the extent that there is excess interest such current-year interest can be surrendered within a corporation tax group (ie a 75% group). The interest surrendered can be offset against the other company's total profits, minimising its tax.

6. Are losses of the target company/ies available after an acquisition is made?

General rule for using trading losses forward

Subject to anti-avoidance legislation, a trading loss in an accounting period may be carried forward indefinitely for offset against the trading income from the same trade in succeeding accounting periods.

In certain circumstances, losses attributable to particular classes of income are ringfenced against certain income such as:

- Capital allowances for leased machinery or plant – allowances are confined to income from the leasing activity, whether assessable as trading income under Case I of Schedule D (trading income) or under Case IV of Schedule D (Section 403 of the Taxes Consolidation Act)
- Capital allowances of a limited partner: Allowances are confined to the share of income from the partnership trade (Section 1013 of the Taxes Consolidation Act)

Anti-avoidance legislation on sale of shares

Where shares in a loss-making company are sold, specific rules apply to carrying losses forward. The legislation provides that relief for the losses forward is not available where:

- Within any period of 3 years there is both a change in the ownership of a company and (whether earlier or later in that period or at the same time) a major change in the nature or conduct of a trade carried on by the company
- At any time after the scale of activities in a trade carried on by a company has become small or negligible and before any considerable revival of the trade, there is a change in the ownership of the company

The legislation defines major change in the nature or conduct of a trade as including either:

- A major change in the type of property dealt in, or services or facilities provided, in the trade
- A major change in customers, outlets or markets of the trade

Company reconstructions without change of ownership

Subject to certain conditions, capital allowances and relief for losses may be transferred from one company to another where a trading company ceases to carry on a trade and following the cessation, another company carries on the trade where there is a substantial common identity in the ownership of the trade both before and after the cessation of trade.

For the trading losses to be transferred under this section one of the following conditions must be satisfied:

- The same persons must own at least a 75% share in the trade at some time within 1 year before the change and at any time within 2 years after the change
- The trade must have been carried on by a company within the charge to corporation tax

Capital losses

Capital losses can only be offset against chargeable gains arising in the current accounting period or carried forward (but not back) against future chargeable gains. Capital gains on development land can only be offset by capital losses on development land. However it is possible to set off capital losses on development land against capital gains on all types of assets.

Development land is land in Ireland where consideration for the disposal or market value of which at the time that the disposal is made, exceeds the current use value of the land at that time. It includes shares deriving their value or the greater part of their value directly or indirectly from such land, other than shares quoted on a stock exchange.

Where a capital loss is incurred by one group company in relation to the disposal of an asset, that capital loss cannot be transferred to another group member.

7. Is there any indirect tax on the transfer of shares (stamp duty, transfer tax, etc)?

Stamp duty is payable on the transfer of shares in Ireland at a rate of 1% of the consideration paid for the shares or market value, whichever is the higher. It is worth noting that there is no stamp duty on the issue (as opposed to the transfer) of new shares.

The transfer of shares or other securities in a company is exempt from VAT.

8. Are there any particular issues to consider in the acquisition of foreign companies?

In certain circumstances transfers of foreign shares (shares in companies registered outside Ireland) are not chargeable to stamp duty even if the stock transfer form is executed in Ireland. However if the foreign shares transfer relates to Irish immoveable property or to Irish shares, stamp duty may apply.

9. Can the group reorganise after the acquisition in a tax neutral environment? What are the main caveats to consider?

Intra-group transactions

A range of tax reliefs is available allowing the transfer of assets between group companies provided certain conditions are satisfied.

Group relief (for corporation tax and CGT purposes) applies to members of a group as defined for tax purposes. For the purposes of capital gains tax and corporation tax, a company is generally considered to be a group company if:

- Not less than 75% of its ordinary share capital is owned directly or indirectly by the parent company
- The parent company is entitled to not less than 75% of profits available for distribution
- The parent company would be entitled to not less than 75% of the assets available on a winding up

In order to be regarded as a group member, the company must be resident in a EU Member State or EEA State, which Ireland has a tax treaty with, and be trading in Ireland or be an Irish tax resident company.

Stamp duty legislation does not impose any conditions as to the tax residence or place of incorporation of companies claiming group relief. Foreign companies can generally qualify provided they correspond under their domestic law to a body corporate with ordinary share capital. However to qualify for stamp duty relief, the parent company must beneficially own 90% of the company's share capital, be beneficially entitled to 90% of profits available for distribution and be beneficially entitled to 90% of the assets on a winding-up.

Capital gains tax

Generally transfers of chargeable assets between group members are deemed to take place for such consideration as would result in no gain or loss. The transferor and transferee must be an Irish resident, or the asset must represent a chargeable asset. Therefore for non-resident companies (ie companies resident in the EU or in an EEA Member State with which Ireland has a tax treaty) relief only applies to transfers of Irish branch assets.

The group company acquiring the asset is deemed to have acquired it at the same date and for the same base cost as the original group company.

It is also worth noting that an exit charge can be applied in the event of a company becoming non-resident although there are exceptions to this.

Stamp duty

Generally associated companies relief allows for full relief from stamp duty on transfers of most assets within a group of companies (provided the 90% relationship is fulfilled). Associated companies relief only applies to documents stampable as conveyances on sale (eg does not include the creation of leases). This includes contracts for sales, gifts, transfers of leases and exchanges.

Since the introduction of the self-assessment system documents making a claim for associated companies' relief can no longer be submitted for adjudication. Although it is no longer necessary to make an application to Revenue for relief, it is good practice for a statutory declaration to be sworn by a director of the transferee setting out the transaction circumstances and demonstrating that it qualifies for relief. The statutory declaration should be held on file as part of a pack of back-up documents. This is necessary in order to demonstrate entitlement to relief in the event of a Revenue audit. Relief is clawed back if the transferor and transferee companies cease to be associated within 2 years of the transfer.

Transfer pricing

The impact of the transfer pricing rules (in effect as of 1 January 2011) should be considered within the group post-acquisition. Non-trading transactions are not subject to the rules, nor are small or medium-sized enterprises (with fewer than 250 employees and either turnover of less than €50 million or assets of less than €43 million).

VAT

Entities established in Ireland bound by financial, economic and organisational links may be entitled to form a VAT group for Irish VAT purposes. Supplies of goods and services between VAT group members (except supplies of property) are disregarded for Irish VAT purposes. Therefore no VAT is charged on transactions between group members. Each member of the group is however joint and severally liable for the VAT liabilities of the other group members.

10. Is there any particular issue to consider in the case of companies whose main assets are real estate?

Withholding tax obligation

A withholding tax applies where, on a purchase of shares in a company, the consideration exceeds €500,000. The shares (other than shares quoted on a stock exchange) must also derive their value or greater part of their value directly or indirectly from land and buildings in Ireland, minerals in Ireland or any minerals or mining rights, exploration, exploitation right in a designated area.

In these cases, under Section 980 of the Taxes Consolidation Act 1997, the purchaser must withhold from the consideration and remit to the Office of the Revenue Commissioners tax which amounts to 15% of the consideration unless the vendor provides a Form CG50 (Capital Gains Tax Clearance Certificate). A CG50 is also required when the shares consideration exceeds €500,000, the shares were acquired following to a reorganisation and the old shares fell within the category of shares outlined above.

The 15% withholding tax obligation does not apply if the seller obtains a CG50 from the Office of the Revenue Commissioners and delivers it to the purchaser prior to the consideration being paid.

VAT

Ireland has complex rules for VAT on property, which should also be closely examined. A capital goods scheme tracks the use of a property over a 20-year period to ensure the VAT recovered reflects the property use over the period. An annual review will establish if there are any adjustments to be made. There are also recordkeeping requirements over the life of the capital good.

Close company

A close company is a company controlled by 5 or fewer participators. When there is surplus rental and investment income, a close company surcharge applies (at a current rate of 20%) if the close company has not distributed such income within 18 months of the accounting period end.

11. Thinking about payment of dividends out of your country and a potential exit, is there any particular country that provides a tax efficient exit route to invest in your country?

Under Irish domestic legislation no withholding tax applies on payments of dividends to a person or company resident in a tax treaty jurisdiction. Ireland has signed 69 tax treaties, of which 64 were in effect at the time of publication of this guide. To the extent that dividend withholding tax does apply, the rate of withholding is 20%. To take advantage of the exemption from dividend withholding tax, certain procedural requirements must be complied with.

12. How is foreign debt usually structured to finance acquisitions in your country?

There are currently no thin capitalisation rules in Ireland. Therefore acquisitions can be funded 100% with foreign debt. It is usual for such debt to be structured so that a tax deduction is available for market rate interest paid. However it should be noted that Irish legislation provides that interest paid to a 75% non-resident parent or sister company, except a sister company 90% of whose ordinary share capital is owned directly by an Irish resident company, is deemed to be a distribution.

From a Seller's Perspective

13. What are the main differences between share and asset deals?

Double taxation

The sale of assets in a company will typically result in 2 layers of taxation, and corporation tax will be payable by the company in respect of any chargeable gains or balancing charges triggered on the sale of the target assets. Capital gains tax or income tax or corporation tax will also be payable in the hands of the ultimate shareholders, depending on whether the proceeds from the sale are distributed upon a subsequent liquidation of the company or as a dividend.

In contrast the sale of shares avoids double taxation on the extraction of the sale proceeds. Share sales typically only trigger a single layer of taxation – either capital gains tax or corporation tax in the hands of the selling shareholder.

Losses

In a share sale where a target company has losses, it may be possible for the losses to be used going forward (see section 6 above). However in an asset sale, it is not possible to purchase losses.

VAT recoverability

Generally the transfer of assets is subject to VAT. However where the assets transferred constitute a business or part of a business capable of being operated on an independent basis, the transfer is not deemed to be a supply for VAT purposes. This applies to transfers of tangible and intangible assets and applies even if the business has ceased trading.

Specific provisions under Irish VAT legislation allow a company to recover VAT incurred on costs associated with the transfer of a business or part of a business.

The issue, transfer or any dealings in shares is VAT-exempt under Irish VAT legislation. Therefore, where costs (eg professional fees) are incurred by a vendor and those costs have a direct and immediate link to the sale of the shares, the VAT on such costs is irrecoverable under Irish legislation (apart from transactions involving non-EU clients, ie qualifying activities).

EU case law suggests that VAT on costs incurred in a share acquisition may be recoverable where there is no direct and immediate link between the costs incurred and the sale of the shares, and a number of other factors are also present (ie the company acquiring the shares was engaged in the management of the subsidiary being sold, and the funds generated by the sale of the shares will be used for the purpose of group activities). Irish Revenue has commented that this judgment will apply where the subsidiary is directly managed by the parent holding company and does not have its own independent management capabilities. Revenue has noted that in the case of a share acquisition such a holding company will be involved in 2 activities, namely:

- The acquisition of shares in a company, a non-taxable activity
- The supply of management to a newly acquired subsidiary as a taxable activity

Revenue has highlighted that the acquisition costs will relate to both activities and an apportionment must be made to correctly reflect the extent to which the dual use inputs are used for the purposes of its taxable (deductible) and non-taxable (non-deductible) activities.

Recent EU case law suggests that VAT on costs incurred in a disposal of shares may in certain circumstances be recoverable where a holding company disposes of shares in a subsidiary to which it has supplied management services to. The VAT may be recoverable if there is a direct and immediate link between these costs and the overall economic activity of the holding company. The VAT will not be recoverable where the costs are factored into the price of the shares sold. Irish revenue has not yet commented on this case.

Specific provisions under Irish VAT legislation allow VAT recovery on costs incurred in the issue of new shares in a company. Such recovery is only allowable where funds raised through the issue of the new shares will be used by the business to make taxable supplies.

Exiting a group

If a company leaves a group as a result of a sale of shares, a capital gains tax charge may arise where an asset has been acquired from a group member within the previous 10 years.

Anti-avoidance

Anti-avoidance legislation provides that where dividends or distributions are made in connection with the disposal of shares in a company, these can be taxable as part of the proceeds of the disposal of the shares. This provision applies where the amount of dividends paid to a company is more than would reasonably be expected to be made if there were no disposal of the shares.

14. How are capital gains taxed in your country? Is there any participation exemption regime available?

Capital gains tax for residents

Individuals who are resident or ordinarily resident and domiciled in Ireland are liable to Irish capital gains tax on their worldwide gains. The charge to capital gains tax applies to individuals, trusts, unincorporated bodies and companies in the case of development land gains. Companies resident in Ireland are taxed on chargeable gains, other than for development land, at the same rate as capital gains tax, but the tax falls under corporation tax liability.

The current rate of Irish capital gains tax is 33%. An Irish resident and domiciled individual is fully within the charge to capital gains tax on all disposals made in that year, irrespective of the location of the asset.

As a general rule companies incorporated in Ireland are resident in Ireland. But there are a number of exceptions to this rule. An Irish incorporated company is not treated as Irish resident for tax purposes if it is a relevant company and carries on a trade in Ireland or is related to a company, which carries on a trade in Ireland. Also an Irish incorporated company regarded as not resident in Ireland by virtue of a tax treaty is treated as not being tax resident in Ireland.

A relevant company is a company that either:

- Is ultimately controlled by persons resident in the EU or in a country with which Ireland has concluded a double tax treaty and is not under the control, whether directly or indirectly, of a person who is, or persons who are, not so resident
- Is, or is related to, a company whose principal class of shares are substantially and regularly traded on one or more than one recognised stock exchange in an EU Member State or a double taxation agreement country

A company can also be tax resident in Ireland (whether it is incorporated here or not) if its central management and control is exercised in Ireland. The central management and control test is not set out in Irish legislation but has emerged as a result of judicial decisions set down in case law. Factors to be taken into account in establishing where the company's central management and control lie include, eg where the important questions of company policy are determined, where the majority of directors reside, where the negotiations of major contracts is undertaken and where the company's head office is located.

Capital gains tax for non-residents

A company that is non-resident or an individual who is neither resident nor ordinarily resident is liable to Irish capital gains tax on the disposal of specified assets, including:

- Land and buildings in Ireland
- Minerals in Ireland or any rights or other assets in relation to minerals or mining for minerals (exploration or exploitation rights in a designated area are deemed to be assets situated in Ireland)
- Assets situated in Ireland and used for the purposes of trade carried on by the person in Ireland at the time of the disposal where that trade was carried on through a branch or agency or where at or before that time the assets were used, held or acquired for the branch or agency's use or purpose
- Shares in a company where the shares derive their value or the greater part of their value directly or indirectly from assets outlined in the first 2 points above, other than shares quoted on a stock exchange
- Assets situated outside Ireland of an overseas life assurance company being assets which were held in connection with the life business carried on by the company, which at or before the time the chargeable gains accrued were used or held by or for the purposes of that company's branch or agency in Ireland

An individual who is resident or ordinarily resident in Ireland but not domiciled is liable on gains from the disposal of Irish situate assets in full and on gains from disposal of foreign assets to the extent that those gains are remitted into Ireland.

Capital gains tax for temporary non-residents

Capital gains tax also applies to gains accruing on the disposal of certain shares by an individual who is temporarily non-resident when the share disposal is made. The broad effect of this is to deem such an individual to dispose of and reacquire the shares at market value at the end of the tax year in which the individual departs (temporarily) from Ireland (ie he or she is treated as selling the assets at a time when they are resident in Ireland). However for the purpose of filing the appropriate return and paying the tax, the person is deemed to make the disposal in the first year in which they are resident following the period of temporary non-residence.

To be within the above charge, the individual must have:

- A shareholding of 5% or more of the market value of the company (or exceeding €500,000 in value)
- Been resident and domiciled in Ireland at some time prior to his or her departure and for a period of not more than 5 complete tax years

In broad terms, if they are non-resident for more than 5 years, (ie for 6 full tax years), the charge does not apply. However the 5 years must be measured under the rules set out in the legislation.

This temporary non residence anti-avoidance measure is strengthened by an exception to the inter-spousal exemption for CGT purposes. This spousal exemption does not apply to a disposal to a spouse, separated spouse or former spouse who could not be taxed in Ireland on a gain arising on a subsequent disposal of the asset.

Participation exemption regime (applies only to companies)

Subject to certain conditions capital gains realised on the disposal by an Irish resident company of shares in another Irish company or in companies resident in another EU country or a country with which Ireland has a double taxation treaty will generally be exempt from Irish capital gains tax provided the following criteria are met:

- The shares disposed of must be held in a company that is, at the time of the disposal, resident for tax purposes in either an EU Member State (including Ireland) or a country with which Ireland has a double taxation treat
- The company that disposes of the shares must either directly or indirectly:
  - hold least 5% of the company's ordinary share capital
  - be beneficially entitled to at least 5% of the profits available for distribution to equity holders of the company
  - be beneficially entitled in the case of a winding up at least 5% of the assets available for distribution to equity holders
  - for a consecutive period of 12 months ending not more that 2 years before the date of disposal
- Either the subject company alone or alternatively the combination of the subject company, the disposing company and every other company in which the disposing company holds a 5% or more equity interest, considered as a whole, must exist wholly or mainly for the purposes of carrying on a trade or trades
- The shares disposed of must not derive their value or the greater part (ie greater than 50%) of their value from land or mineral rights in Ireland, or be held as part of a foreign business fund

The exemption extends to disposals of certain assets related to shares including options over shares, securities convertible into shares or options to acquire securities convertible into shares.

15. Is there any fiscal advantage if the proceeds from the sale are reinvested?

Generally there is no rollover relief available in Ireland.

Your Taxand contact for further queries is:

Ireland

Sonya Manzor

T. +353 16 39 5212

E. sonya.manzor@williamfry.ie

ITALY

Italy

From a Buyer's Perspective

1. What are the main differences among acquisitions made through a share deal versus an asset deal in your country?

Asset deal

The buyer acquires tax values (subject to depreciation) equal to the price paid, while in a share deal in principle this does not occur (unless certain conditions are met and a specific substitute tax is paid by the buyer itself).

In fact given Italy's corporate income tax rate of 27.5% (higher tax rates are provided in some circumstances for oil, gas and energy industries) and its regional income tax (*Imposta Regionale sulle Attività Produttive*, ie IRAP) rates ranging from 3.9% to 4.9%, it is important to bear in mind that a share deal does not allow in principle any step-up in tax value of the target company's assets that would then generate larger tax deductions (see also section 2 for some exceptions to this principle). On the contrary an asset deal implies a step-up in the depreciable basis of assets transferred corresponding to the purchase price paid allocated to each asset. Goodwill can in principle be amortised only in the case of asset deals where a business as a going concern is transferred (however see section 2 below for some exceptions to this principle in the case of share deals).

Share deal

Tax losses carried forward by the target company may remain available if certain conditions are met (see section 6 below). In asset deals only assets are transferred and any tax loss remains with the transferring company.

Another difference is that a target company's contingent tax liabilities are transferred when the transaction is structured as a share deal (with a normal 4-year statute of limitation which in some circumstances can be extended to 8 years). But in asset deals contingent liabilities relating to the assets or the going concern transferred remain as a general rule with the transferring company.

In accordance with Article 14 of Decree no. 472/1997, buyer of a going concern is jointly and separately liable with the seller for the tax liabilities regarding such assets, but such liability is limited to:

- An amount not exceeding the value of the assets
- Taxes and penalties for violations relating to the year of the transfer and for the 2 previous years

- Taxes and penalties for violations resulting from a tax audit carried out in the year of the transfer or in the preceding 2 years, even if such penalties relate to previous years

Moreover, in order to limit the buyer's liabilities, the law allows the parties to apply for a tax certificate stating the amount of tax liabilities attached to the going concern and existing at the date of the request. Once the certificate is issued, the buyer's liabilities are limited to those resulting from it. The buyer does not take over from the seller any liability if the tax authorities do not issue a certificate within 40 days from the date of application.

The acquisition of shares of a target company is not subject to indirect taxes or stamp duties (see section 7 below). But in case the shares sold regards an Italian joint stock company (*società per azioni*) a 0.22% tax (Tobin tax) applies on transactions executed after 1 March 2013.

In an asset deal where a business as a going concern is transferred, it is subject to registration tax at a rate depending on the nature of assets transferred. Movable property, receivables, goodwill, patents and trademarks, inventory etc are taxed at the rate of 3%, while real estate assets are taxed at the rate of 7% (in some cases at 8%, and at 15% for agricultural land). Moreover when immovable properties are transferred, cadastral and mortgage taxes also apply. These taxes are due for formal transcription in the public registers and rates are set at 3% and 1%.

An asset deal made by the transfer of an isolated asset (ie not a business as a going concern) is subject to VAT or to registration tax, depending on the nature of the seller (whether the seller is liable for VAT or not) and on the nature of the asset transferred.

Moreover the taxable value of a going concern is the market value (not the purchase price), including goodwill, net of liabilities as reported in the company's accounting books, excluding the liabilities that the seller has undertaken to pay. If the assets transferred are subject to different registration tax rates, liabilities are apportioned to the various assets in proportion to their respective value.

Commonly transfer taxes are paid by the buyer. The parties however may agree otherwise. Both parties are jointly and severally liable for the payment of registration tax.

2. What strategies are in place, if any, to step up the value of the tangible and intangible assets in case of share deals?

As a general rule share deals do not allow any step-up in value of any assets of the target company.

If the target company is subsequently merged with the acquiring company, the possible merger deficit (*disavanzo di fusione*), which represents the difference between the cost borne by the absorbing company for acquiring the shares of the merged company and the book value of its net assets, can be used to step up the value of the assets only for accounting purposes, not for tax purposes.

As an exception to this rule the 2008 budget law (Law no. 244/2007) provides that the absorbing company is entitled to step up the tax value (for corporate income tax and IRAP purposes) of tangible and intangible fixed assets received by paying a substitute tax at the rate of 12% on the portion of the step-up in value up to €5 million, 14% on the portion of the step-up from €5 million to €10 million and 16% on the portion of the step-up in value exceeding €10 million. The step-up option can be elected in the tax returns of the year in which the merger takes place or in tax returns of the following tax year. The step-up tax values are effective starting from the fiscal period in which the option is exercised, except for the capital gain or loss computation in the case of sales for which the step-up is effective only from the fourth fiscal period following the one in which the option is exercised.

Other opportunities to step up tax values are provided by Article 15 (10-12) of Decree no. 185/2008, which provides a special rule applicable only to goodwill, trademarks and other intangible assets. The absorbing company is entitled to step up the tax value of these intangible assets by paying a substitute tax at the rate of 16% (see the following section for the consequences in terms of depreciation). Moreover Article 15 of Decree no. 185/2008 allows the absorbing company to step up the tax value of assets other than the fixed assets; this may be done by paying ordinary taxes or, in the case of a step-up of receivables, by applying a substitute tax at a rate of 20%.

3. What are the particular rules of depreciation of goodwill in your country?

In an asset deal where a business as a going concern has been acquired and a goodwill price has been paid, such goodwill can be recorded on the balance sheet and amortised for accounting purposes over 5 financial years or over a longer period if not exceeding its utilisation period and if properly motivated in the accompanying notes. For tax purposes the goodwill must be amortised in not less than 18 financial years (Article 103(3) of the Italian tax code).

On the contrary (as discussed in the preceding section) in a share deal the possible goodwill deriving from a merger can be amortised only for accounting purposes but not for tax purposes unless the option for the substitute taxes is elected.

Where an election is made to pay the 16% substitute tax provided for by Article 15 of Decree no. 185/2008 in order to step up the tax value of goodwill and trademarks, their amortisation for tax purposes can be done over 10 instead of the usual 18 years. The stepped-up tax values are fully effective starting from the fiscal period in which the option is exercised.

4. Are there any limitations to the deductibility on interest of borrowings?

The regime of the deductibility of interest expenses in Italy was completely revised by Law no. 244/2007 (the budget law for 2008) which abolished the thin capitalisation and pro-rata rules then in force.

According to new Article 96 of the Italian tax code, net interest expenses (ie interest expenses less interest income) are deductible up to an amount equal to 30% of earnings before interest, taxes, depreciation and amortisation (EBITDA) as shown in the profit and loss statement.

Interest expenses exceeding the 30% EBITDA threshold are not deductible in the relevant fiscal year and are carried forward in the following fiscal years. Interest expenses carried forward can be deducted in the following fiscal years (without any time limit) if and to the extent that 30% of EBITDA is higher than net interest expenses in that fiscal year. If the 30% EBITDA does exceed net interest expenses, such exceeding EBITDA can be carried forward to offset future exceeding interest.

For the purpose of this computation interest income and interest expenses from loans, financial lease contracts, bonds and from any legal obligation having a financial nature are relevant. Some categories of interest expenses are excluded and considered as totally non-deductible, such as the portion of intra-group interest expenses exceeding the market rate, interest expenses due to residents in some tax havens, interest expenses on bonds having a rate exceeding a certain threshold and interest expenses on loans lent to co-operative companies by their shareholders.

Excessive interest can be offset within a domestic fiscal unit by computing the total income within the group if (and to the extent) other companies within the group have their own 30% EBITDA that exceeds their own interest expenses. The domestic fiscal unit is the general tax consolidation regime that applies in Italy (upon election) to groups of companies. Among other requirements for the election is a required shareholding of higher than 50% of voting rights and participation in profits from the beginning of the fiscal year.

Moreover if a domestic fiscal unity is elected, excessive interest expenses can be offset also by the available 30% EBITDA (net of its own interest expense) of other non-resident subsidiaries having the following requirements:

- The same fiscal year
- A parent company holding the majority of shares from the beginning of the fiscal year
- Audited financial statements

In other words for the purposes of utilising the exceeding 30% EBITDA, a non-resident subsidiary is considered as a virtual participant in the domestic fiscal unity.

In a merger or a demerger interest carried forward is subject to the same limitations imposed for the carryforward of tax losses (ie the net equity test and vitality test explained in section 6).

The regime for the deductibility of interest expenses described above is not applicable to companies operating in banking, finance, insurance and other particular industries listed by the law. For these companies only 96% of interest expenses accrued is tax-deductible.

5. What are usual strategies to push-down the debt on acquisitions?

Commonly an acquisition of shares in an Italian target company is made through a leveraged buyout, ie by setting up a new Italian company financed partially by equity and partially by debt. The new company uses the cash received to buy the shares of the target company. Then the new company and target company are merged. As a consequence of the merger, the debt is pushed down into the surviving company, and interest expenses accrued on it are utilised to offset revenues generated by the target.

In recent years the tax authorities have challenged various cases of leveraged buyouts by considering them abusive tax schemes or by denying the inherence of the interest on such additional debts. The jurisprudence has not yet formed a consistent position on such tax issues.

If for whatever reason a merger is not feasible, another option is to consolidate the new company and the target company in a domestic fiscal unity. In doing so the target's tax position (hopefully a taxable income position) can be offset by the new company's tax position (usually a tax loss position due to interest expenses accrued on the debt).

The upstreaming of dividends may be another available strategy, taking into account that dividends are taxable only on 5% of their amount.

In formulating the strategy for the acquisition, attention must be paid to the limitations to the deductibility of interest on borrowing.

6. Are losses of the target company/ies available after an acquisition is made?

A new regime for carrying forward of tax losses has been introduced in 2011 by Article 23 (9) of Decree no. 98/2011.

According to these new rules tax losses can be carried forward without any time limit but can be used to offset the taxable income only within a 80% threshold, eg given a taxable income for 100 and losses for 120, these losses can offset the income only up to 80 (80% of 100) and the remaining 40 loss (120-80) can be carried forward without any time limit. Tax losses suffered in the first 3 years from setting up the company can be carried forward – as before – without any time limit and are not subject to the 80% threshold.

Such a new regime applies to all carried forward losses not yet expired in fiscal year 2011 and to tax losses generated in fiscal year 2011 and following.

Limitations to the carrying forward of tax losses apply to the transfer of shareholdings and to mergers and demergers.

For anti-tax-avoidance purposes, no loss carryforward is allowed (Article 84(3) of the Italian tax code) and losses are lost when the following conditions are both met:

- The majority of the voting shares in the company that is carrying forward losses is transferred
- The main activity carried on by the company is changed from the one carried on in the fiscal years when losses were suffered. The change in activity has to occur in the year the shares are transferred or during the previous or following 2 years

Nevertheless even if the above conditions are not met a company can still carry forward losses if, during the 2 years before the transfer of shares, it did not reduce employees below 10 units and it showed in the profit and loss statement of the previous year an amount of revenues and salaries. It must also show social contribution respectively exceeding 40% of the average of the same elements in the previous 2 years' profit and loss account (vitality test).

In a merger (or demerger), tax losses carried forward by companies involved are available for the absorbing company (ie the surviving entity) after the merger on the condition that both the vitality test (see above) and the net equity test (ie losses cannot exceed the net equity computed without taking into account any contributions and payments to equity made during the prior 24 months) are passed.

7. Is there any indirect tax on transfer of shares (stamp duty, transfer tax etc)?

In an acquisition of shares of Italian companies, no stamp duty is due. Moreover the deed of the transfer of shares is exempt from registration tax in Italy unless it is drawn up in the form of a notarised deed (ie signed or legalised by a public notary). In such a case, a flat €168 registration tax is due. The same €168 flat registration tax is due if – for whatever reason – a party to the transaction requires a voluntary registration.

It may happen that the seller contributes into a new company the going concern and then immediately sells the shares of the new company to the purchaser. Such share deals should in theory be subject to the flat €168 registration tax but the tax offices are consistently recharacterising them as asset deals (*cessione d'azienda*) and assessing the proportional registration tax rates applicable in an asset deal to the various type of assets (see section 1 above). The position of the Supreme Court on such litigations seems to favour the tax offices.

As regards share deals please note that, starting from 1 March 2013, a Tobin tax has been introduced in Italy at a 0.20% rate (0.22% for 2013) and it is applicable also to the transfers of shares of joint stock companies (*società per azioni*) executed outside financial markets.

8. Are there any particular issues to consider in the acquisition of foreign companies?

When a foreign company is acquired, the main issue to be considered is whether the company falls within Italy's controlled foreign company regime.

According to Italian law (Article 167 of the Italian tax code) and subject to some conditions, a controlled foreign company is treated as a transparent entity and its profits are attributed to the Italian company or individual who controls it. Control means the majority of voting rights or an amount of voting rights giving a dominant influence over the subsidiary.

The controlled foreign company's income is computed by applying the Italian tax provisions regulating the computation of business income and is subject to tax – in the hands of the controlling company – separately and at the taxpayer's average tax rate, which cannot however be lower than 27%.

Until recently Italian controlled foreign company regulations were applicable only when the foreign entity involved was a resident of a tax haven included in a specific blacklist. But the scope of controlled foreign company rules has been broadened by Decree No. 78/2009 to include entities located in any jurisdiction where the following conditions are both met:

- The effective taxation of the controlled foreign company is 50% lower than the Italian taxation on the same income, in the same taxable year
- The foreign company derives more than 50% of its revenues from passive income or intra-group activities

If the above conditions are both met, controlled foreign company rules apply unless the Italian parent company obtains a tax ruling from the Italian revenue agency, providing evidence that the activity carried out by the foreign controlled company does not represent a wholly artificial arrangement aimed at achieving an unlawful tax benefit (ie by giving evidence that there is a real business purpose).

Moreover dividends flowing from companies located in tax havens are not entitled to the 95% participation exemption and the relating dividends (and capital gains) are fully subject to corporate income tax – that is unless they are already taxed for transparency according to the above-mentioned Article 167 of the Italian tax code.

9. Can the group reorganise after the acquisition in a tax neutral environment? What are the main caveats to consider?

Italian law provides for a tax neutral regime applicable to some qualifying corporate restructurings, such as mergers, spin-offs, contributions-in-kind and exchanges of shares. Under this tax neutral regime a deferral of capital gains taxation is allowed and the acquiring entities receive a carryover basis in the assets acquired.

The main caveat to tax neutral restructurings is the specific anti-tax avoidance provision that requires a transaction to be carried out for sound business purposes and not with the sole purpose of obtaining a tax advantage (Article 37-bis of DPR No. 600/1973).

According to this provision tax authorities may disregard single or connected acts, facts and transactions intended to circumvent obligations and limitations provided under tax law and to obtain tax savings or refunds otherwise not due. Such anti-tax avoidance provision applies to a number of transactions, including mergers, divisions, contributions-in-kind, sales of business as a going concern, transfers of shares and others. To disregard the above operations for tax purposes, tax authorities must first inform the taxpayer about the reasons for the application of the anti-tax avoidance provision. The taxpayer then has the right to provide justifications.

Moreover although Italian tax law does not provide for a general anti-avoidance principle applicable in all cases and for all taxes, in December 2008, the Grand Chamber (*Sezioni Unite*) of the Italian Supreme Court stated on the contrary that a general rule based upon the disregard of any abuse of law conduct exists under Italian law, which stems from the ability-to-pay principle in Article 53 of the Italian constitution.

10. Is there any particular issue to consider in the case of companies whose main assets are real estate?

The favourable participation exemption regime (effective tax rate of 1.375%) does not apply to the transfer of shares in real estate companies (Article 87(1)(d) of the Italian tax code). Capital gains on these transfers are subject to corporate income tax at the ordinary 27.5% rate.

A real estate company is defined a company having the value of its assets mainly represented (ie more than 50%) by real estate. Properties used for the purpose of a commercial activity are not deemed to be real estate assets for capital gain purposes.

Shares in a real estate company are entitled to the participation exemption regime if the ratio relating to the real estate assets remains below 50% in the year when shares are transferred. They are also exempt without interruption from the beginning of the third fiscal year before the shares are sold.

11. Thinking about payment of dividends out of your country and a potential exit, is there any particular country that provides a tax efficient exit route to invest in your country?

Domestic withholding tax on outbound dividends is at a rate of 27%. According to Decree No. 138/2011, such a withholding tax will be reduced down to 20% for dividends distributed after 1 January 2012. Moreover this withholding tax can be reduced down to 5%, 10% or 15%, depending on the applicable tax treaty.

No withholding tax applies on dividends in cases where the EU Parent-Subsidiary Directive 435/90/CE is applicable – that is, when a EU parent company has held at least a 10% stake for 1 year in an Italian subsidiary company.

Moreover according to Article 27(3-ter) of Decree No. 600/1973, as modified by Law No. 244/2007 in force from 1 January 2008, dividends distributed by an Italian company to entities that are resident of an EU or EEA country, giving exchange of information (currently only Norway, while the position of Iceland is not completely clear) are subject to a reduced 1.375% withholding tax (corresponding to the ordinary corporate income tax rate at 27.5% on a tax base equal to 5% of the dividends). The reduced rate only applies to dividends paid to companies or other entities that are subject to corporate income tax under the domestic law of their country of residence.

The reduced 1.375% rate only applies to dividends paid out of profits accrued from financial year 2008 onwards.

For distributions made out of profits accrued before 2008, Italian revenue agency has issued Circular Letter No. 32/2011 in order to come into line with the 19 November 2009 judgment of European Court of Justice, in the case C-540/07. According to the agency, if the distribution is made out of profits accrued between 2004 and 2008 a reduced 1.65% withholding tax is applicable corresponding to 5% of the corporate income tax rate at 33% that was in force before 2008.

According to tax treaties signed by Italy with other countries, capital gains realised in the sale of shares of Italian companies are often taxable only in the country of residence of the seller. (However not all the treaties provide such full exemption rules.)

12. How is foreign debt usually structured to finance acquisitions in your country?

In terms of financing acquisitions, any bank loan that lasts for more than 18 months and is granted by an Italian bank is subject to a 0.25% substitute tax (*imposta sostitutiva*) applied on the amount of the loan. This tax substitutes other indirect taxes due on guaranties like mortgages, pledges, etc, related to the bank loan. If instead the bank loan is not subject to the *imposta sostitutiva*, indirect taxes may be due on guaranties deed executed in Italy.

No withholding tax applies to interests from shareholder loans if the EU Council Directive 2003/49/CE on interest and royalty payments is applicable, ie when the 2 companies are established in an EU Member State and one of them holds directly at least 25% of the other for at least 1 year or when a third EU company holds directly at least 25% of both the recipient and debtor companies and the payee is the effective interest payment beneficiary.

When this EU directive does not apply, a domestic 20% withholding tax is levied on interest paid by Italian companies to non-resident companies (although the rate is generally reduced to 10% by tax treaty provisions signed by Italy).

From a Seller's Perspective

13. What are the main differences between share and asset deals?

From a seller's standpoint the main difference between share and asset deals is that capital gains from sales of shares are subject to a more favourable tax regime. Italian companies can benefit from the 95% participation exemption provided some conditions are met. Capital gains realised by individuals are subject to personal tax at a rate ranging from 20% to 24.4% (see section 14 below).

In asset deals the taxation of capital gains is heavier. If an Italian company sells assets the capital gain is subject to both corporate income tax at the ordinary 27.5% rate and regional tax (IRAP) at a rate ranging from 3.9 to 4.9%. However when a business as a going concern is sold, the capital gain is only subject to corporate income tax – not to IRAP. If the capital gain then has to be distributed to shareholders, additional taxation on them should also be considered. In both cases (sale of assets or of a business), if the seller owned the assets for at least 3 financial years prior to transfer, the capital gain can be subject to tax upon election of the seller, in equal instalments over a period of up to 5 years (Article 86(4) of the Italian tax code).

The selling company may also decide to contribute the assets to be sold into a new company in exchange for its shares and then sell that new company's shares to the purchaser. In such transactions the contribution is tax neutral (ie the contributing company does not realise any taxable capital gain and the receiving company still keeps the original tax values of the contributor) and the subsequent sale of the new company's shares may benefit of the participation exemption regime (only 5% of the capital gain is taxable at a 27.5% rate).

Such a scheme is not deemed to be abusive for income tax purposes (as stated in Article 175 of the Italian tax code). For indirect tax treatment see section 7 above.

14. How are capital gains taxed in your country? Is there any participation exemption regime available?

Italian companies are entitled to the 95% participation exemption if the following requirements by law (under Article 87 of the Italian tax code) are met:

- The shareholding has been held at least from the first day of the 12th month prior to the disposal
- Shares have been booked by the seller as a long-term investment (fixed financial asset) in the first balance sheet of the holding period
- The participating company is not resident of a tax haven
- The participating company is doing a real business activity. Companies with assets mainly represented by real estate not used in the business activity are deemed not to perform a real business activity under the active business test

The law does not provide for any minimum level of participation to apply the 95% participation exemption regime.

If these 4 conditions are met the corporate income tax applies at 27.5% on 5% of the capital gain, so tax the tax burden is 1.375%.

If on the contrary these conditions are not met, the capital gain is fully subject to corporate income tax at the ordinary rate of 27.5%. However if the shares were booked as fixed financial assets in the last 3 financial years, the seller can elect to subject the capital gain to corporate income tax in equal instalments over a period up to 5 years (Article 86(4) of the Italian tax code).

For individuals resident in Italy the taxation of capital gains in Italy depends on the level of shareholding as follows:

- If the individual is a non-qualified shareholder, ie owning no more than 20% of voting rights or 25% of the paid-in share capital in the company (not listed at the stock exchange), the capital gain is subject to a 20% substitute tax
- If the individual is a qualified shareholder, ie owning more than 20% of voting rights or 25% of the paid-in share capital in the company (not listed at the stock exchange), the capital gain is subject

to personal tax for 49.72% (ie 50.28% exempt). The capital gain is subject to tax according to the progressive scale of rates. Income exceeding €75,000 is taxed at 43% (plus 3% additional tax for income exceeding €300,000 in 2013), so the highest tax burden on a capital gain is about 24.4% (46% times 49.72%)

15. Is there any fiscal advantage if the proceeds from the sale are reinvested?

For companies there is no specific fiscal advantage if the proceeds from the sale of shares are reinvested.

But some tax benefits for individuals, non-profit entities and non-resident taxable persons are provided by the law on the disposal of certain participations if a number of requirements are met (Article 68(6-bis)(6-ter) as amended by Article 3, Decree No. 112/2008). Capital gains upon the disposal of both qualifying and non-qualifying participations in stock companies and partnerships are tax-exempt provided that:

- The participating entity has been set up for no more than 7 years
- The shares sold were held for at least 3 years
- The capital gains realised are reinvested in another Italian resident company or partnership operating in the same business sector and incorporated within the previous 3 years. The new investment must be made through the subscription or acquisition of such companies' capital and within 2 years from disposal of the participations previously held

However the amount of exempt capital gain cannot, in any case, exceed 5 times the costs borne by the company to which the transferred shares refer during 5 years preceding the disposal, for the purchase or the production of depreciable assets (intangible or tangible, excluding real estate properties) or for research and development activities.

Your Taxand contact for further queries is:

Italy

Alfredo Fossati

T. +39 02 726 0591

E. afossati@fantozzieassociati.it

LUXEMBOURG

Luxembourg

From a Buyer's Perspective

1. What are the main differences among acquisitions made through a share deal versus an asset deal in your country?

A share deal in Luxembourg enables the target company to continue to carryforward its losses. In an asset deal, the target's losses may not be carried forward by the purchaser, but the purchaser will dispose of a higher basis for depreciation in the future. Indeed a financial participation cannot be amortised.

Another disadvantage of asset deals is the relatively high Luxembourg registration duty applicable on the disposal of certain assets (essentially real estate), where registration is mandatory. The duties in an asset deal are higher than in a share deal. Indeed contributions of real estate assets situated in Luxembourg are subject to the following regime:

- Contributions remunerated by shares are subject to a 0.6% registration duty plus a 0.5% transcription tax, whereas contributions remunerated by other means than shares are subject to a 6% registration duty plus a 1% transcription tax (4% for Luxembourg City)
- Transfers made in the context of a corporate restructuring are however exempt from proportional duties. These transfers include contributions of all assets and liabilities, contributions of one or more branches of activities and contributions of all assets and liabilities of the 100%-held subsidiary. But the transfers have to be mainly remunerated (ie with more than 50%) with securities that represent share capital of the companies involved

2. What strategies are in place, if any, to step up the value of the tangible and intangible assets in case of share deals?

In principle in share deals it is not possible to perform a step-up in value in Luxembourg.

3. What are the particular rules of depreciation of goodwill in your country?

In principle goodwill may be depreciated for tax purposes over a 10-year period.

4. Are there any limitations to the deductibility on interest of borrowings?

Luxembourg has 3 types of limitation to the deductibility of interest on borrowings:

- Limitations related to the purpose of the expense
- Limitations based on transfer pricing rules
- Limitations based on the recharacterisation of the interest expense into a dividend

Limitations related to the expense's purpose

Only expenses incurred exclusively by businesses are considered to be tax-deductible operational expenses. The purpose of this rule is to draw a line between operational and personal expenses (a comment relevant mostly for individual commercial enterprises). It is not designed to distinguish between expenses that are or are not necessary and/or profitable for the enterprise. Therefore interest payments are deductible if the debt is contracted in the company's interest. One limitation to this rule is that expenses which are economically connected to tax-exempt income are not deductible. Based on this rule limits on interest deduction apply to an exempt dividend, income derived through a foreign permanent establishment or exempt capital gains on the disposal of shares.

Limitations based on transfer pricing rules

Transfer pricing principles are defined in Articles 56 and 164(3) of Luxembourg's corporate income tax law.

Article 56 provides that the tax authorities can determine the operating income on a lump-sum basis in a situation where a transfer of profit occurred because of particular direct or indirect economic relationships that exist between the taxpayer and a non-resident person.

Article 164(3) provides that hidden distributions, defined as direct or indirect advantages granted by the company to the shareholder, which would otherwise not have been granted absent the shareholding relationship, are non-deductible from the taxable basis of the company.

In this respect it is also worth mentioning that the Luxembourg tax authorities recently issued 2 circulars regarding intra-group financing activities.

Among other requirements such circulars enable Luxembourg companies involved in intra-group financing activities to rely on the transfer pricing guidelines in order to evidence that the remuneration is at arm's length. It also allows them to evidence the activity carried out is in line with third party transaction characteristics, as well as the procedure to follow to obtain a binding advance pricing agreement from the Luxembourg tax authorities on the financing activity.

Limitations based on the recharacterisation of interest expense into a dividend

Based on the substance-over-form approach an instrument is qualified as debt or equity based on its economic nature – that is not necessarily based on its legal qualification. If an instrument is requalified from debt into equity, the proceeds are no longer considered as interest but are instead considered as dividend for tax purposes and the payment will not be tax deductible.

Article 164(2) of Luxembourg's income tax law furthermore includes specific situations where interest might be recharacterised into dividends. Distributions of any kind made to shareholders, founder's shares, *parts bénéficiaires, parts de jouissance* or any other titles including variable interest bonds entitling the holder to a participation in the annual profits or the liquidation proceeds are to be treated as dividend distributions and therefore non-deductible.

5. What are usual strategies to push-down the debt on acquisitions?

Tax consolidation between the profit-making entity and the debtor entity may be one way to push-down debt on acquisitions. However the conditions for a tax consolidation in Luxembourg are quite restrictive.

Another strategy is to form a domestic holding company which in turn forms a temporary merger subsidiary used to perform the acquisition. Upon the consummation of the transaction, the merger subsidiary is merged into the target and the proceeds are disbursed to the selling shareholders in exchange for their stock. Financing is arranged for the merger subsidiary, which is subsequently assumed by the target as the successor to the merger. Financing may come directly from third parties or internally through back-to-back loans.

(For specific interest deductibility conditions in the context of intra-group financing activity, please refer to section 4 above.)

If the acquisition is initially done without using debt at the local level, it can subsequently be introduced in Luxembourg through a variety of means. Direct financing of the target and a distribution of the proceeds may be one way.

Causing the target to be sold to a newly-formed domestic subsidiary of the foreign parent for a note may be another. Caution should be exercised however as such transactions may create a dividend, giving rise to withholding tax.

6. Are losses of the target company/ies available after an acquisition is made?

A share deal enables the target company to continue to carry forward its losses.

In an asset deal losses of the target may not be carried forward by the purchaser.

Luxembourg capital companies remain in any case liable for a minimum corporate income tax. As a result even though losses are incurred, a Luxembourg capital company remains liable for a minimum amount of corporate income tax. The amount varies depending on the activities of the company. A so-called SOPARFI (ie a capital company investing more than 90% in financial assets) is liable for €3,000 (€3,210 including the 7% solidarity surcharge). All other capital companies are liable for an amount that varies between €500 and €20,000 depending on their total amount of balance sheet.

7. Is there any indirect tax on transfer of shares (stamp duty, transfer tax etc)?

Since 2009 Luxembourg companies are no longer subject to the 0.5% capital duty that was formerly levied on the value of the assets contributed to the company upon incorporation and capital increases.

Contributions of real estate assets situated in Luxembourg are however now subject to the following regime:

- Contributions remunerated by shares are subject to a 0.6% registration duty plus a 0.5% transcription tax
- Contributions remunerated by other means than shares are subject to a 6% registration duty plus a 1% transcription tax (4% for Luxembourg City)

Transfers made in the context of a corporate restructuring are exempt from proportional duties. These transfers include contributions of all assets and liabilities, contributions of one or more branches of activities and contributions of all assets and liabilities of the 100%-held subsidiary) The transfers must however be mainly remunerated (ie with more than 50%) with securities that represent share capital of the companies involved.

8. Are there any particular issues to consider in the acquisition of foreign companies?

In principle there are no particular issues to consider when acquiring foreign companies. However locating the foreign entity in a double tax treaty jurisdiction could reduce potential withholding tax implications in the country of investment or source country.

Luxembourg does not have any controlled foreign corporation legislation. Therefore the use of foreign intermediate holding entities to structure an investment does not raise tax issues to the extent the structuring is not considered abusive.

9. Can the group reorganise after the acquisition in a tax neutral environment? What are the main caveats to consider?

Luxembourg's corporate income tax law provides for a special tax neutral regime applicable to certain qualifying corporate restructurings (such as mergers, demergers, etc). These are based on the tax regime of the EU Council Directive 90/434/EEC (as further amended) on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States, known as the EU Merger Directive.

In Luxembourg tax neutral mergers are possible for purely domestic reorganisations or if a Luxembourg company transfers its assets to another EU company in the course of a merger or demerger involving a company from another EU Member State. A cash payment of a maximum of 10% of the nominal value of the shares allocated to the shareholders of the absorbed company is allowed.

The merger is tax neutral only to the extent Luxembourg retains the right to tax the deferred gain in the future, which generally means that a permanent establishment has to continue in Luxembourg. The transfer of permanent establishments located outside Luxembourg is also covered: if the permanent establishment is located in a EU treaty country, Luxembourg exempts the transfer of this permanent establishment by a Luxembourg company.

In the absence of a tax treaty between said country and Luxembourg, Luxembourg retains the right to tax the gain on the transfer of this permanent establishment. If the absorbing company has a participation in the absorbed company that is cancelled at the time of the merger, this participation is deemed sold at fair market value, even if the merger is realised in a tax neutral manner. A tax exemption is available based on the participation exemption regime where the absorbing company holds a qualifying participation of 10% or has an acquisition value of at least €1.2 million in the absorbed company for at least 12 months. In addition the gain realised upon the cancellation of the participation in the absorbed company is tax exempt if the absorbing company has had a participation of at least 25% in its subsidiary, without any holding period requirement.

A tax neutral demerger is possible for purely domestic reorganisations under the condition that all or part of the assets of a company is transferred to several Luxembourg-resident capital companies in the course of the demerger.

Under similar conditions a tax neutral demerger is available in a EU context.

The partners or shareholders of the demerged company have to receive shares in the beneficiary companies on a basis proportional to their participation in the demerged company. A cash payment not exceeding 10% of the nominal value of the shares allocated to the shareholders of the absorbed company is allowed. The assets transferred have to constitute an enterprise or a branch of activity.

10. Is there any particular issue to consider in the case of companies whose main assets are real estate?

Contributions of real estate assets situated in Luxembourg are subject to the following registration duties:

- Contributions remunerated by shares are subject to a 0.6% registration duty plus a 0.5% transcription tax
- Contributions remunerated by other means than shares are subject to a 6% registration duty plus a 1% transcription tax (4% for Luxembourg City)

Where a Luxembourg company acquires foreign real estate directly or through a local real estate company, the Double Tax Treaty (DTT) provisions should be checked carefully together with the local tax regime to analyse how income from the investment will qualify and where it will be taxed. Some treaties entail specific provisions applicable to income from real estate entities. This income might either be considered as capital gain or as real estate income and therefore be taxable either in the country where the real estate is located or in the country of residence of the beneficial owner of the income. Even though the company's income might be exempt by the application of such rules, a minimum amount of corporate income tax will be payable according to the principles mentioned in section 6 above.

11. Thinking about payment of dividends out of your country and a potential exit, is there any particular country that provides a tax efficient exit route to invest in your country?

No particular country provides a tax efficient exit route to invest in Luxembourg since Luxembourg is already the suitable jurisdiction for profit repatriation purposes.

Luxembourg has an exemption regime applicable to dividend and liquidation proceeds received and capital gains realised on share sales under certain conditions.

Luxembourg furthermore exempts dividend distributions from withholding tax under certain conditions. This exemption of withholding tax not only applies in a EU context but has also recently been extended to distributions made to entities located in a country with which Luxembourg has concluded a DTT. Finally Luxembourg generally exempts interest payments from withholding tax. Therefore Luxembourg companies can be used as both holding and financing vehicles for acquisitions.

The use of convertible debt instruments is also often a good alternative, when the repatriation of dividends cannot be achieved in a tax efficient way (because of withholding tax implications).

Participation exemption: dividends

Dividends (as well as liquidation proceeds) received by Luxembourg companies are in principle currently taxable at a rate of 29.22% (for companies whose registered office is in Luxembourg City). But they are exempt from corporate income tax and municipal business tax if the following conditions are met:

- The distributing subsidiary is a collective entity referred to in Article 2 of the EU Council Directive 2011/96/EU on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, known as the EU Parent-Subsidiary Directive. Alternatively the distributing subsidiary is a fully taxable Luxembourg company or a non-resident capital company which is liable to a tax corresponding to Luxembourg corporate income tax (ie subject to at least half of the Luxembourg corporate income tax rate, meaning it is subject to at least 10.5% corporate income tax)
- At the date the dividend is placed at the recipient company's disposal, the latter holds or commits to hold a continuous shareholding for at least 12 months. This shareholding should represent at least 10% of the distributing company's capital or its acquisition price should amount to at least €1.2 million

The beneficiary may hold its participation through a tax-transparent entity as defined in Article 175(1) of Luxembourg's income tax law. The underlying shareholding is valued according to the proportion held in the net assets of the tax transparent entity.

If a dividend is exempt, the amount of expenses in direct economic connection with this dividend income (eg interest expenses that relate to the financing of the shareholding) is non-deductible up to the amount of dividends received.

If a write-down of the participation takes place, then this write-down is only deductible to the extent that the write-down exceeds the amount of dividends received during the current as well as previous financial years.

If a write-down of participation was undertaken in the past and has to be subsequently revalued above the written-down value, then the income derived from the revaluation of the participation is deemed to be an exempt dividend distribution. However the amount to be exempted may not exceed the sum of all related expenses and write-downs that were considered to be non-deductible in the current and in previous years, in accordance with the rules described above.

Participation exemption regime: capital gains

Capital gains realised by Luxembourg companies upon the disposal of shareholdings are in principle currently taxable at a rate of 29.22% (for companies whose registered office is in Luxembourg city). But they are exempt from corporate income tax and municipal business tax if the following conditions are met:

- The subsidiary is a collective entity referred to in Article 2 of the EU Parent-Subsidiary Directive, or a fully taxable company which is a resident of Luxembourg, or a non-resident company which is liable to a tax corresponding to Luxembourg corporate income tax
- At the date of the disposal the seller has held or commits to hold for an uninterrupted period of 12 months, a shareholding that amounts either to 10% of the shares issued by the company or to an acquisition cost of at least €6 million

Apart from the conditions mentioned above the capital gains realised upon disposal of participation are subject to a recapture rule. According to this recapture rule, capital gains will remain subject to tax up to the sum of all related expenses that were deducted for tax purposes in the year of disposal or in previous financial years. Expenses include interest expenses on loans used to purchase the shares or any write-downs of the participation. This recapture rule merely implies that in certain cases, the deduction of related expenses will give rise to a tax deferral rather than to an absolute saving.

Participation exemption regime: exemption of dividend withholding tax

Dividends distributed by a Luxembourg company are in principle subject to a withholding tax at a rate of 15%, unless a reduced rate under the provisions of a DTT applies.

However a general exemption from withholding tax applies to dividend distributions to:

- A collective entity referred to in Article 2 of the EU Parent-Subsidiary Directive
- A fully taxable corporation or permanent establishment of a collective entity which is a Luxembourg resident
- A Luxembourg permanent establishment of a capital company which is resident in a state with which Luxembourg has concluded a DTT
- A Swiss resident capital company subject to corporate income tax without benefiting from a tax exemption
- A capital company or co-operative company which is a resident of an European Economic Area country other than an EU Member State and which is liable to a tax corresponding to the Luxembourg corporate income tax

- A permanent establishment of a capital company or co-operative company which is a resident of an EEA country other than an EU Member State
- A fully taxable non-resident company located in a country with which Luxembourg has concluded a DTT

At the date the dividends are placed at the beneficiary company's disposal, the latter holds or commits to hold for a continuous period of at least 12 months a direct shareholding of at least 10% in the capital of its subsidiary or a shareholding that was acquired for at least €1.2 million.

The beneficiary may hold its participation through a transparent entity as defined by Article 175(1) of Luxembourg's income tax law. The underlying shareholding will be valued according to the proportion held in the net assets of the transparent entity.

If the above conditions are not met and a dividend distribution is not the best way to repatriate profits in a tax efficient way, convertible debt instruments can be used, because interest is generally not subject to any withholding tax in Luxembourg.

Even though the income of the company might be fully exempt by application of the participation exemption regime, a minimum amount of corporate income tax will be payable according to the principles mentioned in section 6 above.

12. How is foreign debt usually structured to finance acquisitions in your country?

Straight loans or convertible debt instruments can be used to structure foreign debt to finance acquisitions, depending on the needs in terms of profit repatriation. To the extent the interest on the debt is considered an arm's length interest rate, the payment is considered tax-deductible and is generally not subject to withholding tax (except if EU Savings Directive conditions of apply).

From a Seller's Perspective

13. What are the main differences between share and asset deals?

From a seller's perspective the main difference between a share deal and an asset deal is that the capital gain realised on a share deal can be fully tax-exempt under certain conditions. But as a downside the losses carried forwards and the current losses up to the transfer date are denied.

14. How are capital gains taxed in your country? Is there any participation exemption regime available?

Capital gains realised by Luxembourg companies upon the disposal of shareholdings are in principle currently taxable at a rate of 29.22% (for companies whose registered office is in Luxembourg City). But these gains are exempt from corporate income tax and municipal business tax if the following conditions are met:

- The subsidiary is a collective entity referred to in Article 2 of the EU Parent-Subsidiary Directive, or a fully taxable company resident in Luxembourg, or a non-resident company liable to a tax corresponding to Luxembourg corporate income tax
- At the date of the disposal the seller has held or commits itself to holding for an uninterrupted period of 12 months, a shareholding that amounts either to at least 10% of the shares issued by the company or to an acquisition cost of at least €6 million

Notwithstanding what is mentioned above, the capital gains realised upon disposal of participation are subject to a recapture rule. According to this recapture rule capital gains will remain subject to tax up to the sum of all related expenses that were deducted for tax purposes in the year of disposal or in previous financial years. Expenses include eg interest expenses on loans used to purchase the shares or any write-downs of participation. This recapture rule merely implies that in certain cases the deduction of related expenses will give rise to a tax deferral rather an absolute saving.

Even though the income of the company might be fully exempt by application of the participation exemption regime, a minimum amount of corporate income tax will be payable according to the principles mentioned under section 6 above.

15. Is there any fiscal advantage if the proceeds from the sale are reinvested?

Luxembourg tax law enables a Luxembourg company to defer a capital gain realised on a corporate reorganisation if an amount corresponding to the sale proceeds of a fixed asset realised is reinvested into another fixed asset including substantial participations.

Upon the sale of such participations the participation exemption is however denied. The exemption is available for shares acquired as a contribution of assets or for shares exchanged in the course of a share or asset merger. If shares not forming part of a participation qualifying for the dividend and/or capital gains exemption are exchanged for a participation that meets the participation threshold for such exemptions, the participation exemption will nevertheless be denied for a period of 5 years. This avoids reorganisations exclusively driven by the motivation to benefit from the participation exemption regime.

Your Taxand contact for further queries is:

Luxembourg

Olivier Remacle

T. +352 26 940 239

E. olivier.remacle@atoz.lu

MALTA

Malta

From a Buyer's Perspective

1. What are the main differences among acquisitions made through a share deal versus an asset deal in your country?

Share deal

The purchase of assets through a share acquisition may be subject to duty on documents. However exemptions from duty on documents apply if the company has more than 90% of its business activities outside Malta. If the share transfer is not exempt, then the duty on documents is computed on the market value of the shares. The market value is usually taken to be the net asset value of the shares, adjusted to reflect the market value of any immovable property, any investment in another company and goodwill. Duty on documents is levied at €2 on every €100 of the market value, with the rate being €5 on every €100 if the company has more than 75% of its assets in immovable property situated in Malta.

It is possible for a group company to transfer losses to another group company as long as the 2 companies are considered to belong to the same group for income tax purposes. Shareholding must exceed 50% for companies to be considered as a group and enable the transfer of trading losses between companies. The surrendering of trading losses must be made within the same tax year. Therefore any losses carried forward cannot be surrendered. Tax losses carried forward by the target company may be utilised by the acquiring company only if the 2 companies are merged, unless the Inland Revenue Department considers such merger as being a scheme and therefore applies the anti-abuse provisions. Anti-abuse provisions apply when the transfer of losses to a group company arise from profits relating to immovable property situated in Malta.

The future sale of shares may be subject to capital gains tax at the rate of 35%, but an exemption applies if a non-resident person makes the transfer and the Maltese company (in which the share transfer is being made) does not have any immovable property in Malta.

Share transfers are not subject to value-added tax.

Asset deal

The purchase of individual tangible assets (except for the purchase and sale of immovable property situated in Malta) does not trigger any tax issues. Duty on documents or income tax is not payable upon the purchase of assets.

Goodwill is not deductible for income tax purposes and it may not be amortised for tax purposes. Other assets used in income production, eg plant and machinery qualify, for a tax deduction in form of capital allowances (wear and tear rates as prescribed by the Inland Revenue Department).

Purchase of individual assets may be subject to VAT (at 18%), unless the transfer of assets is considered to be a transfer of a going concern, in which case no VAT is applicable.

2. What strategies are in place, if any, to step up the value of the tangible and intangible assets in case of share deals?

Companies who opt to re-domicile to Malta or companies resulting from a cross-border merger are entitled (but not obliged) to claim a step-up in the tax base cost of assets situated outside Malta without any adverse Malta tax consequences.

A share acquisition does not entitle the acquiring company to any tax deductions. Therefore it is not possible to take advantage of an increase in the step-up value of assets during a simple share transfer. However revaluations are possible and the increase in the value is not subject to any tax.

3. What are the particular rules of depreciation of goodwill in your country?

Goodwill may not be amortised for income tax purposes. It is a non-deductible expense.

4. Are there any limitations to the deductibility on interest of borrowings?

Malta has no debt-to-equity ratios or thin capitalisation rules and there are no limitations on the deduction of interest provided such interest is incurred in the production of the income. Therefore interest paid on a loan used to acquire an investment may be deducted from dividend income received from such investments (unless the dividend income is exempt under participation exemption rules). Although no specific rules limit the deductibility of interest on borrowings, general anti-abuse provisions may limit a scheme, which reduces the amount of tax payable by any person.

As a general rule no distinction is made between intra-group debt and third party lenders.

5. What are usual strategies to push-down the debt on acquisitions?

Since Malta has no thin capitalisation rules or debt-to-equity ratios, it is possible to push-down debt by an assignment, transfer or contribution of any existing loan. The tax legislation clearly provides that any interest payable on capital employed in acquiring the income is allowable for income tax purposes. No duty on documents is payable on the assignment, transfer or contribution of a debt and there are no limitations on debt push-downs.

6. Are losses of the target company/ies available after an acquisition is made?

Tax losses may be transferred from one company to another (within the same group) provided the transfer of loss is made during the same year in which it is incurred.

Only trading losses may be surrendered to group companies. Any capital losses as well as unabsorbed capital allowances are carried forward indefinitely and may be deducted against the same type of profits realised in future periods but may not be surrendered to another group company.

Any losses incurred by the target company/ies before the year of acquisition may not be transferred to other companies after acquisition unless the 2 companies merge.

It is possible that the Inland Revenue Department may view the purchase and eventual merger of 2 companies as a scheme to utilise tax losses by the target company, in which case anti-abuse provisions will apply.

7. Is there any indirect tax on transfer of shares (stamp duty, transfer tax etc)?

Duty on documents (stamp duty) is payable (by the buyer) upon the transfer of shares at €2 on every €100 or €5 on every €100 of the market value of the shares (see section 1 above). As pointed out exemptions from duty on documents apply if the company whose shares are being transferred has more than 90% of its business activities outside Malta. If no exemption applies the market value of shares is computed on the basis of the company's net asset value, with adjustments for the market value of any other shares held by the company, for increases in the market value of immovable property situated in Malta and for goodwill. Goodwill is calculated as 2 years' profit based on the company performance over the last 5 years of operation.

Share transfers are not subject to any VAT.

8. Are there any particular issues to consider in the acquisition of foreign companies?

The acquisition of shares in a company incorporated outside Malta is not subject to duty on documents.

Malta does not have any controlled foreign company legislation or transfer pricing rules. Therefore transactions with foreign controlled entities will not create any limitations to tax deductions in Malta. This is however premised on all transactions being made using the arm's length principle in view of general anti-abuse provisions in Malta's income tax legislation.

If the equity investment qualifies as a participating holding then any dividend income received from such holding or capital gains realised upon the disposal or transfer of such investment is exempt from income tax. An investment is considered to be a participating holding if any of the following conditions is satisfied:

- The Maltese company has at least 10% of the equity shares in another company
- The Maltese company is an equity shareholder in a company and is entitled to purchase the balance of the company's equity shares or it has the right of first refusal to purchase such shares
- The Maltese company is an equity shareholder in a company and is entitled to either sit on the board or appoint a person on the board of that subsidiary as a director
- The Maltese company is an equity shareholder which invests a minimum of €1,164,000 (or the equivalent in a foreign currency), and such investment is held for a minimum uninterrupted period of 183 days
- The Maltese company holds the shares in a company to further its own business, and the holding is not held as trading stock for the purpose of a trade

Furthermore the body of persons in which the participating holding is held must satisfy any 1 of the following 3 conditions:

- It is resident or incorporated in the EU
- It is subject to foreign tax of a minimum of 15%
- It does not derive more than 50% of its income from passive interest and royalties

Alternatively the equity investment must satisfy both of the following conditions:

- The shares in the non-resident company must not be held as a portfolio investment
- The non-resident company or its passive interest or royalties have been subject to tax at a rate not less than 5%

Maltese companies may also avail themselves of double taxation relief or unilateral relief when receiving foreign source dividend income. Relief is granted against any Malta tax due on the income received.

9. Can the group reorganise after the acquisition in a tax neutral environment? What are the main caveats to consider?

Mergers, demergers, amalgamations and reorganisation within a group of companies are tax neutral if the shareholding position of every shareholder remains unchanged.

The above are exempt from duty on documents as well as capital gains tax.

No income tax and/or duty on documents are due upon the transfer of immovable property or shares or any other asset between 2 companies which form part of the same group.

10. Is there any particular issue to consider in the case of companies whose main assets are real estate?

Exemptions from capital gains tax upon share transfers exclude companies that hold immovable property situated in Malta.

Transfer of immovable property may be subject to property transfer tax at the rate of 12% on the consideration instead of 35% on the capital gain.

11. Thinking about payment of dividends out of your country and a potential exit, is there any particular country that provides a tax efficient exit route to invest in your country?

Malta does not impose any withholding tax on dividend distributions made by a Maltese company, irrespective of the recipient's tax residence and tax status. Therefore Maltese companies provide an efficient vehicle for investors from outside the EU who wish to invest in a company incorporated in a EU Member State. Dividends received by a Maltese company from another Member State may benefit from the EU Parent-Subsidiary Directive (Council Directive 2003/123/EC). Since such an investment (in an EU company) qualifies as a participating holding, the dividend income received by the Maltese company is exempt from any tax in Malta. Since Malta does not levy any withholding tax, there will be no tax leakage whatsoever.

The sale of shares in a Maltese company by a non-resident person is exempt from any tax in Malta as long as the said company does not own immovable property in Malta.

12. How is foreign debt usually structured to finance acquisitions in your country?

Deduction of interest for income tax purposes is allowable only against income derived from capital employed on which the interest is due. For example, if the financing is used to acquire an investment, which in return pays out dividends, the interest expense may be deducted against any dividend income received. However no tax benefit is available if the income received from the investment qualifies for the participation exemption.

From a Seller's Perspective

13. What are the main differences between share and asset deals?

Share deals

The sale of shares in a Maltese company by a Maltese resident company is subject to tax in Malta unless the participation exemption applies. The gain on such shares is computed by deducting the cost of shares from the market value of the shares of the company. The market value of shares is computed on the basis of the company's net asset value with adjustments for the market value of any other shares held by the company, for increases in the market value of immovable property situated in Malta and for goodwill. Goodwill is calculated as 2 years of profit based on the company's performance over the last 5 years.

Should the seller transfer the shares at a loss (a tax loss is computed using the same rules as applied when calculating a capital gain), then such loss is carried forward to the following year and may be utilised against any future capital gains. No limitation exists on the maximum number of years that the loss may be carried forward.

If the person transferring the shares in a Maltese company is a non-resident person, then any gain is not subject to tax in Malta provided the Maltese company does not own immovable property in Malta.

Asset deals

Capital gains tax is levied if the asset being transferred is immovable property or securities (although any capital gain realised on the transfer of shares held by non-resident persons is not subject to tax provided the Maltese company does not own any immovable property in Malta). The capital gain is computed in accordance with prescribed rules. However the value of assets takes into consideration the market value of the assets and not only the transfer value.

Any gains on the transfer of other assets used by the business in its economic activity are brought to charge by computing the balancing statement. The gain brought to charge (at the standard rate of 35% for companies and progressive rates for individuals) is the difference between the transfer value and the written-down value of the asset being sold. The gain arising from the sale of the assets is limited to the total capital allowances deducted from profits in previous tax years. A balancing charge is brought to charge, while a balancing allowance is tax-deductible.

Should the seller have an economic activity and be registered for VAT purposes, then the sale of the assets may be subject to VAT, at the standard rate of 18% unless the transfer of assets is deemed to be considered a transfer of a going concern and, in which case, the transfer of assets is not subject to VAT. No duty on documents applies unless the asset is immovable property situated in Malta.

Other assets outside the scope of capital gains tax such as receivables are not subject to any tax on any gain realised upon a transfer.

14. How are capital gains taxed in your country? Is there any participation regime available?

Capital gains are brought to charge together with any other income. Capital gains apply upon transfer of shares (unless the participation exemption applies) and of immovable property.

The applicable income tax rate depends on whether the gain arises in the hands of an individual or a company. Individuals are taxed at progressive rates with the highest tax rate being 35%. Companies are taxed at a standard rate of 35% subject to double taxation relief. Therefore a Maltese company in receipt of foreign source capital gains (which do not qualify for the participation exemption) may claim a Flat Rate Foreign Tax Credit (FRFTC) of 25% so that the tax payable is reduced from 35% to 18.75%. Upon a distribution of such gains or profits, the shareholder may be entitled to claim a tax refund equivalent to two-thirds' tax paid by the company so that the overall effective tax rate is 6.25%.

Transfers made by a non-resident person in a Maltese company are exempt from tax as long as such company does not hold immovable property in Malta.

Malta's participation exemption is quite generous and it applies to dividend income as well as to capital gains arising from the transfer of a participating holding. (See details in section 8 above.)

15. Is there any fiscal advantage if the proceeds from the sale are reinvested?

Rollover relief is available to companies that transfer an asset used in the business for at least 3 years and replaced within 1 year. Therefore the sale of immovable property may not be brought to charge but the original cost of the immovable property is reduced by the gain. Such relief defers tax liability until the asset is disposed of and not replaced.

Anti-abuse provisions were introduced by the Inland Revenue Department to minimise tax avoidance when premises are replaced by property of a lower value than the original property.

Your Taxand contacts for further queries are:

Malta

Walter Cutajar

T. +356 2730 0045

E. walter.cutajar@avanzia.com.mt

Mary Anne Inguanez

T. +356 2730 0045

E. maryanne.inguanez@avanzia.com.mt

MAURITIUS

Mauritius

From a Buyer's Perspective

1. What are the main differences among acquisitions made through a share deal versus an asset deal in your country?

Share deal

Under the Registration Duty Act transfer of shares in a company shall include any acquisition by a company of its own shares by way of redemption or share buy-back or reduction in capital or in any other manner and issue of new shares to any person which result in a change in control of that company.

In the event that documents witnessing a transfer for valuable consideration of shares in the following takes place:

- In any financial institution, commercial, industrial or civil society, partnership or association
- In any company with the following among its assets:
  - Any freehold or leasehold immovable property
  - Any shares in a partnership which reckons among its assets such property, or any shares that the partnership holds in any other partnership, successive partnership, company or successive company which reckons among its assets such property
  - Any shares in a company which reckons among its assets such property, or any other shares that the company holds in any other company, successive company, partnership or successive partnership which reckons among its assets such property

The buyer will have to pay a registration of 5% of the valuable consideration of shares.

In the event that the transfer of shares do not entail any transfer of the above mentioned assets/ company types, then the transfer documents will be registered free.

Asset deal

Asset deals will attract a registration duty of 5% of the value of the property.

2. What strategies are in place, if any, to step up the value of the tangible and intangible assets in case of share deals?

In principle, step up of value in case of share deals are not allowed.

3. What are the particular rules of depreciation of goodwill in your country?

Mauritius follows the depreciation rules under IFRS 3, which requires goodwill acquired in a business combination to be recognised by the acquirer as an asset from the acquisition date. This is initially measured as the excess of cost of the business combination over the acquirer's interest in the net fair value of the acquirer's identifiable assets, liabilities and contingent liabilities.

Furthermore IFRS 3 prohibits the amortisation of goodwill acquired in a business combination and instead requires the goodwill to be tested for impairment annually, or more frequently if events or changes in circumstances indicate that the asset might be impaired.

4. Are there any limitations to the deductibility on interest of borrowings?

According to Section 19 of the Income Tax Act 1995 (ITA 1995), interest which has been incurred in respect of capital employed exclusively in the production of gross income shall be allowed as an allowable deduction.

It should be noted that there are no thin capitalisation rules in Mauritius.

5. What are usual strategies to push-down the debt on acquisitions?

Up to now, domestic companies have not adopted debt push-down strategy. There are tax opportunities to promote debt push-down strategy. For example when an entity (parent entity) resident in Mauritius intends to finance another entity also resident in Mauritius through debt, it can set up a SPV for the acquisition and park the loan in the SPV. After the acquisition the SPV can be merged with the acquired entity. The interest on loan will be available as a deduction against the income of the acquired company.

On the other hand if the loan was parked in the parent entity's books, the interest on loan will not be allowable as a deduction as it will be considered interest incurred on the production of exempt dividend income. (Dividend income received by the Parent entity from the acquired company is exempt.)

6. Are losses of the target company/ies available after an acquisition is made?

Accumulated losses cannot be carried where there has been a change of more than 50% in the ultimate shareholding of a company.

7. Is there any indirect tax on transfer of shares (stamp duty, transfer tax etc)?

A stamp duty of MUR500 (approx. USD17) is levied on documents witnessing transfer of property.

8. Are there any particular issues to consider in the acquisition of foreign companies?

A number of issues can be considered in the case of acquisition of foreign companies.

Tax Treaties

Whether the company being acquired is in a country with which Mauritius has a tax treaty. Mauritius has 38 bilateral tax treaties in place, which are based mainly on the OECD model. These treaties primarily provide for taxing rights to the resident state that is Mauritius. As far as passive income such as dividend, interest and royalties is concerned, the negotiated rate of withholding tax is beneficial. With several countries it is zero or less than the domestic rate applicable in the source country.

Holding companies

Mauritius is a low tax jurisdiction and it also has a very favourable tax credit mechanism (explained below), which may bring a company to a tax neutral position in Mauritius.

Tax credit mechanism

Under the ITA 1995 and the Income Tax (Foreign Tax Credit) Regulations 1996, a company resident in Mauritius can offset against its Mauritius tax liability any foreign taxes suffered – underlying and withholding taxes. Under the Income Tax (Foreign Tax Credit) Regulations 1996, underlying tax credit will be available where the recipient of the dividends has at least 5% shareholding in the investee company. By contrast most of the Mauritius treaties provide for a shareholding threshold of at least 10%.

Use of a Global Business Category 1 Company (GBC1)

In case of a qualified corporation (a corporation holding a GBC1 Licence under the Financial Services Act 2007) where evidence of foreign taxes is not available the corporation will be entitled to an 80% deemed tax credit on the Mauritius tax liability; resulting in a maximum effective tax rate of 3%.

Therefore where a Mauritian resident wishes to acquire a foreign entity it is advisable to set up a GBC 1.

Controlled Foreign Corporations (CFC)

Mauritius does not have any CFC rules or regulations.

Transfer Pricing

Section 75(1) of the ITA 1995 requires that all transactions between related parties to be at arms' length. The ITA 1995 does not define arm's length principle. The Mauritius Revenue Authority follows the general definition of arm's length principle given by the OECD, which is as follows:

> *"A transfer price should be the same if 2 companies involved were 2 independents, not part of the same corporate structure."*

Moreover if, in the opinion of the Director-General of the Mauritius Revenue Authority, the related party transactions are not at arm's length, the Director-General has the power, under Section 75(2) of the ITA 1995, to compute the tax payable of a company on the income that would have been derived by that company had all transactions been wholly at arm's length.

It should be noted that there are no transfer pricing rules or regulations in Mauritius. However the Mauritius Revenue Authority follows the Transfer Pricing Guidelines of the OECD in case of related party transactions.

9. Can the group reorganise after the acquisition in a tax neutral environment? What are the main caveats to consider?

The group can reorganise after the acquisition in a tax neutral environment. In the case of a merger or demerger any tax losses shall lapse immediately if there is more than 50% change in the ultimate shareholding of the company.

It should be noted that Mauritius does not have group relief or tax consolidation.

10. Is there any particular issue to consider in the case of companies whose main assets are real estate?

As previously mentioned, where the assets of a company consist of real estate, the buyer will have to pay a registration duty equivalent to 5% of the value of the property on registration or inscription of the transfer documents.

In case the real estate falls under the Integrated Resort Scheme (IRS), the buyer will have to pay a registration duty of USD$70,000 on acquisition of an IRS property.

The IRS offer luxury residential property of international standard with high-class facilities and amenities such as golf courses, marinas, health and beauty centres, individual swimming pools, nautical and sports facilities and high quality restaurants. Under the IRS, a minimum of USD$500,000 investment is required in the acquisition of immoveable property, other than for an apartment, or penthouse, which shall not exceed 0.5276 hectares (1.25 arpents).

11. Thinking about payment of dividends out of your country and a potential exit, is there any particular country that provides a tax efficient exit route to invest in your country?

Mauritius does not impose withholding on dividend payments by any corporate entity in Mauritius. Furthermore as per Part II – Second Schedule of the ITA 1995, dividends paid by a company resident in Mauritius will be exempt from tax in the hands of the recipient (irrespective of the whether the recipient is a resident or non-resident of Mauritius).

Moreover there is no capital gains taxation in Mauritius and the gains can be repatriated free from any withholding taxes.

Given the above Mauritius is a suitable jurisdiction to set up holding companies and other types of vehicles (collective investment schemes, closed end funds etc) from any country's perspective around the world.

12. How is foreign debt usually structured to finance acquisitions in your country?

There is no specific foreign debt structure to finance acquisition in Mauritius. However all debts should be at arm's length.

From a Seller's Perspective

13. What are the main differences between share and asset deals?

Share deals

From a seller's perspective if the company reckons among its assets any immovable property then the seller will have to pay a land transfer tax equivalent to 5% of the value of the property.

In case the company does not have any immovable property then the seller will not have to pay any transfer tax.

Asset deals

The seller will have to pay a registration duty equivalent to 5% of the value of the property.

Where the transfer is made by the owner of an immovable property under the IRS scheme, a fixed amount of land transfer tax shall be payable by the seller as follows:

- In case of a non-citizen or a company registered as a foreign company under the Companies Act 2001, US$50,000 or its equivalent in Euro or GB pounds sterling
- In the case of a citizen of Mauritius or a company incorporated under the Companies Act 2001, US$50,000 or its equivalent in Euro, GB pounds sterling or in Mauritius currency

It should be noted that under the Non-Citizen (Property Restrictions) Act, a non-citizen who wishes to acquire immovable property in Mauritius should seek authorisation from the Prime Minister's Office prior to acquiring the property.

Prior to the Finance (Miscellaneous Provisions)(No.2) Bill 2009, companies listed on the Mauritius Stock Exchange which had a minority of foreign shareholders required approval from the Prime Minister's office to acquire immovable property in Mauritius. Now with the Finance (Miscellaneous Provisions)(No.2) Bill 2009 these companies may acquire immovable property in Mauritius without prior approval from the Prime Minister's Office.

14. How are capital gains taxed in your country? Is there any participation exemption regime available?

Capital gain is outside the scope of the ITA 1995 and therefore is not subject to tax in Mauritius.

The sale of a capital asset by a VAT registered person will normally attract VAT at the rate of 15% provided the transaction does not fall into the definition of exempt supply.

Participation exemption is available in Mauritius only in respect of dividend from resident companies. Foreign source dividend is taxable at 15% but under the ITA 1995 and the Income Tax (Foreign Tax Credit) Regulations 1996, a company resident in Mauritius can offset against its Mauritius tax liability any foreign taxes suffered – underlying and withholding taxes. Under the Income Tax (Foreign Tax Credit) Regulations 1996 underlying tax credit will be available where the recipient of the dividends has at least 5% shareholding in the investee company, whereas most of the Mauritius treaties provides for a shareholding threshold of at least 10%.

15. Is there any fiscal advantage if the proceeds from the sale are reinvested?

There is no specific fiscal advantage in case the proceeds from the sale are reinvested.

Your Taxand contact for further queries is:

Mauritius

Gyaneshwarnath (Gary) Gowrea

T. +230 405 2002

E. gary.gowrea@cim.mu

MEXICO

Mexico

From a Buyer's Perspective

1. What are the main differences among acquisitions made through a share deal versus an asset deal in your country?

Share deals

Acquisitions of shares of a corporation or partnership interest of a limited liability company are not subject to value added tax (VAT) or stamp tax in Mexico.

Tax losses remain in the Mexican company. However certain restrictions to use the losses will apply if the buyer acquires more than 50% of the shares of the target company.

The Mexican company's liabilities remain in the company and consequently are acquired by the buyer.

If a Mexican company acquires the shares, they cannot be depreciated for income tax purposes or deducted for single rate business tax (IETU) purposes. The acquisition price will form part of the tax basis of shares of the buyer for subsequent sales.

No transfer taxes are triggered. Nor is the buyer generally allowed to deduct the financing costs of the acquisition against the target's future profits.

If the buyer is a foreign resident and acquires shares at a value that is at least 10% lower than the appraisal value of the shares, the tax authorities may assess a deemed income to the foreign buyer on the difference between the actual sales price and the appraisal shares value. The foreign buyer then must pay a 30% income tax on the difference between the sales price and the appraisal value.

Asset deals

VAT would be applicable in purchase of the assets at a general 16% rate. If the buyer were a foreign resident, the VAT would be a final tax payment. If the buyer were a Mexican company in most cases the VAT paid would be creditable and therefore recoverable.

Tax losses of the seller are not transferred to the buyer. Nor are the Mexican company's liabilities transferred to the buyer. In spite of this the Mexican tax provisions establish that, in case of the acquisition of ongoing businesses, the buyer will be jointly and severally liable with the seller regarding contributions incurred for activities carried out on the ongoing business.

For social security purposes if the employees are transferred, the buyer will be jointly and severally liable for the contributions triggered during the previous 6 months.

If a Mexican company acquires the assets, they will generally be depreciated for income tax purposes and deducted for IETU purposes. Also the purchaser is entitled to deduct the financing costs of the acquisition against profits of the acquiring vehicle.

Real estate transfer tax would be applicable on the transfer of real estate property situated in Mexican territory. This is a local tax that varies depending on the location of the real estate property. The tax may go from 2% to 5% of the value of the property.

The effective corporate income tax rate for both share and assets deals is 30% on the gain obtained. The corporate income tax rate will be 29% in 2014 and will go down to 28% as from 2015.

2. What strategies are in place, if any, to step up the value of the tangible and intangible assets in case of share deals?

Mexican tax law does not contain provisions to allow step up in the value of assets in share deals.

3. What are the particular rules of depreciation of goodwill in your country?

Mexican income tax law does not allow the deduction of goodwill. Nor is goodwill is deductible for IETU purposes. Goodwill paid as part of the purchase price of shares of a company is part of the original tax basis of the shares, which can be deducted from a future sales price (provided however that the overall original acquisition price was at market value at the time of purchase).

4. Are there any limitations to the deductibility on interest of borrowings?

For income tax purposes interest is deductible only when:

- The capital is invested for the attainment of the purposes of the business
- If the taxpayer grants loans to third parties, employees or shareholders only the interest accrued on borrowed capital for up to the amount of the lowest interest rate set forth in the loans to third parties to the taxpayer's workers or to its shareholders on the portion of the loan made to the latter parties will be deductible. These limitations do not apply to banking institutions, non-bank banks or ancillary credit organisations regarding transactions that are inherent to their purpose

- The interest must be determined at a fair market value

Mexico maintais a thin capitalisation rule disallowing deductions of interest on debt owing to foreign related parties if the debt exceeds 3 times equity.

Although interest expense on a debt subscribed for dividend distribution purposes is not generally prohibited, Mexican tax authorities have the position that interest derived from a loan obtained to pay dividends to shareholders is non-deductible because they consider that such loan is not used for the corporate business purpose of the company.

Interest is also non-deductible for IETU purposes except for the case of interest paid by financial institutions or other financial entities.

5. What are usual strategies to push-down the debt on acquisitions?

The usual strategy to push-down debt on an acquisition is to incorporate a Mexican acquisition company to borrow the purchase funds. Following the purchase the acquisition company is merged into the target company so it pays debt and interest from operating cash flows. Nevertheless the Mexican tax authorities may challenge the deduction of the interest considering that such interest is not strictly necessary for the purposes of the merging company.

Alternatively tax consolidation is used to optimise a group's tax burden utilising the deduction of acquisition debt interest (with the associated recapture of losses if the holding company did not individually generate sufficient profits to amortise the loss derived from financing).

6. Are losses of the target company/ies available after an acquisition is made?

The target company may carry forward the net operating losses for a period of 10 years after they were incurred. The target company may only offset such tax losses against the profits corresponding to the same business lines as those in which the losses were incurred if the purchaser acquired more than 50% of the shares of the target. There are no restrictions to carry forward IETU losses.

Mexico does not allow carryback of losses.

7. Is there any indirect tax on transfer of shares (stamp duty, transfer tax etc)?

Mexico has no indirect tax (stamp duty, duty tax etc) on transfer of shares.

8. Are there any particular issues to consider in the acquisition of foreign companies?

In Mexico the tax consolidation regime is allowed only for companies established in Mexico for tax purposes. As a consequence there is no possibility to consolidate a foreign company with a Mexican company for tax purposes.

When non-Mexican company shares are sold, a specific procedure to determine the tax basis must be considered, that differs from the one applicable to shares issued by a Mexican company. Under this procedure the tax basis of the shares is calculated by taking into account the acquisition price of the shares decreased with any capital reductions carried out during the ownership period.

Additionally when a Mexican company acquires the shares of a company resident in a tax haven or if it is a transparent entity, the Mexican shareholder must consider Controlled Foreign Corporation (CFC) rules and therefore report income generated by such company/entity even if said income has not been distributed. For this purpose a company is resident in a tax haven, if is not taxed in its country of residence or when it is subject to an income tax, which is less than 75% of the tax that would be assessed and paid in Mexico.

9. Can the group reorganise after the acquisition in a tax neutral environment? What are the main caveats to consider?

Mexican law provides for a tax neutral regime applicable to some qualifying corporate restructurings, such as mergers, spin-offs, contributions-in-kind and exchanges of shares.

Regarding the contribution-in-kind and exchanges of shares, the Mexican tax authorities have to authorise the corporate restructure before it is executed and the benefit of the authorisation is a deferral in the payment of the tax that would have been triggered without the reorganisation authorisation. The transfer value of the shares that must be considered to determine the deferral is the tax basis of the shares.

In any case several formalities and requirements must be fulfilled in order to have the tax neutral regime. Among others, the related parties must not be resident in a tax haven country and a filing requesting authorisation to carry out the tax neutral reorganisation must be submitted to the tax authorities prior to the restructure. Such filing must include, among other documentation and information, the organisational chart of the group and general corporate information of all the parties involved in the restructure as well as certificates of tax residence of their respective countries.

Additionally some income tax treaties entered into by Mexico and several countries (eg United States, the Netherlands, Luxembourg, Hong Kong and Spain among others) provide for tax free or tax deferral reorganisations. Under some other income tax treaties the transfer of a participation that represents less than 25% in the capital of the target company may be exempt for income tax purposes in Mexico.

10. Is there any particular issue to consider in the case of companies whose main assets are real estate?

Income derived from the transfer of shares or securities that represent the ownership of assets will be considered Mexican-source income when the entity who issued the shares or securities is a Mexican resident or when more than 50% of the book value of said shares or securities derives, directly or indirectly, from real estate property located in Mexico.

In this sense if a foreign resident indirectly sells the shares of a Mexican company whose value is represented substantially by Mexican real estate, such a transaction would be taxable in Mexico. Income tax treaties may contain a direct ownership rule in order for Mexico to be able to consider that the sale is Mexican sourced and therefore taxed in Mexico (eg Belgium).

11. Thinking about payment of dividends out of your country and a potential exit, is there any particular country that provides a tax efficient exit route to invest in your country?

Dividend distributions and capital redemptions are not subject to any withholding tax but they are subject to taxation in Mexico on a corporate level, regardless of the residence of the shareholders (ie if income tax arises upon such events, the distributing entity will be the taxpayer and no additional amount would be charged to the shareholders). Therefore from a dividend distribution perspective the place of residence of the shareholder is irrelevant for Mexican tax purposes.

12. How is foreign debt usually structured to finance acquisitions in your country?

Mexico does not have a portfolio interest exemption or other types of legislation that place significant limits on the structure of foreign debt to finance Mexican acquisitions. However the amount of foreign debt used in financing Mexican acquisitions is in practice limited by the thin capitalisation rules as discussed above. This places a practical 3:1 debt-to-equity ratio on foreign acquisition structures.

It is common to use a Mexican non-bank bank (ie a multi-purpose financial company, commonly known as SOFOM) to finance the acquisition in Mexico, considering that the withholding rate applicable to interest payments made by such entities to foreign residents is 4.9%.

There are no hybrid instruments in Mexico that would accomplish a Mexican double dip. However other countries, eg the US, may consider the Mexican limited liability corporation (*sociedad de responsabilidad limitada*) a pass-through entity.

From a Seller's Perspective

13. What are the main differences between share and asset deals?

The main difference is that IETU is not applicable to the sale of shares. In addition it is common that assets do not have a tax basis for IETU purposes, so the gross income would be taxed at a 17.5% rate.

If the seller incurs in a loss in an asset deal, such loss may be offset against taxable income of subsequent fiscal years. However if the seller incurs in a loss on the sale of shares, such loss may only be offset against gains on the sale of shares.

VAT will be charged to buyer on most assets deals, whereas no VAT applies to shares deals.

14. How are capital gains taxed in your country? Is there any participation exemption regime available?

Mexican tax provisions provide that income obtained by a non-Mexican tax resident derived from the sale of shares will be considered Mexican source income if:

- The issuer of the shares is a Mexican entity
- The value of shares is represented directly or indirectly by more than 50% of real estate property located in Mexico

In general terms the alienation of shares issued by Mexican entities performed by a person or group of persons through the Mexican Stock Exchange or certain foreign stock exchanges will not be subject to taxation in Mexico if such shares represent a participation of less than 10% in the Mexican entity, in one or subsequent sales, within a 12-month period.

The exemption would not apply to a person or group who controls the issuing entity and sell their control through one or more simultaneous or successive transactions in a period of 24 months.

In any other case the Mexican income tax law provides the following options to compute income tax arising from a sale of shares:

- 25% on the gross amount of the transaction (sales price) with no deductions allowed
- 30% on the gain obtained upon the sale of shares (sales price less tax basis) provided that several formal requirements established in the Mexican income tax law are fulfilled being among

others the appointment of a legal representative in Mexico for purposes of the sale of shares and the filing before the Mexican tax authorities of a tax report of the transaction issued by an independent public accountant

It is worth mentioning that the second of the above options will apply only to the extent that the income of the non-resident is not subject to a preferential tax regime under the terms previously described or if the non-resident does not reside in a country governed by a territorial tax system.

A 40% withholding rate may apply to sales of shares made by residents of a tax haven when selling to related parties.

As mentioned earlier Mexican income tax law provides a deferral regime to sales of shares that take place as a part of certain qualifying restructures.

Income tax treaties may provide a lower tax rate on the gain or exemptions from Mexican tax.

There is no participation exemption regime or similar concept in Mexico.

For Mexican tax residents, capital gains are considered taxable as ordinary income; there is no special capital gains treatment.

15. Is there any fiscal advantage if the proceeds from the sale are reinvested?

There is no particular advantage or deferral benefit for reinvesting proceeds from a sale.

Your Taxand contact for further queries is:

Mexico

Manuel Tamez

T. +52 55 5201 7403

E. mtamez@macf.com.mx

NETHERLANDS

Netherlands

From a Buyer's Perspective

1. What are the main differences among acquisitions made through a share deal versus an asset deal in your country?

Asset deal

Advantages:

- The acquired assets and goodwill can be depreciated/amortised for tax purposes at the purchase price (fair market value)
- In general, no (tax) liabilities are inherited
- The Dutch loss-making companies of the acquirer's group can absorb profitable operations of the target company
- In principle all acquisition costs are deductible

Disadvantages:

- Capital gains taxation is at the level of the seller (reflected in the purchase price)
- Possible transfer taxes apply on real estate (6%)
- The potential benefit of the target company's carryforward losses is retained by the seller (if still available after a gain on the sale of the assets)

Share deal

Advantages:

- The buyer may benefit from the target company's carry forward losses (see section 6 below)
- There is a lower chance of transfer tax on real estate
- The seller may be able to apply the participation exemption, which exempts capital gains and dividends (see section 9 below)

Disadvantages:

- There is no depreciation of assets at purchase price and no amortisation of goodwill
- The buyer is in principle liable for the target company's existing (tax) liabilities
- The buyer may incur a potential dividend withholding tax liability on retained earnings
- In principle, all costs relating to acquisitions as well as disposals of participations qualifying for the participation exemption are not deductible

In the case of a share deal the acquisition costs should be added to the cost price of the participation. These may not be depreciated for tax purposes and is only beneficial in case of liquidation or for purposes of establishing the interest deduction restricted under the Dutch participation interest regime (see section 4). Some costs (including costs relating to the financing) may however be deductible. Therefore the allocation and specification of the costs should be monitored carefully. Monitoring these costs is also important for VAT purposes. In the event that the acquisition of a participation is debt-financed, it will be difficult to deduct the corresponding interest considering the various restrictions on interest deductions.

2. What strategies are in place, if any, to step up the value of the tangible and intangible assets in case of share deals?

Due to the application of the participation exemption there are very limited planning strategies to create a step-up in share deals.

3. What are the particular rules of depreciation of goodwill in your country?

Acquired goodwill can in general be depreciated in at least 10 years (at an annual rate of 10%). Self-created goodwill can generally not be activated and is therefore not depreciable.

4. Are there any limitations to the deductibility on interest of borrowings?

Dutch interest deduction restrictions are complicated and professional advice should be sought in this regard. Under Dutch case law restrictions apply to interest paid on loans that function as equity (hybrid financing) or are qualified as loss-financing or as a fictitious loan. The general abuse of law principle should also be taken into account.

The Dutch Corporate Tax Act also provides for numerous and complicated interest deduction restrictions. Therefore professional tax advice should be sought in this regard. Firstly the reported interest (and the other terms and conditions of the financing) has to be at arm's length. Secondly the interest deduction is denied if a loan with no fixed maturity (or a maturity of more than 10 years) is obtained from a related company and the loan bears either no interest or interest at a rate which is substantially lower than that which would have been agreed upon between unrelated parties.

In addition deduction is denied for interest incurred in respect of loans relating to:

- Profit distributions or repayment of capital to a related company or related individual
- A capital contribution in a related company
- The acquisition or increase of a participation in a company which becomes a related company after this acquisition or increase

Exceptions may apply to transactions based on sound business reasons or if the interest is effectively taxed at a sufficient rate at the creditor's level.

As of 1 January 2013 the Dutch thin capitalisation regime has been abolished and the participation interest regime has been enacted. Based on the new rule as of 2013 a taxpayer may not deduct excessive participation interest expenses relating to loans taken out from both affiliated as well as third-party creditors. This is to the extent that as the average acquisition price of a (qualifying) participation exceeds the average fiscal equity of the Dutch company, the participation is deemed excessively leveraged. Interest expenses and related costs incurred on this excess financing are in principle not deductible insofar the interest exceeds €750,000. Exceptions may apply to loans taken out to finance expansions of operational activities of the group and detailed rules apply to reorganisations.

Finally under the leveraged acquisition holding regime the deduction is denied for interest on the debt at acquisition company level, insofar as the acquisition vehicle's interest costs exceed the acquisition vehicle's profit on stand-alone basis (tainted interest). The limitation only applies to the extent that:

- The tainted interest exceeds €1,000,000
- The debt-to-equity ratio of the fiscal unity exceeds a 2:1 ratio (ie 66.6% debt and 33.3% equity)

Interest will therefore be restricted if the acquisition company itself does not have sufficient taxable profit to set off the interest. In general the acquisition company will not have significant taxable profits and the interest deduction will, consequently, be restricted. Nevertheless the amount of interest, which is non-deductible following the proposed regime, may under certain conditions be carried forward and offset against the acquisition company's holding profits in subsequent years. The limitation of interest deductions will apply to both group and third party interest payments. Various tax planning strategies can be considered to mitigate this regime.

5. What are usual strategies to push-down the debt on acquisitions?

As discussed earlier (see section 4 above) in general debt push-down structures are limited due to the leveraged acquisition holding regime. Yet various planning structures may be available to achieve an interest deduction. Furthermore asset transactions could constitute a tax efficient alternative to share transactions, especially if the target company has carryforward losses available.

6. Are losses of the target company/ies available after an acquisition is made?

Carryforward losses may not be available as a result of the transfer of the shares in the target company. Under anti-abuse rules the carryforward losses are not available if the ultimate ownership in the target company has changed substantially (30% or more), with the oldest loss year, unless an exception applies (eg the target company is an active trading company which has not substantially decreased its activities or intends to decrease its activities substantially in the future). Separate rules apply to holding or finance companies.

7. Is there any indirect tax on transfer of shares (stamp duty, transfer tax etc)?

The Netherlands does not levy capital tax, stamp duties or a minimum tax. If a company is considered to be a real estate company, the transfer of shares in the company may trigger a 6% real estate transfer tax (see section 10).

8. Are there any particular issues to consider in the acquisition of foreign companies?

There are no particular issues to consider in the case of an acquisition of foreign participations. In general (not limited to foreign companies) the costs relating to the transaction (acquisition costs) are not deductible. But they should be added to the cost price of the subsidiary. Furthermore it is important to review the applicability of the Dutch participation exemption and proper implementation of substance at the level of the Dutch company (the latter is particularly important from the source jurisdiction's perspective).

9. Can the group reorganise after the acquisition in a tax neutral environment? What are the main caveats to consider?

A fiscal unity can be formed between a Dutch parent company and any Dutch subsidiaries in which it owns 95% of the shares. Inclusion in a fiscal unity means that, for Dutch corporate tax purposes, the subsidiaries' assets and activities are attributed to the parent company. The main advantage of a fiscal unity is that losses of one company can be offset against the profits of another in the year they are incurred (as discussed above). However restrictions may apply with respect to leveraged acquisitions.

The participation exemption applies to shareholdings provided that certain conditions are met (see section 14 below). The Dutch tax system provides for a merger and a split-off facility. This means that under certain conditions companies (or parts of companies) can be merged or split-off in order to obtain the desired group structure.

10. Is there any particular issue to consider in the case of companies whose main assets are real estate?

If a company is considered a real estate company the transfer of shares in the company may trigger a 6% real estate transfer tax. A company qualifies as a real estate company if:

- On a consolidated basis the assets consist of 70% or more of Netherlands real estate
- The real estate is used for 70% or more for the purchase, sale or exploitation of real estate
- The acquisition of the shares in a real estate company is only taxed if, together with an affiliated companies or individuals, an interest of 0.33% is obtained or increased

However various reorganisations exemptions may apply.

11. Thinking about payment of dividends out of your country and a potential exit, is there any particular country that provides a tax efficient exit route to invest in your country?

The Netherlands has a statutory dividend withholding tax rate of 15%. The extensive tax treaty network of the Netherlands usually eliminates or significantly reduces the dividend withholding tax rate.

A Dutch co-operative (co-op) corporate entity is frequently used if the treaty rate is not reduced to 0% or if the shareholders do not qualify as a qualifying resident under the treaty (eg funds). A Dutch co-op is an entity similar to Dutch BV – the main difference being that a co-op is not subject to dividend withholding tax provided that certain requirements are met. No withholding tax on dividend distributions will be due even if there is no tax treaty or if anti-abuse rules (ie limitation of benefits) in an applicable treaty apply. Luxembourg and Cyprus holding structures are also used if the dividend withholding tax rate cannot be reduced to 0% through a treaty.

12. How is foreign debt usually structured to finance acquisitions in your country?

As described above the Netherlands has a number of restrictions on interest deductions. Planning techniques can be used to retain an interest deduction but require a detailed analysis.

From a Seller's Perspective

13. What are the main differences between share and asset deals?

Asset deals

Advantages:

- The potential benefit of the target's carryforward losses are in principle retained by the seller

Disadvantages:

- Taxation on the difference between the book value and the market value of the assets and any goodwill in general remains with the seller

Share deals

Advantages:

- The participation exemption can be applied
- The (tax) liabilities are in principle transferred to the buyer

Disadvantages:

- The potential benefit of carryforward losses is transferred to the buyer
- Costs related to the sale are generally not deductible

14. How are capital gains taxed in your country? Is there any participation exemption regime available?

In addition to profit distributions the Dutch participation exemption also applies to capital gains on the disposal of a qualifying participation (or part of), as well as to currency gains, many hybrid loans and certain option schemes. The main rule is that the Dutch participation exemption applies to participations of at least 5% in the nominal paid-up capital of a company (non-transparent entity). There is no requirement as to the duration of the period in which a participation must be held by the parent company.

The participation exemption applies as long as the participation is not held as a portfolio investment. The intent (ie purpose for holding the shares) of the Dutch parent company is the decisive criterion. A participation in a company is held as a portfolio investment if it is held with the intent to merely receive a return on investment that can be expected in the case of normal asset management.

The participation exemption should apply if the taxpayer is a top holding of the group, if the taxpayer serves as an intermediate holding company or if the activities of the subsidiaries are in line with the activities of the parent of the taxpayer. Under certain circumstances a subsidiary is deemed to be a portfolio investment subsidiary. For example, if the subsidiary qualifies as a group financing subsidiary. If the subsidiary qualifies as a portfolio investment subsidiary, the participation exemption will nevertheless apply under the following safe harbour rules (which make the subsidiary a qualifying portfolio investment subsidiary):

- The subsidiary is subject to a reasonable tax on its profits from a Dutch perspective (rate test)
- The assets of the portfolio investment subsidiary consist directly or indirectly of less than 50% of low-taxed free portfolio investments (asset test)

Under the rate test, the subsidiary itself should be subject to an effective corporate tax rate of 10% or more. A statutory tax rate of 10% should generally be sufficient.

Under the asset test, the assets of the subsidiary should not directly or indirectly largely (ie more than 50%) consist of low-taxed (ie less than 10% corporate tax rate) portfolio investments.

Free portfolio investments are assets that are not required for the business of the owner of these assets. Real estate, as well as rights related directly or indirectly to real estate, is in general not considered a free portfolio investment.

15. Is there any fiscal advantage if the proceeds from the sale are reinvested?

The taxpayer may defer taxation of the capital gain realised upon disposal of a business asset by forming a reinvestment reserve. If the proceeds realised upon disposal exceed the asset's book value, the taxpayer may form a reinvestment reserve for the excess if, and so long as, the company intends to reinvest this amount. The amount for which the investment has been formed must generally be reinvested no later than within 3 years after the year of disposal. Various anti-abuse rules apply with respect to this regime.

Your Taxand contact for further queries is:

Netherlands

Marc Sanders

T. +31 20 757 0905

E. marc.sanders@vmwtaxand.nl

NORWAY

Norway

From a Buyer's perspective

1. What are the main differences among acquisitions made through a share deal versus an asset deal in your country?

An asset deal is where the buyer's acquisition value for tax purposes corresponds with the total asset purchase price. The total purchase price will be allocated among the tangible and identifiable assets according to fair market value and any residual amount will be allocated among intangible/ unidentifiable assets (normally goodwill). The buyer's total cost price for tax purposes on the assets going forward (ie tax depreciation base and cost price upon future asset sale) will therefore correspond with the purchase price.

In a share deal there will be no step-up in the value for tax purposes on the company's assets, therefore the transaction will not influence on the company's tax depreciation base and cost price upon future asset sale. The buyer's cost price for tax purposes on the acquired shares will correspond to the purchase price. However the tax benefits on a share deal may be very limited due to the fact that:

- Shares are non-depreciable
- Capital gains on shares are tax exempt for corporate shareholders, implying the stepped-up cost price on the shares will have no beneficial tax effect for the buyer in a future sale of the shares

As the total purchase price will normally exceed the total tax base of the acquired assets, an asset deal is normally more tax efficient than a share deal from the buyer's perspective. There are however other circumstances that might imply share deals are more commonplace than assets deals in Norway. A share deal is – unlike an asset deal – tax exempt for a corporate seller under the exemption method. An asset deal is normally structurally more complicated than a share deal as all agreements with third parties, public approvals, concessions etc. must be transferred to the acquiring company, subject to third party consent.

2. What strategies are in place, if any, to step up the value of the tangible and intangible assets in case of share deals?

A step-up is not possible by a share deal. However the buyer may liquidate the acquired company subsequent to the acquisition, in which event the assets (which will be acquired by the buyer company upon liquidation) will have a value step-up corresponding to the assets' fair market value. Such strategy will only be efficient if the acquired company has a carryforward loss, as the liquidation will trigger capital gains taxation on the liquidating company based on the difference between the assets' tax balance and the fair market value.

3. What are the particular rules of depreciation of goodwill in your country?

Acquired goodwill may be depreciated under the declining balance method at a maximum annual rate of 20%.

Goodwill relating to shares (ie the balance between the company's book assets value and total share acquisition value) is not subject to tax depreciation.

4. Are there any limitations to the deductibility on interest of borrowings?

Under the current tax regulations, tax deductibility on interest of borrowings is only limited by the general (statutory and non-statutory) anti-avoidance rules and general domestic transfer pricing rules. In order to challenge interest deductions the tax authorities would normally either apply transfer pricing rules (generally stated in the Norwegian Tax Act as the principle of arm's length) or non-statutory thin capitalisation rules. Regarding the latter no specific equity ratio applies (other than under the Petroleum Tax Act where minimum equity ratio of 20% applies for petroleum companies) implying that a possible application of the thin capitalisation rules in a specific case will be subject to a general assessment of the case in terms of equity ratio, type of business, interest rate, security etc.

On 11 April 2013 the Ministry of Finance presented a draft to certain tax rules limiting interest deduction on intra-group borrowings. According to the draft proposal interests will be limited to 25% of the debtor's taxable income (calculated before depreciations, amortisations and financial items). The draft proposal is currently on public hearing and it is expected new rules will be introduced as from 2014. The new rules will, provided that they are enforced substantially in accordance with the draft proposal, apply alongside the general anti-avoidance rules described above.

5. What are usual strategies to push-down the debt on acquisitions?

Debt push-down transactions are increasing in Norway due to the relatively high corporate tax rate of 28% and the broad tax base on corporate income. Therefore debt allocation to Norway may be tax efficient from a group perspective.

There are 2 main strategies of debt push-down commonly used:

- In connection with a group re-structuring to acquire a group company by a Norwegian company (partly) against debt financing, resulting in a debt allocation to Norway
- Capitalising an intra-group financing company (internal bank) outside of Norway by equity, with the purpose of debt financing of the group operations in Norway, resulting in an (increased) debt allocation to Norway

Due to the Norwegian group contribution regime (implying that intra-group contributions are tax deductible for the transferor and taxable on the transferee) group contributions from a Norwegian transferor in a tax position to a Norwegian transferee with carryforward losses are also commonly used. Therefore in Norwegian intra-group tax planning, group contributions are commonly used in tax planning as a substitute to debt push-down.

6. Are losses of the target company/ies available after an acquisition is made?

Losses may be carried forward for an unlimited period without regard to whether the actual loss-making operations are terminated.

However certain statutory and non statutory anti-avoidance rules apply on mainly tax motivated transactions, ie transactions where the predominant motive is to improve the overall tax position of the target company, acquiring company or group. The predominant motive test is a typical specific assessment of the overall motives for the transaction, where the acquiring company's commercial motives for the transaction are assessed and balanced against the tax motives (ie the improved overall tax position gained by the transaction). If the improved tax position is substantial and the target company only has limited assets and/or operations, the taxpayer's burden of proof is heavy in order to demonstrate that the transaction is not predominantly tax motivated. Similarly if the target company operates a business substantially different from the acquiring company (and so does not fit in with the acquiring group), the tax authorities are likely to conclude on a predominant tax motivation.

7. Is there any indirect tax on transfer of shares (stamp duty, transfer tax etc)?

There are currently no indirect taxes on transfer of shares, and it is expected that no such taxes will be introduced in the near future.

8. Are there any particular issues to consider in the acquisition of foreign companies?

There are no specific tax consequences upon acquisition of non-Norwegian companies (relative to the acquisition of a Norwegian company).

However the following general assessments should be made upon acquisition of shares in a non-Norwegian company:

- Whether earnings related to the target company (ie distributed dividends and capital gains) are eligible to Norwegian participation exemption. Participation exemption applies on shares in companies domiciled in an EU/EEA jurisdiction, as well as companies domiciled outside of EU/EEA, subject to certain additional qualifications
- Whether the target company is domiciled in a jurisdiction where Norwegian controlled foreign corporation (CFC) rules apply. CFC rules apply if:
  - The target company is controlled by a Norwegian domiciled taxpayer (or jointly by several Norwegian domiciled taxpayers)
  - The target company is subject to an effective taxation of less than 2/3 of the taxation had the company been a Norwegian taxpayer
  - Provided that the target company is domiciled in a country with which Norway has entered into a tax treaty, the target company's income is deemed to be mainly from passive sources. Certain limitations to the CFC rules apply if the target company is domiciled in the EU/EEA area (such qualifications is generally compliant with the EU Court's decision in the Cadbury Schweppes case)
- The withholding tax rate on dividends to/from the target company. The general Norwegian withholding tax rate is 25% but is regularly reduced (and even abolished) in tax treaties. Dividends to corporate shareholders domiciled in the EU/EEA area generally exempt of Norwegian withholding tax
- Whether the new structure is exposed to anti-avoidance rules (due to thin capitalisation) or the proposed new statutory limitation rules on interest deduction

9. Can the group reorganise after the acquisition in a tax neutral environment? What are the main caveats to consider?

Although Norway has not directly implemented the Council Directive 90/434/EEC (Tax Merger Directive), Norwegian tax legislation is from 2011 for all practical purposes in accordance with the directive.

Merger, demergers and business combinations of limited companies domiciled in 1 or more EU/EEA states may, as a general rule, be accomplished without taxation of the involved companies and its shareholders. This is provided that the transaction is carried out in accordance with the principles of the tax continuity of such transaction, applying in the Member State in which the acquired company is resident. Such tax neutrality is subject to the following general conditions:

- The state of the transferor company must have a tax legislation approving the tax-exempt cross border merger. The condition will normally be met if the transferor company is resident in EEA
- The acquiring company shall assume all fiscal values (tax balances) on the acquired assets as well as the acquisition dates for all transferred assets, rights and obligations
- If, and to what extent, assets, rights and obligations are moved out of the Norwegian tax jurisdiction as a result of the business combination, unrealised taxable capital gains (and losses) will be triggered

In addition the following conditions must be met:

- The involved parties must be limited companies
- The shareholder(s) of the transferor company must receive shares in the acquiring company, in addition to and cash not exceeding 20% of the total consideration
- The involved companies must not be resident in jurisdictions outside of EEA where the general tax level is less than 2/3 of the Norwegian tax level, unless such companies are performing real economic operations (substance requirement)
- The transferor company must be dissolved by the merger

In addition to tax-exempt mergers, demergers and business combinations, group reorganisations are regularly carried out under the domestic tax exemption method.

10. Is there any particular issue to consider in the case of companies whose main assets are real estate?

As a transfer of real estate is subject to a stamp duty of 2.5% of the market value, while a transfer of shares is exempt of stamp duty, business property in Norway is regularly held through single purpose companies.

Upon acquiring shares in a real estate company the transaction does not give a step-up in the company’s tax base on the real estate, but merely provides a non-depreciable tax base on the acquired shares.

Norwegian tax authorities have recently applied anti-avoidance provisions on several transactions where real estate has been spun off (by tax-exempt demerger) into a single purpose company with immediate subsequent sale of the shares in the new company. In such cases the tax authorities have disregarded the tax-exempt demerger and classified the transaction for tax purposes as an asset sale with a consequential taxable capital gain.

11. Thinking about payment of dividends out of your country and a potential exit, is there any particular country that provides a tax efficient exit route to invest in your country?

Norway does not under domestic law impose withholding tax on either interests or capital gains on shares.

The general withholding tax rate on dividends is 25%. However under the Norwegian tax exemption regime, withholding tax is not imposed on dividends distributed on shares in companies domiciled in an EU jurisdiction. Therefore EU jurisdictions will generally provide a tax efficient exit route.

12. How is foreign debt usually structured to finance acquisitions in your country?

Debt is regularly allocated to Norway due to the relatively high Norwegian corporate tax burden. An acquisition in Norway could be carried out through a Norwegian debt-financed company (Bidco) acquiring the Norwegian target company. Bidco will serve as the holding company to the target company. The target company's taxable profits may be offset against tax deficits in Bidco through group contribution.

From a Seller's Perspective

13. What are the main differences between share and asset deals?

An asset deal is where the seller will trigger a taxable capital gain (or a tax-deductible loss). The capital gain is subject to a certain deferred taxation. The tax system does not however allow tax-exempt reinvestment of capital gains.

Under the Norwegian tax exemption regime capital gains earned by corporate shareholders on shares in companies domiciled in an EU/EEA jurisdiction are generally tax exempt. The tax exemption is even extended to capital gains on shares in companies domiciled outside of EU/EEA, subject to certain additional conditions.

14. How are capital gains taxed in your country? Is there any participation exemption regime available?

Under the Norwegian tax exemption regime, capital gains earned by corporate shareholders on shares in companies domiciled in an EU/EEA jurisdiction are generally tax exempt. If the company in which the shares are sold is subject to tax in its jurisdiction, which is less than 2/3 of the tax had the company been a Norwegian taxpayer, the exemption regime will only apply if the company has real establishment and carries out real operations in an EU/EEA country.

The tax exemption is extended to capital gains on shares in companies domiciled outside of EU/EEA provided that the shareholder has held at least 10% of shares in the company for a continuous period of at least 2 years immediately prior to the transaction.

15. Is there any fiscal advantage if the proceeds from the sale are reinvested?

Tax efficient reinvestments are not available in Norway.

Your Taxand contact for further queries is:

Norway

Einar Bakko

T. +47 905 30 589

E. e.bakko@selmer.no

POLAND

Poland

From a Buyer's Perspective

1. What are the main differences among acquisitions made through a share deal versus an asset deal in your country?

Asset deal

The general result of concluding an asset deal is that the seller is obliged to recognise the gain on disposal and the purchase price paid by the buyer will constitute tax depreciation base as well as tax cost base (decreased by the depreciation write-offs made by the buyer) for the future sale of assets.

The acquirer of assets may be held responsible for tax liabilities of the seller in case the assets constitute enterprise or its organised part. The liability may be effectively limited or excluded if the buyer obtains from tax authorities a specific certificate disclosing tax liabilities and pending penalties due by the seller. In such a case the buyer may not be held responsible for tax arrears and other dues not revealed by the certificate.

Until 2009 the buyer was also responsible for component assets connected with the economic activity carried on, if their unit value on the day of transfer was at least PLN15,000 (approximately €3,650). The liability was limited to the value of acquired assets. This responsibility was eliminated from 1 January 2009. However under transitional provisions introduced with the change, the above rule may be still applicable to liabilities of the seller prior to 2009 until expiry of limitation period (ie generally 5 years starting from the end of year when the payment was due).

Transactions regarding sale of business assets are generally subject to VAT (currently 23% standard rate). As long as the buyer runs a VAT-liable activity, VAT charged upon acquisition should be effectively neutral. Input VAT incurred upon acquisition may be utilised via deduction from output VAT or direct refund.

Certain transactions may fall outside the scope of VAT (enterprises or organised part of thereof) or be exempt from VAT (eg certain types of real estate). Sale transactions falling outside the scope of VAT and transactions regarding real estate and shares that are VAT exempt are subject to polish tax on Civil Law Transaction (TACL). The rates of TACL vary from 1% to 2% of the market value of assets (meaning usually purchase price).

Share deal

A share does not allow the buyer to achieve step-up on the value of assets of the target company. At the same time by acquiring shares in the target company, the buyer acquires an entity with all its potential tax liabilities, net operating loss (NOL) for 1 year of acquisition and unsettled losses from previous years. There is no legal possibility to cut off the liability of the target company for its tax liabilities arisen prior to acquisition.

Expenses incurred on acquisition of shares (eg price paid) constitute tax deductible costs on the date of disposal of the shares, while interest on the loan for purchase of shares are tax deductible costs on the date of incurring based on the current approach of tax authorities.

The acquisition of shares in a Polish company triggers obligation of payment of TACL. The tax at the rate of 1% is charged on the acquisition value of shares. Acquisition of shares in foreign company by Polish entity will also fall within TACL taxation if SPA is concluded in Poland.

2. What strategies are in place, if any, to step up the value of the tangible and intangible assets in case of share deals?

Generally share deals do not result in step-up in asset value of the target company.

The current existing step-up opportunities include liquidation of target company and distribution of its assets as liquidation proceeds. Some limitations resulting from CIT law may be however applicable. These limitations concern assets distributed upon liquidation which were previously contributed to liquidated company as an enterprise or OPE. In such a case continuation rule is applicable. For this reason in some cases additional tax planning is required.

It should be noted that liquidation proceeds are treated as dividend-like income and for this reason they may be exempt from taxation based on EU Parent-Subsidiary Directive exemption implemented into CIT law.

Additionally there are other possibilities to conduct step-up process, which require additional effort and the need to obtain a tax ruling to secure the envisaged procedure.

3. What are the particular rules of depreciation of goodwill in your country?

According to the Polish CIT law, goodwill is depreciable only if it has arisen as a result of acquisition of an enterprise or an Organised Part of Enterprises OPE through purchase, leasing enterprise under financial lease agreement (under additional conditions) or contribution in kind of an enterprise under the specific provisions on commercialisation and privatisation. Goodwill revealed upon acquisition of shares in the company or contribution in kind of company's enterprise is not depreciable.

If goodwill is depreciable, it may be written-off for tax purposes over a period of 60 months (5 years) at 20% annual rate. The taxpayer may prolong depreciation period and reduce yearly rate. In any case depreciation period and rates should be determined before commencement of depreciation write-offs.

4. Are there any limitations to the deductibility of interest on borrowings?

In principle there is no direct limitation on deductibility of interest on debt if it is used for financing the purchase of assets or shares of a target company. Despite the fact that some technical doubts may arise with respect to deductibility of interest on loans financing acquisition of shares in a company, we are not aware of cases where tax administration would try to challenge interest deduction on loans financing such acquisitions. Based on the current verdicts of administrative courts, including Supreme Administrative Court, interest on a loan taken for the payment of dividend or remuneration for redemption of shares is not deductible.

Nevertheless the CIT law provides a few general restrictions on the deductibility of interest on loans. It must be noted that under the Polish domestic law interest is deductible on cash (ie upon payment, offset, capitalisation) and not accrual basis. Interest on debt financing acquisition of fixed assets accrued until the date of delivery for use are capitalised to the initial value of assets for tax depreciation purposes.

Furthermore Polish CIT law introduces rules according to which deductibility of interest on loans between certain associated entities is subject to thin capitalisation restrictions. Interest paid to a qualified entity (ie a direct parent or sister company) is non-deductible for tax purposes if, on the date of interest payment, the value of all kinds of debts (ie loans as well as all other debts, including trade payables) to certain qualifying entities exceeds 3 times the registered, properly paid-in share capital of the taxpayer (ie if the ratio between total indebtedness and equity exceeds a 3:1 threshold). These restrictions concern interest on the amount of debt exceeding the threshold mentioned above.

The restrictions apply to loans granted to a borrowing entity by:

- Its shareholder holding 25% or more of the company's voting rights or by shareholders holding jointly not less than 25% of the company's voting rights, ie loans from parent companies
- Another company if the same shareholder holds 25% or more of the voting rights in each of those companies, ie loans from sister companies

In current practice relatively simple tax planning is usually used to avoid these restrictions. However the Polish Minister of Finance plans to amend provisions on thin capitalisation as of 1 January 2014. In accordance to the proposed amendments to the CIT law thin capitalisation regulations may change under the amended provisions:

- Loans from indirect shareholders will also be subject to thin capitalisation restrictions
- Trade payables and other liabilities towards shareholders will also be literally included in the scope of indebtedness
- Alternative method of thin capitalisation calculation will be implemented based on which:
  - Tax deductible may be interest on loans (including bank loans) in the amount not exceeding in the given tax year 5% of tax value of assets
  - The value of tax deductible interest may not exceed 50% of operational profit of the company reported in the financial statement for the given year
  - There are some additional administrative conditions of application of the above method

It is currently difficult to predict whether the new regulations will start to apply from 2014 (and they may not enter into force earlier).

In addition transfer pricing adjustments may be also applied if the financing terms agreed by taxpayers performing transactions with related entities differ from market conditions limiting the amount of tax-deductible costs.

The provisions of Polish CIT law does not regulate tax treatment of takeover of debt and payment of related interest. However interest on loans taken over without consideration is very unlikely to be deductible.

CIT law provides that interest on own capital invested by the taxpayer in a source of his revenue does not constitute tax-deductible cost. This limitation covers the loan granted to the partnership by its direct partner, for this partner proportionally to their participation.

5. What are usual strategies to push-down the debt on acquisitions?

A typical strategy to push-down debt is post-acquisition merger. The same result could be achieved through post-acquisition liquidation. (This operation may additionally allow for a step-up in the value of assets of liquidated entity.) Another strategy could be acquisition of assets of a target company financed by debt (eg a loan granted by an affiliated company or third party bank).

It should be stressed that Poland has not introduced any specific anti-abuse provisions regarding merger of the entity acquiring shares with the target. However deductibility of interest in the case of post-acquisition merger is usually confirmed in individual tax ruling.

A somewhat less frequently used strategy is the establishment of Tax Capital Group and consolidation with tax transparent partnerships.

6. Are losses of the target company/ies available after an acquisition is made?

Generally in case of acquisition of assets of the target company the NOLs and un-utilised losses of the target company remain with the seller. In case of acquisition of the target company's shares, the NOLs of such company arisen prior to acquisition, may be offset against its taxable income for the given fiscal year of acquisition or carried forward. The losses incurred and not utilised in a given tax year may be carried forward and used for tax purposes during 5 consecutive years. The maximum amount that can be utilised in each of these years is 50%. There are no specific anti-abuse provisions limiting this possibility.

Certain restrictions on utilisation of losses exist in respect to specific forms of transfer of assets. In particular losses of entities disappearing within the framework of merger, spin-off, liquidation or division are lost for tax purposes. Also losses of transformed entities are forfeited (unless transformation involves transformation of one type of capital company into another type of capital company).

7. Is there any indirect tax on transfer of shares (stamp duty, transfer tax etc)?

In general according to the TACL Law, acquisition of shares is subject to 1% TACL. The tax base is market value of shares transferred. Transactions on shares in foreign entities as a rule are not taxed with TACL in Poland. (Unless the acquirer is Polish entity and the transaction is performed in Poland ie the contract is concluded in Poland). The entity liable for payment of this tax is the buyer.

8. Are there any particular issues to consider in the acquisition of foreign companies?

Foreign companies may not benefit from the tax consolidation regime provided under the Polish CIT law. Although certain objections may be raised against such regulations under the EU law principles, the practical relevance of this constraint is limited – tax consolidations are rarely used in practice due to strict conditions imposed on all the companies involved in tax consolidation and the consolidated group as a whole. Moreover income from liquidation of foreign company shall not benefit from EU Parent-Subsidiary Directive based exemption.

9. Can the group reorganise after the acquisition in a tax neutral environment? What are the main caveats to consider?

Under the Polish CIT law, in kind contribution of going concern, merger, divisions, spin-offs, exchange of shares may be performed free of tax based on the domestic provisions implementing Merger Directive (90/434/EEC). As of 2008 the possibility for tax neutral reorganisation also includes cross-border mergers of capital companies (including companies limited by shares).

The domestic provisions provide for specific conditions for neutrality of mergers (the operation is CIT neutral provided that the surviving company holds at least 10% shares of the company disappearing through the merger or does not hold any shares in the latter). Spin-off and division is neutral provided that both the assets carved out and remained from the divided company constitute organised parts of an enterprise. Please note that there are restrictions on utilisation of losses of companies disappearing on mergers and divisions (spin-offs) – as described in section 6.

When planning the merger, special attention should be paid to business justification for the restructuring. This operation along with division is currently the only one with respect to which the domestic legislation introduced explicit anti-avoidance clause.

Moreover please note that the Polish Minister of Finance has drafted an amendment to Polish transfer pricing regulations under which the tax authorities will be entitled to examine the arm's length conditions of remuneration in relation to restructuring between related entities (including exit charge or its lack). This new provisions are to be introduced to Polish law in order to harmonise Polish regulations with OECD Guidelines on Transfer Pricing to a greater extent.

Polish Minister of finance is also working on the new general anti abuse law. The exact wording of planned regulations has not yet been revealed however based on the assumptions of the draft amendments the clause is to be based on the European Commission Recommendation on aggressive tax planning of 6 December 2012.

10. Is there any particular issue to consider in the case of companies whose main assets are real estate?

Generally there are no particular issues to consider. Polish domestic law does not contain specific regulations for real estate entities. It should be kept in mind that, though generally gains realised by non-resident entities on sale of shares in Polish real estate companies are taxable in the country of residence of the seller, certain Polish DTTs provide for exception leading to taxation of income realised on alienation of shares in real estate company in Poland (so called real-estate clause).

Under these provisions real estate companies should be generally referred to as entities the value of which (or the value of their shares being alienated) is directly or indirectly derived mainly (some treaties provide for 50% ratio) from immovable property.

11. Thinking about payment of dividends out of your country and a potential exit, is there any particular country that provides a tax efficient exit route to invest in your country?

Generally dividends distributed abroad are subject to 19% standard withholding tax.

In practice withholding may be easily eliminated under the domestic CIT provisions implementing EU Parent-Subsidiary Directive (90/435/EEC). The exemption from withholding tax applies to payments to EU/EEA resident parents provided that they hold at least 10% shares in the borrower for at least 2 years (the required holding period may be met after profit distribution). EU Parent-Subsidiary based exemption is available also for Swiss parent companies (minimum shareholding entitling to withholding exemption in their case is 25%). However in case of Swiss parent companies, the DTT between Poland and Switzerland provides for exemption under the same holding conditions as those set in the EU Parent-Subsidiary Directive. Therefore in practice conditions for both exemptions are the same.

Regardless of the above, the withholding tax relief is usually available under other applicable DTT.

Importantly both EU Parent-Subsidiary Directive and DTT may offer effective route for exit even if there are no distributable profits that could be repatriated as dividends from Polish SPV. This is due to the fact that under current regulations Poland treats the same as dividends also distributions of proceeds from:

- Obligatory or automatic shares redemption (with exception in respect to redemption of shares taken over in exchange for a contribution of enterprise or its organised part)
- Liquidation: proceeds from the voluntary redemption of shares should be recognised for CIT purposes as regular sale of shares and other capital gains

Based on most of the DTTs concluded by Poland capital gains are subject to tax in the country where the seller is tax resident. Therefore buy-back may be effectively used as an exit strategy in the cases of the foreign investor seated in the non-resident country where the participation exemption regime applies.

12. How is foreign debt usually structured to finance acquisitions in your country?

A withholding tax at a rate of 20% is in principle levied on interest paid by the Polish company to non-resident company. Such rate may be reduced:

- Under applicable double tax treaty (most of the Polish double tax treaties provide for withholding tax rates in the range of 0-10%)
- Under the domestic provisions implementing Interest-Royalty Directive (2003/49/EC) for the

lenders resident in a EU Member State or Switzerland. The preferential treatment applies to interest payments made to financing entities provided that they maintain at least 25% shares in the borrower for at least 2 years (the required holding period may be met after interest distribution). Due to transitional period negotiated by Poland upon accession to the EU qualified payments may be subject to (i) 5% withholding tax until 30 June 2013 and (ii) 0% as of 1 July 2013

Foreign debt may be structured in multiple ways: the techniques used in practice involve back-to-back loans (making the use of jurisdictions with respect to which Polish DTT provide for 0% withholding tax rate on interest) and hybrid instruments.

Implementation of structures with the use of hybrid instruments requires particular care due to lack of established practice in assessing their tax implications among tax administration. Due to relatively low tax rate (19%), the tax shield achieved on interest deduction at the level of Polish company may be lower than interest taxation at the level of lender. Related party issues, foreign exchange differences and postponed interest deductibility (generally on cash basis) are the main ones to be considered in financing structuring.

From a Seller's Perspective

13. What are the main differences between share and asset deals?

From the seller's perspective both sale of assets and sale of shares are taxable events. Any income realised on the above transactions is subject to standard 19% CIT rate. In both cases income realised on disposal may be offset with operating losses of the seller (if there are any available) as Polish CIT does not provide for special regime for taxation of capital gains and gains from alienation of property.

In practice, if share deals are contemplated for the transfer of Polish target, the transaction is usually effected from the level of the seller located in the typical holding jurisdiction (where participation exemption regime exists). Combination of the use of DTT and provisions implementing EU Parent-Subsidiary Directive (90/435/EEC) and Merger Directive (90/434/EEC) is used to minimise the sale tax burden.

14. How are capital gains taxed in your country? Is there any participation exemption regime available?

Polish CIT does not provide for participation exemption regime in respect to sale of shares. Any profits realised on such transaction are generally subject to 19% CIT which usually drives investors to keep holding company in foreign jurisdictions where such regime is applicable.

15. Is there any fiscal advantage if the proceeds from the sale are reinvested?

Polish CIT does not contain special incentives for the reinvested income.

Nevertheless use of certain vehicles such as closed-end investment fund (FIZ) and joint-stock partnerships (SKA) should allow the postponement of effective taxation of profit until it is paid, which gives the possibility to conduct neutral reinvestment. In case of SKA, expected tax benefits should be additionally confirmed with binding ruling.

However please note that the Polish Minister of Finance has drafted amendments to the Polish CIT law according to which the structure using SKA and FIZ may no longer trigger tax benefits starting from 1 January 2014. The project of new provisions is controversial and is still under the governmental works. Therefore it is not certain when and in what shape the amendments will come into force.

Your Taxand contact for further queries is:

Poland

Andrzej Puncewicz

T. +48 22 324 5949

E. andrzej.puncewicz@taxand.pl

PORTUGAL

Portugal

From a Buyer's Perspective

1. What are the main differences among acquisitions made through a share deal versus an asset deal in your country?

Share deals

Share deals in either a limited liability company (*sociedade por quotas* or Lda) or in a limited liability corporation (*sociedade anónima* or SA) are not subject to either VAT or stamp tax in Portugal.

However the acquisition of a quota in an Lda company that owns real estate, which results in the ownership by the same entity of 75% or more of its share capital, triggers a real estate transfer tax levied on the proportion of such quota in the property's taxable value or the property's accounted value if higher.

Asset deal

From a VAT perspective the acquisition of a business as a going concern susceptible of forming an independent branch of activity (including the assets, liabilities and commercial relations of seller) is not subject to VAT, if the purchaser is liable or becomes liable by virtue of the transaction, to this tax.

If the transfer is not subject to VAT, an assessment must be made as to whether or not stamp tax should be levied on the transaction. For stamp tax purposes reference should be made to *trespasse* (conveyance or transfer of a business). Under the general schedule of stamp tax the conveyance of a business is liable to Portuguese stamp tax at 5% on its value. The purchaser must pay stamp tax.

Real estate transfer tax is due on the acquisition of immovable property. The tax is levied on the higher of acquisition value or property's taxable value. The tax is due by the acquirer of the property at the following rates:

- 5% on non-urban property
- Progressive rate up to 6% on urban property for residential purpose only
- 6.5% on other immovable property

Stamp tax at 0.8% is also assessed on the higher of transaction or taxable value of the immovable property.

2. What strategies are in place, if any, to step up the value of the tangible and intangible assets in case of share deals?

Portuguese tax law has no provisions to step up the value of assets in share deals.

3. What are the particular rules of depreciation of goodwill in your country?

Depreciation of goodwill is not tax deductible unless, in very strict and specific cases, most of which are recognised in advance by the Portuguese Tax & Customs Authority.

4. Are there any limitations to the deductibility on interest of borrowings?

The 2013 Budget Bill implemented the replacement of the thin capitalisation rules (ie non-deductibility for CIT purposes if the global amount of the financing exceeds a 2:1 debt-to-equity ratio – only applicable to non-EU resident lenders) by an interest barrier rule which limits the deductibility of net financial expenses to the higher of the following:

- €3 million
- 30% of EBITDA (operating profits before interests, taxes, depreciations and amortisations)

This means that net financial expenses up to €3 million will be deductible in all cases. Once this threshold is reached, the entire net interest will be exposed to the 30% deduction limitation. However important transitional provisions have been included in the Budget Bill, allowing a phase-in system, according to which the EBITDA limit will be 70% in 2013, 60% in 2014, 50% in 2015, 40% in 2016 and 30% in 2017.

Net financial expenses that cannot be deducted may be deducted in the following 5 fiscal years, jointly with those incurred in the relevant tax period, provided general limits of €3 million or 30% of EBITDA are not exceeded. When actual net financial expenses in a year is less than the 30% rule, the difference can be added to the 30% limit for the purpose of deducting net financial expenses in the following 5 fiscal years. The net expenses are computed at individual level. This means entities that are taxed as part of a tax group, which does not work as a pure consolidation or fiscal unity system, should apply the interest barriers rule in relation to each individual entity (including the parent).

In addition interest expense incurred by a Portuguese holding company on the financing raised to acquire shares in other companies is generally not tax deductible.

5. What are usual strategies to push-down the debt on acquisitions?

Strategies used to push-down debt on acquisitions include bank financing followed by profit distribution or reimbursement of supplementary capital contributions, as well as tax neutral mergers.

In the first strategy, the target company contracts a banking loan in a sufficient amount to upstream funds to the acquisition vehicle to pay off acquisition debt, via distribution of dividends, reserves or reimbursement of supplementary capital contributions (as described under section 12 below). Interest expense incurred by a Portuguese non-holding target company on the financing raised is tax deductible.

In a tax neutral merger the acquisition vehicle company is merged (in a tax neutral way) into the target company, therefore transferring all its assets and liabilities (including debt on acquisition).

6. Are losses of the target company/ies available after an acquisition is made?

The right to carry forward is forfeited if, prior to the tax year in which the loss would be deductible, the corporate purpose or the nature of the activity of the company changed, or at least 50% of the capital or the majority of the voting rights was transferred. However in these situations and upon prior request, the Minister of Finance may grant an express authorisation to the target company to deduct and off set all or part of such losses.

Additionally if the acquisition is made through a tax neutral merger, demerger or contribution of assets and, if certain conditions are met, it may be also possible to transfer the target company's existing tax losses (or part of them) to the acquiring or newly formed entity, provided that a prior approval from the Minister of Finance is obtained.

7. Is there any indirect tax on transfer of shares (stamp duty, transfer tax, etc)

No indirect taxes are due on the transfer of shares (see section 1 above).

8. Are there any particular issues to consider in the acquisition of foreign companies?

Dividends and other profit distributions derived by a Portuguese parent company from its EU subsidiary are fully exempt (participation exemption) provided that certain requirements are met (see section 14 below).

Portugal also benefits from a broad network of DTTs and applies unilateral relief from double taxation on income in addition to EU directives.

9. Can the group reorganise after the acquisition in a tax neutral environment? What are the main caveats to consider?

A group can reorganise after the acquisition in a tax neutral environment. Both the EU Merger Directive (Council Directive 2009/4133/EC, of 19 October 2009) and the Portuguese corporate tax code provide for a tax neutral regime for certain types of mergers, demergers and contribution of assets. This regime can be achieved if the following applies:

- The companies involved must have their head office or place of effective management in Portuguese territory and/or are from a European Union Member State
- The transferred assets (and liabilities) of a permanent establishment located in Portuguese territory must remain allocated to a permanent establishment located in Portuguese territory
- Profit and loss computation relating to the assets and liabilities transferred must be done as if no transaction had occurred
- Depreciation of the transferred fixed tangible assets, intangible assets and investment properties recorded in the books at cost value must be computed according to the regime that existed in the transferring company
- Provisions, stock value adjustments and imparities transferred must keep for tax purposes in the same regime as previously followed
- The recipient must maintain for tax purposes the same value of the assets and liabilities being transferred
- Those amounts should derive from the application of the provisions of the corporate tax code or from revaluations undertaken under the scope of Portuguese domestic tax legislation

In principle the above operations are not liable for VAT and an exemption of real estate transfer tax and stamp tax may be obtained if certain conditions are met.

10. Is there any particular issue to consider in the case of companies whose main assets are real estate?

As stated in section 14 below, capital gains derived from the transfer of shares in a company whose assets are composed more than 50% of real estate located in the Portuguese territory or that holds a controlling stake in companies whose assets are composed more than 50% of real estate located in Portuguese territory, are taxed in Portugal at 25%. DTT provisions may apply.

On the other hand the acquisition of a quota in a limited liability company that owns real estate, which results in the ownership by the same entity of 75% or more of its share capital triggers real estate transfer tax due by the buyer.

11. Thinking about payment of dividends out of your country and a potential exit, is there any particular country that provides a tax efficient exit route to invest in your country?

Concerning outbound dividends the participation exemption applies in respect of dividends paid to EU or EEA head offices meeting the minimum holding requirements under the EU Parent-Subsidiary Directive (Council Directive 2011/96/EU of 30 November 2011) provided that the head office and subsidiary concerned comply with the conditions set out in the Directive. In addition Portugal benefits from a broad treaty network, allowing tax treaty relief from double taxation.

12. How is foreign debt usually structured to finance acquisitions in your country?

Debt financing

Foreign debt is usually structured via inter-company loans. Stamp tax on the principal is due by the borrower at variable rates according to the duration of the loan. If the loan is for less than 1 year, the rate per month or fraction is 0.04%. If the loan is for 1 or more years the rate is 0.5%. If it is for 5 or more years the rate is 0.6%. If the loan is for an undetermined duration the rate is 0.04% on the monthly debt average of the total daily debtor balances during the month divided by 30.

If certain conditions are met, some exemptions may apply to:

- Short-term loans (up to 1 year) and related interest granted by holding companies to their subsidiaries, companies or other members of a group of companies on behalf of the holding
- Short-term loans and related interest granted by subsidiaries (under relationship of dominium or of group) to holding companies
- Short-term loans granted by shareholders to entities held directly in at least 10% since their incorporation or for more than 1 year, including related interest
- Shareholder loans and related interest

Under the Portuguese stamp tax code and according to the internal instructions issued by the Portuguese tax administration, the actual use of credit granted to or by Portuguese resident entities, regardless of the location or the nature of the counterparts, is liable to Portuguese stamp tax.

For Portuguese corporate tax purposes interest paid may be subject to withholding tax of 25% (NB 30% in case of interest paid to companies domiciled in tax havens) and transfer pricing and thin capitalisation rules is in general applicable.

Equity financing

There are 2 main alternatives to financing a Portuguese subsidiary with equity: by means of share capital or by means of supplementary contributions of capital (*prestações suplementares*) or accessory contributions of capital (*prestações acessórias*).

Supplementary capital contributions are widely used in Portugal. These contributions unique in Europe (quasi-capital) cannot earn interest, are accounted for as equity and may be made in cash. They are repayable to shareholders if the net equity of the company after the distribution does not fall below the sum of share capital and legal reserve.

If the foreign parent company opts for supplementary or accessory capital contributions, equivalent to equity to finance its acquisition, this may be a good planning alternative. In fact when the Portuguese subsidiaries become capable of distributing dividends these may be retained at the company level or distributed to the shareholders. A company with minimal share capital and a large amount of supplementary capital maximises the level of distributable dividends.

From a Seller’s Perspective

13. What are the main differences between share and asset deals?

For indirect taxation see the discussion of section 1 above. For direct taxation see the following section.

14. How are capital gains taxed in your country? Is there any participation exemption regime available?

Capital gains

For the seller the disposal of assets gives rise to a taxable gain, which will correspond to the positive or negative difference between the transfer value and the assets’ net book value adjusted by an inflation coefficient (for assets held for more than 2 years) for the year of acquisition.

Under the Portuguese Tax Incentives Statute, capital gains from the sale of shares in Portuguese companies, held by non-resident companies without their head office or effective place of management in the Portuguese territory and without a permanent establishment to which the capital gains can be allocated, are exempt from Portuguese corporate tax.

This exemption cannot be applied in any of the following situations, where capital gains are subject to corporate tax at 25%:

- The non-resident entity is held, directly or indirectly, more than 25% by resident entities in Portugal
- The non-resident entity is in a tax haven jurisdiction (listed in a government order issued by the Ministry of Finance)
- The capital gain derives from transfer of shares in a company whose assets are composed more than 50% of real estate located in the Portuguese territory or that holds a controlling stake in companies whose assets are composed more than 50% of real estate located in Portuguese territory

As a general rule the Portuguese Tax Incentives Statute exempts from corporate tax the capital gains resulting from disposal of shares or capital participations by a Portuguese holding-type company. This is applicable if the shares or participations have been held for more than 1 year, except when the shares or participations have been acquired from a related party, in which case the holding requirement increases to 3 years.

Participation exemption

Dividends and other profit distributions derived by a Portuguese parent company from its Portuguese or otherwise EU subsidiary are fully exempt provided the following:

- Both the parent and the subsidiary have one of the legal forms listed in the annex to the EU Parent-Subsidiary Directive (Council Directive 90/435/EEC of July 23) in case of an EU parent company
- The parent company is not taxed under the tax transparency method
- The subsidiary is subject in the state of its residence to corporate tax with no possibility of an option or of being exempt
- The subsidiary is not resident for tax treaty purposes outside the European Union
- The Portuguese parent has a direct holding of either at least 10% in the capital of the subsidiary
- The holding has been maintained for an uninterrupted period of at least 1 year prior to the date of distribution (distributions within a holding period of less than 1 year qualify for the relief, provided that the holding period requirement is subsequently met)

Income that has not been subject to effective taxation will not benefit from this exemption.

Profit distribution to parent companies located within the European Economic Area (therefore also including Liechtenstein, Iceland and Norway) is included within the scope of this rule.

15. Is there any tax advantage in case the proceeds from the sale are reinvested?

Capital gains rollover relief or reinvestment relief is available for gains on the disposal of tangible fixed assets held for not less than 1 year, as well as for shares provided that (i) the participation represents not less than 10% and (ii) was held for no less than 1 year. The reinvestment relief is not available if the participation is sold to or acquired from (i) an entity resident in a listed tax haven or (ii) a related entity.

The reinvestment relief is applicable provided that the total transfer value is reinvested in the tax year prior to sale, the tax year in which the sale was carried out or the following 2 tax years. Under these circumstances only 50% of the gain is taxed. If the transfer value is not reinvested by the end of the second year or the shares (acquired under the reinvestment) not held for 1 year, the gain corresponding to the part not reinvested is increased by 15% and considered a gain in that tax year.

Your Taxand contact for further queries is:

Portugal

Miguel C. Reis

T. +351 226 158 861

E. miguel.c.reis@garrigues.com

PUERTO RICO

Puerto Rico

From a Buyer's Perspective

1. What are the main differences among acquisitions made through a share deal versus an asset deal in your country?

Asset deal

The principal objective for structuring the transaction of acquiring a business as an asset acquisition is that many of the historical business liabilities (including income taxes) of the target business ordinarily do not carry over to the acquirer. In the absence of a contractual agreement providing otherwise these liabilities remain with the seller. Time has proved however that this statement is not necessarily true in the case of certain types of taxes, such as gross receipts tax, sales and use tax, payroll tax and property tax. Here a buyer may succeed to the seller's historical obligations under local law. This also happens with the acquisition of real estate, where the environmental liability will follow the real estate regardless of how its acquisition is structured.

Asset acquisitions may be taxable or non-taxable depending on how the parties structure the transaction. It is important to mention that subject to compliance with certain requirements a shares acquisition may be treated as an asset purchased deal for income tax purposes.

Another major advantage of a taxable asset purchase is that, in the instance where the seller would recognise gain, the buyer will obtain a corresponding step-up in the basis of the assets acquired to fair market value normally resulting in increased future depreciation or amortisation deductions for the buyer. However a disadvantage may be that tax attributes do not carry over to the purchaser.

If the assets are acquired in a tax-free exchange the acquirer generally takes over the target's historical basis in the assets. Other tax attributes are generally lost, unless the acquisition is structured as a business combination that is classified as a tax-free reorganisation. Here the survivor succeeds to the target's historical tax attributes and liabilities. But in many cases certain tax attributes, like net operating losses (NOLs) may become restricted or limited under various rules.

If material appreciation exists in the hands of the seller asset purchases are usually most viable when the target assets are held in a passthrough entity such as a partnership or a corporation of individuals (which is not subject to an entity-level income tax and is like counterpart to the S corporations found under the US Internal Revenue Code). In contrast where the target assets are appreciated and held in a C corporation, an asset sale may not be practical because there are 2 levels of income tax:

- Corporate-level tax on the gain at the corporate alternative capital gain rate of 15%
- Shareholder-level tax on any subsequent distribution to the shareholders

If on the other hand assets are depreciated a C corporation with operating income may be motivated to sell assets in order to recognise loss and offset such operating income, as losses from the sale of property used in the trade or business held for more than 6 months and subject to allowance for depreciation are treated as ordinary losses.

Asset deals may trigger some transfer tax depending on the nature of the asset. If the asset is considered personal property, there should not be any transfer tax or sales and use tax involved, as occasional or isolated sales are exempt from sales and use tax. If the asset however is real property, it will be subject to realty transferor documentary stamp tax.

There are occasions where an asset deal is not feasible as it may lead to costly non-tax issues. The most common situation is where among the assets of the target there are significant distribution agreements, licences or contracts that would be administratively burdensome or expensive to transfer or renegotiate.

Share deal

In a deal where the stocks of the target are acquired, any pre-closing historical or contingent liabilities remain with the acquired company.

A stock acquisition may be structured as either a taxable or non-taxable transaction. However no matter how the transaction is structured, the basis in the underlying assets of the target company carries over and is not stepped up. Subject to the compliance with certain requirements and a corresponding election, the acquisition of the shares of stock of a target can be treated as an asset purchase for income tax purposes. Where the requirements of Section 1034.06 of the Puerto Rico Internal Revenue Code of 2011 (IRC 2011) are met and the corresponding election is made, the basis in the underlying assets of the target will be stepped up to fair market value.

An acquisition of the shares of stock will carry any tax attributes such as NOLs or tax credits with the acquired target corporation. However because of the change in control, certain limitations may be imposed on the use of net operating losses.

Quite often the acquisition of the shares of stock may result in the best alternative to acquire a target. This is normally the case where it would be difficult, expensive or risky to transfer existing contracts and licences into the name of the purchaser.

The sale of shares of stock in a corporation would not trigger transfer tax.

2. What strategies are in place, if any, to step up the value of the tangible and intangible assets in case of share deals?

Where a corporate buyer purchases at least 80% of the shares of stock (vote and value) of another corporation in one or a series of transactions within a 12-month period from an unrelated seller, it may be possible to make an election under IRC 2011 Section 1034.06 (counterpart to US IRC Section 338) in order to treat the acquisition as an asset deal for income tax purposes. The election must be made by the buyer and is irrevocable.

If a partnership interest is acquired instead it may be possible for a buyer to step up its proportionate share of the partnership's underlying assets by making an election under IRC 2011 Section 1075.04 (counterpart to US IRC Section 754). Otherwise the partnership's assets are not ordinarily stepped up.

3. What are the particular rules of depreciation of goodwill in your country?

Under the provisions of IRC 2011 goodwill and any other intangible acquired as part of a trade or business are amortised using the straight-line method over a 15-year period. Intangible assets not acquired as part of a trade or business are generally amortised using a straight-line basis over their estimated useful lives. Software not acquired as part of a trade or business may be amortised using the straight-line method over a 3-year period.

4. Are there any limitations to the deductibility on interest of borrowings?

In general a deduction is allowed for interest paid or accrued within a taxable year on valid indebtedness of the taxpayer. However certain exceptions and provisions may limit or disallowed the deduction. Some of the major limitations are highlighted below.

Thin capitalisation

There are situations where indebtedness may be considered or treated as equity if the instrument characteristics create a sufficient resemblance to such. Interest on debt that is treated or considered equity may be recast as a non-deductible dividend. Whether an instrument is reclassified as equity instead of debt will depend on the facts and circumstances of each case. Courts rely on a number of factors and no one factor is determinative. Some of the factors are as follows:

- The intent of the parties and the adherence to formalities
- The relationship between creditors and shareholders

- The ability of the corporation to obtain funds from outside sources
- The thinness of the capital structure and the risk involved

Transfer pricing

The interest rate between related parties is subject to scrutiny by the Puerto Rico taxing authority. Under the provisions of Section 1040.09 of IRC 2011, the Secretary of the Treasury has the authority to adjust the interest rate on loans between related parties to reflect an arm's length standard.

Interest owed to related foreign persons

Interest owed to a related foreign person would, in general, not be deductible until it is paid. In general, interest paid to a person not engaged in a trade or business is not subject to income tax withholding at source. This is also true in cases where the interest is paid to a an unrelated foreign person not engaged in a trade or business in Puerto Rico, even if the interest is paid on a debt guaranteed by the parent company. However when the interest is paid to a foreign related person, as such term is defined for this purpose, not engaged in a trade or business, it will be subject to income tax withholding at source at the rate of 29%.

5. What are usual strategies to push-down the debt on acquisitions?

There are various ways to push-down debt in acquisitions of Puerto Rico corporations. One common strategy is to form a domestic holding company which, in turn forms a temporary merger subsidiary used to effect the acquisition of target. Upon the consummation of the transaction the merger subsidiary is merged into the target in a downstream merger and the proceeds are disbursed to the selling shareholders in exchange for their stock. Financing is arranged for the merger subsidiary, which is by virtue of the merger assumed by the target as successor to the merger. Financing may come directly from third parties or third party loans guaranteed by the foreign ultimate parent corporation. If the acquisition is initially done without using financing at the local level, debt can subsequently be introduced in Puerto Rico through a variety of means. However caution should be exercised as such transactions may create a withholding of income tax at source at the rate of 29% if the interest on the debt is paid to related foreign persons not engaged in a trade or business in Puerto Rico.

6. Are losses of the target company/ies available after an acquisition is made?

Under IRC 2011, a NOL may in general be carried forward 7 subsequent years to offset the taxable income in those years. There is no carryback period however. Recent legislation permits losses incurred in taxable years commencing after 31 December 2004 and prior to 31 December 2012 to be carried forward 10 years.

Where the shares of stock of a corporation are acquired, any net operating losses remain available and may be used by the target corporation, subject to certain change in control limitations. The most common limitation is imposed by IRC 2011 Section 1034.04(u) (counterpart to Section 382 of the US IRC). It establishes that where a corporation undergoes an ownership change, (generally defined as a more than a 50% age point change in its ownership over a 3-year period) the income tax rules impose an annual limitation on the amount of taxable income that can be offset by any pre-change NOL carryovers.

This limitation equals the product of the value of the corporation's equity loss immediately before the ownership change and the applicable federal long-term tax-exempt rate. If the Section 1034.04(u) limitation for a post-change year exceeds the taxable income that is offset by pre-change loss, the Section 1034.04(u) limitation for the next post-change year is increased by the amount of such excess. Special rules also apply for corporations in bankruptcy.

7. Is there any indirect tax on transfer of shares (stamp duty, transfer tax etc)?

The sale of shares of stock in a corporation does not result in transfer tax.

8. Are there any particular issues to consider in the acquisition of foreign companies?

A Puerto Rico corporation that acquires the shares of stock of a foreign corporation engaged in a trade or business in Puerto Rico would not have available any IRC 2011 provision to allow it to step up the basis of the underlying assets of the target corporation. In addition if the target foreign corporation derives less than 80% of its gross income from sources within Puerto Rico, the target foreign corporation would be subject to branch profit tax at the rate of 10%. Further any dividend paid by the foreign corporation to the domestic Puerto Rico corporation would not be entitled to the dividend received deduction provided for under IRC 2011 Section 1033.19.

9. Can the group reorganise after the acquisition in a tax neutral environment? What are the main caveats to consider?

The Puerto Rico income tax law was patterned after the 1939 US IRC. Consequently, many of the US tax doctrines are also followed in our tax system. Furthermore upon the recent enactment of the IRC 2011, many of the US IRC provisions relative to reorganisations were adopted. Accordingly a group may reorganise after an acquisition, but care should be given to the step-transaction doctrine, which courts often apply to integrate a series of otherwise separate steps, resulting in unanticipated or unfavourable tax consequences.

It is challenging to achieve tax advantages from a post-acquisition restructuring because of the general business purpose and economic substance requirements under the newly adopted provisions. The best advice to a buyer is to focus on the tax planning alternatives at a very early stage in the acquisition process.

10. Is there any particular issue to consider in the case of companies whose main assets are real estate?

In Puerto Rico in general foreign persons are not taxed on gains from the sale of a corporation's shares of stock. An exception exists however, where the gain is sourced in Puerto Rico. In such a case there will be a 25% income tax withholding at source for foreign individuals (10% for US individuals) and 29% if the seller is a foreign corporation not engaged in a trade or business in Puerto Rico.

11. Thinking about payment of dividends out of your country and a potential exit, is there any particular country that provides a tax efficient exit route to invest in your country?

As a territory of the US Puerto Rico cannot enter into tax treaties with any country without the previous consent from the US. As of the publication of this guide Puerto Rico did not have any tax treaties with other countries. However through a protocol it could become part of the tax treaty between the US and Spain, although there is no protocol yet.

Nonetheless because of the autonomy that Puerto Rico has to impose taxes, the applicable withholding income tax at source on dividend distributions is only 10%.

12. How is foreign debt usually structured to finance acquisitions in your country?

Foreign debt may be used to finance acquisitions in Puerto Rico. Care should be taken to avoid a debt-to-equity classification in the context of a related party lending, as the interest payments may be recast as dividend. This recast will result in the disallowance of the interest deduction and having the recast dividend subject to a 10% income tax withholding at source. On the other hand if in the case of a related party lending the interest is not recast, then the interest payments will be subject to a 29% income tax withholding at source.

The best strategies are a back-to-back loan or arranging a foreign financing with a guarantee from the foreign parent company.

From a Seller's Perspective

13. What are the main differences between share and asset deals?

Asset deals

Asset sales may give rise to both ordinary and capital gain treatment, depending on the nature of the asset in the hands of the seller. Capital gains will be subject to preferential rates (10% in the case of individuals and 15% in the case of corporations). If the seller is a foreign corporation engaged in a trade or business in Puerto Rico the capital gain will be subject to the preferential rate, while ordinary income will be subject to ordinary income tax rates – the top marginal rate under the IRC 2011 is 30%.

Share deals

Gain on the sale of shares of stock is generally capital and therefore subject to preferential rates. Under the IRC 2011, the preferential rate in the case of an individual resident of Puerto Rico is 10%, while the preferential rate in the case of domestic or foreign corporations engaged in trade or business in Puerto Rico is 15%.

14. How are capital gains taxed in your country? Is there any participation exemption regime available?

Capital gains recognised by individuals are taxed at a preferential rate of 10%, while those recognised by domestic corporations and foreign corporations engaged in a trade or business in Puerto Rico are taxed at a preferential rate of 15%. Such rates are expected to rise in future. Capital gains recognised by non-resident individuals and foreign corporations not engaged in a trade or business in Puerto Rico are not generally taxed in Puerto Rico. However if the capital gain is from sale of real estate property located in Puerto Rico, then an income tax withholding at source will apply. The applicable withholding rates are 25% for non-resident foreign individuals, 10% for non-resident US citizens and 29% for foreign corporations not engaged in a trade or business in Puerto Rico.

15. Is there any fiscal advantage if the proceeds from the sale are reinvested?

The only tax incentive for reinvesting the proceeds from the sale is available to individuals selling assets of a sole proprietorship. The proceeds of sale must be invested in the acquisition of another sole proprietorship no later than 12 months following the assets sale of the old business. If the amount invested is equal or higher than the proceeds received, then recognition of the gain realised is postponed.

Your Taxand contacts for further queries are:

Puerto Rico

Edgardo Sanabria

T. +1 787 999 3015

E. esanabria@zatax.com

Juan Zaragoza

T. +1 787 620 7740

E. jzaragoza@zatax.com

ROMANIA

Romania

From a Buyer's Perspective

1. What are the main differences among acquisitions made through a share deal versus an asset deal in your country?

Share deals

Under a share deal in Romania the buyer takes over all liabilities, including tax liabilities, of the seller. Therefore buyers should perform in-depth due diligence to quantify the potential risks and eventually protect themselves with a share purchase agreement (by asking the seller for guarantees and indemnities if certain risks or liabilities do occur or become effective after the acquisition date).

A share deal does not affect the target company's depreciation plan for non-current assets, as the target is entitled to continue the depreciation plan of its depreciable non-current assets.

No Romanian VAT applies, as transfers of shares are exempt without credit operations from a VAT perspective.

No Romanian stamp duties or other indirect tax applies on sale of shares. However potential notary fees may be due if the parties agree to notarise the share purchase agreement. In such a case the notary fees are owed either by the seller or by the buyer, as contractually agreed between the 2 parties.

The tax value of the shares is the acquisition price paid by the buyer. The buyer in the case of a future share deal uses the tax value of the shares to determine the capital gains tax owed.

The target is entitled to recover its fiscal losses within the legal deadline to carry forward the fiscal losses (ie 5 consecutive years for fiscal losses incurred before 31 December 2008, and 7 consecutive years for fiscal losses related to 2009 fiscal years and onwards). It should be noted that special rules apply in case the target shifts to taxation system applicable to micro-enterprises (one of the conditions required to qualify as a micro-enterprise is to obtain yearly revenues below €65,000).

No real estate tax implications arise in the case of a share deal.

The buyer should implement a flexible structure to obtain efficient flows of dividends, borrowings, interest payments, royalties, and management services, while also considering implications for a future exit.

Asset deals

In an asset deal the buyer does not take over the seller's pre-closing financial and tax liabilities.

For Romanian tax purposes, the useful life of depreciable assets is established by a government decision as a range depending on the category of the non-current assets concerned. The general rule is that the taxpayer has the option to choose any period falling within the legal range.

Under an asset deal, the buyer is entitled to recover the acquisition price of the depreciable non-current assets during their remaining useful life. Depending on the nature of the assets transferred, they are normally subject to 24% VAT. The input VAT likely to be incurred upon acquisition may be reimbursed by the buyer. However such a procedure may prove a lengthy and administrative burden (over 4 to 6 months or even longer depending on the complexity of operations, as it generally entails a tax audit). If the asset deal qualifies as a transfer of a going concern, no Romanian VAT should apply because transfer of a going concern falls outside of the Romanian VAT scope.

In an asset deal the target's fiscal loss cannot be used by the buyer, but may be offset by the target against potential gains arising at the date of the asset deal.

No stamp duties, real estate tax or notary fees are due at the moment of the asset deal except for cases whereby a public notary authenticates the transfer of legal title ownership, when notary fees become due. It is mandatory that transfer of ownership of land and real estate generally be authenticated by a public notary. The notary fees (if any) are owed either by the seller or buyer as mutually agreed.

If the assets sold constitute real estate, vehicles or other assets for which local tax is due, certain procedural requirements must also be fulfilled by both the seller and buyer. In addition if buildings are transferred, the related real estate tax to be owed by the buyer could differ from the real estate tax that was owed by the seller, depending on the inventory value of the building acquired (the inventory value of the building is the entry value of the building in the patrimony, recorded in the accounting system of the building owner, in accordance with the legal provisions in force, subsequent revaluations – according to accounting rules – are also recognised for tax purposes).

2. What strategies are in place, if any, to step up the value of the tangible and intangible assets in case of share deals?

The value of the tangible and intangible assets in a share deal cannot be stepped up at the date of the share deal. However at year-end, the value of the tangible non-current assets can be increased for both accounting and tax purposes further to a revaluation of the respective assets provided the target's accounting policy is to revaluate its depreciable non-current assets. Recognition of a step-up in value of intangible assets for accounting and tax purposes is not allowed.

3. What are the particular rules of depreciation of goodwill in your country?

Goodwill cannot be depreciated for tax purposes.

For accounting purposes, according to the Romanian accounting regulations in line with the EU IV Directive, goodwill usually occurs upon consolidation and represents the difference between the purchase price and the fair value of the net assets acquired by an entity at the transaction date. However under these accounting rules recognition of goodwill in the standalone financial statements is also allowed if the goodwill arises further to a total or partial transfer of assets and liabilities, irrespective whether the transfer takes place within a normal sale or a merger process.

If the goodwill is recognised as an asset, it can be depreciated for accounting purposes during a maximum 5-year period. However entities may depreciate goodwill systematically over a period longer than 5 years, provided that this period does not exceed the economic useful life of the asset and it is disclosed and justified in the explanatory notes to the annual financial statements.

4. Are there any limitations to the deductibility on interest of borrowings?

According to general rule, expenses (including interest expenses) are deductible for corporate income tax purposes provided they are incurred for earning taxable income.

In addition the deductibility of interest expenses on loans borrowed from entities other than banks, leasing entities or other credit institutions (as listed by the Romanian Fiscal Code) is limited for each loan to the following thresholds:

- For loans denominated in foreign currency, the interest rate limit is 6% per year. This interest rate limitation is revised periodically and therefore the 6% cap may change in the following years including 2013
- For loans denominated in Romanian currency (ie RON) the interest rate limit is the reference interest rate communicated by the National Bank of Romania for the last month of each reporting quarter (the Bank's reference interest rate valid in March 2013 was of 5.25% per annum)

Should the interest rate on such loans exceed the indicated thresholds, the interest expense corresponding to the interest rate percentage in excess of the deductibility limitation would be non-deductible for corporate income tax purposes. The interest rate limitation test must be performed prior to applying the debt-to-equity ratio limitations (thin capitalisation rules) described below.

A second limitation on the deductibility of interest expenses and foreign exchange losses related to qualifying loans is the thin capitalisation rule, which applies only in case of long-term loans. If the specific debt-to-equity ratio is negative or exceeds 3:1, interest expenses and net foreign exchange losses related to long-term qualifying loans are not deductible for corporate income tax purposes in the fiscal year concerned, but may be carried forward to be deducted in future financial years, as soon as the debt-to-equity ratio is positive and below 3:1. The debt-to-equity ratio is calculated as the ratio between the average qualifying debt and the average equity for the year concerned.

For the purpose of computing the debt-to-equity ratio, the term credit or loan is defined starting February 2013 as any agreement between the parties that generates for one of the parties the obligation to pay interest and to repay the borrowed capital.

In addition if the debt is received from a related party, transfer pricing provisions should also be observed and applied with priority over the interest rate deductibility limitation and thin capitalisation rules.

5. What are usual strategies to push-down the debt on acquisitions?

Although it is not very common in Romania, one way to push-down debt related to the acquisition of a Romanian target company is to use a leveraged buyout structure. Under a leveraged buyout the main tax issue is the deductibility of the interest expenses related to the debt used to acquire the shares.

Under a leveraged buyout a Romanian special purpose vehicle (SPV) is used to buy the target's shares. Subsequently the SPV and the target are merged and, therefore, the debt obtained to acquire the target's shares is presented in the resulting entity's balance sheet. However mergers implemented under a leveraged buyout must have business substance in order to be tax neutral. To our knowledge so far in practice the Romanian tax authorities have not challenged leveraged buyouts.

Fiscal unity is not available in Romania for corporate income tax purposes. However starting 1 July 2013 foreign companies carrying out activities in Romania via more than one permanent establishment (PE) will be able to consolidate all Romanian income and expenses attributable to their PEs at the level of the specific PE assigned to handle the corporate income tax related liabilities.

As a general rule expenses are deductible for corporate income tax purposes if they are incurred with a view of obtaining taxable income. Considering that the sole purpose of the debt is to acquire shares in a Romanian company, the only income obtained would be either dividends or income from the sale of shares (at a future potential exit). Dividends received from a Romanian legal entity are deemed non-taxable income for the recipient legal entity (SPV). Therefore if the intention is to hold the shares as an investment and only receive dividends, there is a risk that interest expenses incurred on the loan granted to acquire the shares in the target would not be deductible for corporate income tax purposes regardless of the lender. However observing the provisions of the Application Norms to the Romanian Fiscal Code, which says that for Romanian corporate income tax purposes, dividend income does not have related expenses, can mitigate such a non-deductibility risk. If however the shares are acquired with a view of reselling them, therefore earning taxable capital gains, arguments may be found to support the fact that such interest expenses should be treated as tax-deductible within the limitations mentioned under section 4 above. Regardless there is always a risk with the above arguments, which are in favour of the expenses reduction, may be denied by the tax authorities.

6. Are losses of the target company/ies available after an acquisition is made?

The target company's losses are available to be offset against its future profits if the buyer acquires the target under a share deal scenario. Starting October 2012 if further to the share deal the target is absorbed by the buyer, any fiscal losses recorded by the target entity can be offset against the buyer's profits.

As for an asset deal the target's fiscal losses may be offset only against its future profits and therefore cannot be available for the buyer.

7. Is there any indirect tax on transfer of shares (stamp duty, transfer tax etc)?

There is no indirect tax on transfer of shares. Sale of shares is exempt without credit operation for VAT purposes, and therefore no Romanian VAT should be charged.

8. Are there any particular issues to consider in the acquisition of foreign companies?

In principle the same rules apply as those applicable to the acquisition of Romanian companies (eg deductibility on interests of borrowings as detailed in section 4 above). In the case of the acquisition of shares of a foreign company, it is important to verify if the acquired shares can benefit from the participation exemption regime applicable to dividend income earned by the Romanian corporate income taxpayer, as provided by the EU Parent-Subsidiary Directive (EEC Directive 90/435/EEC) – that is a minimum holding percentage of 10% and minimum uninterrupted holding period of 2 years before the dividend payment.

Controlled foreign companies (CFC) legislation is not available in Romania, nor is there a specific tax regime for holding companies.

Transactions between Romanian entities and their non-resident related parties must be undertaken at arm's length. The Romanian entity must prepare the transfer pricing file with specific content in line with the EU transfer pricing code of conduct.

Romanian legal entities are entitled to receive fiscal credit for any tax paid on foreign-source income (eg income from dividends, interest) within the limit of the corporate income tax which would have been due in Romania in respect of the foreign taxable base (determined in accordance with the Romanian tax rules) provided that the provisions of the Double Tax Treaty (DTT) concluded between Romania and that foreign state are applicable.

9. Can the group reorganise after the acquisition in a tax neutral environment? What are the main caveats to consider?

After an acquisition the group can reorganise by way of a merger or spin-off. Mergers and spin-offs involving Romanian legal entities, as well as EU qualifying legal entities, are generally tax neutral (ie no VAT and no corporate income tax is due), provided that certain criteria are cumulatively met.

Mergers and spin-offs must have a business substance to be tax neutral. If the sole purpose of a merger or spin-off is to avoid taxation, the transfers are subject to corporate income tax at 16%.

The transfer of assets and liabilities is not a taxable transfer if the surviving entity maintains the tax value, tax depreciation method and useful lives of the assets transferred upon the merger or spin-off the same as they were prior to the reorganisation process.

The write-off of own shares is not taxable in the case of an upstream merger if certain criteria are met (ie the absorbing entity holds at least 10% in the absorbed entity). But the write-off of own shares may be taxable in the case of a downstream merger. Under Romanian legislation the write-off of own shares should be performed against share capital, merger premium or other reserves.

No taxation of provisions and reserves that were previously deemed as deductible, or of the reserves representing tax incentives, arises if such elements are transferred and maintained as such in the surviving entity's books upon merger. The reduction or usage of reserves that were previously deducted (eg by distribution to shareholders, usage for writing-off own shares) triggers corporate income tax liabilities.

Also the usage (ie for share capital increase or to offset of losses) of legal reserves and reserves representing tax incentives triggers corporate income tax liabilities at the applicable corporate income tax rate valid at the date when the tax incentive was granted. It also triggers related late payment interest and penalties.

No VAT is charged if the transaction qualifies as a transfer of a going concern (in line with the EU VAT provisions).

Fiscal losses brought forward at the level of the surviving entity can be recovered. Starting October 2012 fiscal losses brought forward at the target level may also be offset against the surviving entity's profits.

10. Is there any particular issue to consider in the case of companies whose main assets are real estate?

Attention should be paid to the DTT concluded between Romania and the country of tax residency of the buyer of the Romanian target whose assets are mainly represented by Romanian real estate. Under the Romanian Fiscal Code, capital gains received by a non-resident legal entity from the sale of Romanian real estate or from the sale of shares in companies whose major assets represent directly or indirectly Romanian real estate are subject to 16% Romanian corporate income tax, provided that a more favourable treatment is not prescribed by the DTT concluded between Romania and the seller's country of tax residency.

Therefore it should be checked whether under the DTT concluded between Romania and the buyer's country of tax residency, Romania has the right to tax capital gains received from the sale of an entity whose major assets are Romanian real estate. If this is the case, any capital gains received upon a future exit are subject to 16% Romanian corporate income tax.

11. Thinking about payment of dividends out of your country and a potential exit, is there any particular country that provides a tax efficient exit route to invest in your country?

Under the provisions of the EU Parent-Subsidiary Directive as implemented in the Romanian legislation dividend payments performed towards EU or AELS qualifying tax residents are not subject to withholding tax in Romania provided that certain conditions are met (eg minimum 10% holding for an uninterrupted period of at least 2 years ending at the dividend payment date).

If the provisions of EU Parent-Subsidiary Directive are not applicable, tax jurisdictions whose tax treatment in terms of dividends and capital gains are currently favourable include Cyprus, the Netherlands and Luxembourg based on the applicable DTT.

According to recent amendments brought to the Romanian Fiscal Code, as long as the income obtained from Romania by non-residents is paid in a state with whom Romania has not entered into a legal instrument based on which the exchange of information may be carried out a withholding tax rate of 50% applies in Romania, but only if the related income is paid in the frame of transactions qualified as artificial, per the applicable provisions of the Fiscal Code. These include services, dividends, interest, royalties and commissions in certain conditions from independent activities performed in Romania.

12. How is foreign debt usually structured to finance acquisitions in your country?

Foreign debt is usually debt from non-financial institutions. However there are cases where there is a mix of banking and non-banking debts. If the non-banking debts are borrowed from the parent company, attention should be paid to how the transaction is structured, in order to mitigate the risk that Romanian tax authorities might qualify the debt as a profit participation loan agreement.

From a Seller's Perspective

13. What are the main differences between share and asset deals?

Under a share deal no Romanian VAT should be charged unlike an asset deal, which is generally subject to Romanian 24% VAT. The transfer of old buildings and the transfer of land not qualifying as building land are exempt without credit VAT operations in which the seller has the option to charge 24% VAT. In this respect if the sale is made within the VAT exemption regime, the seller needs to determine if any adjustment of the input VAT (incurred upon the acquisition of the immovable) is required.

By contrast if the seller applies VAT on such transactions, the respective VAT may be deductible at the level of the buyer (on the basis that the acquisitions are intended for performing taxable operations for instance from a VAT perspective and the buyer is in the possession of the original invoice drawn up according to the Fiscal Code requirements). The VAT deduction right should be exercised via the VAT return within maximum 5 years starting from 1 January of the year following the year in which the VAT deductibility right occurred.

In an asset deal notary fees may be owed if the assets are represented in whole or in part by Romanian immovable property. The authentication fee charged by the notary public varies depending on the value of the transaction and could range between 0.5% and 2.5% – the effective percentage decreases as the transaction value increases.

Gains obtained from the sale of assets (in an asset deal scenario) can arrive in the hands of the shareholder only in the form of dividends that can be distributed only after the target's annual financial statements are approved by the general shareholders meeting. Therefore the seller should consider the dividend tax implications and the time taken to cash the proceeds. In a share deal scenario, the proceeds are cashed immediately and without dividend tax implications.

14. How are capital gains taxed in your country? Is there any participation exemption regime available?

Capital gains obtained (from the sale of shares and/or of assets) by Romanian resident companies are included in their ordinary profit and taxed at the corporate income tax rate of 16%. Capital losses related to a sale of shares are in general tax-deductible.

Capital gains obtained by non-residents from the sale of shares held in Romanian companies are taxable in Romania at the corporate income tax rate of 16%. However no Romanian corporate income tax is due if under the DTT concluded between Romania and the seller's country of tax residency, the right to tax such gains stays with the country of tax residency of the income beneficiary (therefore not with Romania).

In addition the corporate seller is required to register for Romanian corporate income tax purposes by appointing a Romanian tax agent or representative to declare and pay any Romanian capital gains tax owed. They are also required to provide its valid certificate of tax residency (if no Romanian capital gains tax is due by virtue of the applicable double tax treaty). However if the buyer is a Romanian legal entity or a Romanian permanent establishment of a non-resident legal entity, he should withhold, declare and pay the tax on capital gains. Starting 1 February 2013, even under this scenario whereby the tax is withheld and paid to the state budget by the buyer, the non-resident seller should still register for Romanian corporate income tax purposes and fulfil its tax reporting obligations.

No participation exemption regime is available.

15. Is there any fiscal advantage if the proceeds from the sale are reinvested?

The Romanian Fiscal Code does not currently provide for a fiscal incentive in terms of reinvested profits.

Your Taxand contact for further queries is:

Romania

Angela Rosca

T. +40 21 316 0645

E. angela.rosca@taxhouse.ro

SINGAPORE

Singapore

From a Buyer's Perspective

1. What are the main differences among acquisitions made through a share deal versus an asset deal in your country?

In a share deal in Singapore the buyer of shares in the target company holds an equity investment, not depreciable assets. The target company continues to enjoy depreciation relief for tangible and intangible property. Provided that the substantial shareholder change – which comes with a takeover of the target company – takes place for bona fide commercial reasons, relief for unabsorbed trading losses or capital allowances brought forward from prior years continues to be available to the target company.

A special income tax regime was recently enacted to provide for amalgamations in which 2 or more companies merge through an exchange of shares between the acquiring company and shareholders of the amalgamating companies. The regime is designed to ensure that no adverse tax consequences arise as a result of bona fide moves taken by companies to merge their businesses. In addition relief from stamp duty, otherwise payable on a transfer of shares and/or real estate ownership interests is available for company reconstruction and amalgamation transactions. Essentially the condition for relief requires at least 90% of the consideration for the transfer of the transferor company's net assets consists of shares issued by the transferee company.

A transfer of assets between associates for cash can also be granted relief from stamp duty – associates being owned at least 75% (directly or indirectly) either by each other or through a common shareholder and provided the transfer is made for bona fide commercial reasons. Legislation also provides for any person registered to collect goods and services tax (GST) to transfer an undertaking as a going concern to another without the transfer being treated as a taxable supply.

2. What strategies are in place, if any, to step up the value of the tangible and intangible assets in case of share deals?

Assuming that open market values are higher than book value, the acquired company can sell its business as a going concern at open market value to a newly incorporated subsidiary. The consideration for sale can take the form of shares issued by the latter subsidiary to the target company which, if desired, can wind up and surrender these shares to its acquiring company as dividend *in specie*. Provisions for relief of stamp duty otherwise chargeable on a transfer of shares or real estate properties are available for company reconstruction and amalgamations.

There is no capital gains tax in Singapore. However where depreciated assets are sold for more than their tax written-down value, there is a clawback of depreciation allowance relief that has been granted in past years.

3. What are the particular rules of depreciation of goodwill in your country?

Where goodwill includes intellectual properties (IP) which have been defined in Section 19B of the Singapore Income Tax Act to include any patent, copyright, trademark, registered design, geographical indication, layout design of integrated circuit, trade secret or information that has commercial value, writing down allowance relief over a period of 5 years is granted for the capital expenditure incurred on the acquisition of the intellectual property.

However to counter potential abuse of the provisions of Section 19B, the revenue may require the support of a bona fide valuation of the intellectual property (IP) acquired for the purpose of the taxpayer's trade as a condition for their applicability.

For assessment years 2011 to 2015, special provisions have been enacted to incentivise the productivity and innovation movement in Singapore. Among other things, under these measures the value of writing down allowance relief can be considerably enhanced for acquisition of IP rights and/or automation equipment during the basis periods (ie the preceding calendar or accounting year) for those assessment years.

4. Are there any limitations to the deductibility on interest of borrowings?

Singapore has strict rules that seek to ringfence the deductibility of interest expense to only income-producing assets, which are funded by borrowing that incurs the interest expense. These restrictions have resulted in an amalgamated company being denied deductibility of interest on debt inherited from an amalgamating company, if that debt had been used by the latter company to fund its shares in another amalgamating company prior to the amalgamation event.

Singapore's new amalgamation regime has not removed this constraint. Interest on debt incurred to fund an investment in shares can only be deducted against dividend income from those shares. If this income consists of tax-exempt dividends all associated financing costs will not rank for deduction against taxable income from other sources. Consequently if an amalgamation results in the shareholdings being converted into hardware plant and buildings owned by the amalgamated company, continued payment of interest on the loan may be denied deductibility against operating income from those assets.

5. What are usual strategies to push-down the debt on acquisitions?

If the acquiring company pushes down debt that has been used to fund an acquisition of shares in a target company, that target company may be denied tax deductibility of interest on borrowings raised to repay any part of its share capital. A more tax-efficient, but rather unwieldy, option is for the target company to sell its business as a going concern to another incorporated subsidiary for cash which can be raised by the purchasing subsidiary from new borrowings. The vendor target company can then wind itself up and return all surplus assets, including cash, to the first acquiring company to repay its own borrowings.

Group relief for groups of companies under common control of not less than 75% can take the form of loss transfers from one group member that has losses to another for relief against the latter's profits. There are however detailed rules on what can qualify as transferable losses. But in general most losses, except broughtforward losses, are transferable.

6. Are losses of the target company/ies available after an acquisition is made?

Under Singapore's new amalgamation regime, the unabsorbed losses or capital allowances of amalgamating or target companies brought forward from prior years continue to be available to the amalgamated company for relief against income of the amalgamated company, where it represents income from the same trade or business of the amalgamating companies which have been transferred to the amalgamated company. Normally a substantial shareholder change test has to be passed for continued availability of relief from past, unabsorbed losses and capital allowances (unless expressly waived by the Minister of Finance) when a loss company undergoes a change of shareholders from 1 fiscal year to the next. In a qualifying amalgamation this test does not apply. But the relief for such past unabsorbed losses or capital allowance is restricted, or ringfenced, to deductions against only income from the same trade as that of the amalgamating companies which produced those losses – not income from other sources.

Prior to amalgamation relief available to the loss amalgamating company for its broughtforward unabsorbed losses against current and future years' income is not restricted only to income from a continuing trade. It can also be granted against investment income.

7. Is there any indirect tax on transfer of shares (stamp duty, transfer tax etc)?

Singapore has stamp duty relief provisions which exempt stamp duty on a transfer of shares or real estate properties that stems from a company reconstruction or amalgamation exercise. From a GST standpoint a transfer of shares is an exempt supply.

Apart from company amalgamation and reconstruction exercises, a transfer of shares (but not an issue of new shares) attracts stamp duty at a rate of 0.2% of transfer consideration.

8. Are there any particular issues to consider in the acquisition of foreign companies?

Singapore's tax system is semi-territorial. It does not tax unremitted offshore income. If the income is remitted, it is exempted from tax in Singapore if certain conditions are met – ie the income has already borne tax in its source territory and the source territory's headline or maximum corporate tax rate is at least 15%. Even if the conditions for exemption cannot be met, Singapore provides unilateral tax credit relief for any foreign taxes charged on foreign income remitted into Singapore.

9. Can the group reorganise after the acquisition in a tax neutral environment? What are the main caveats to consider?

Under Singapore's 1-tier dividend system, it is inefficient for a holding company to fund its holdings of shares or equity with debt because all 1-tier dividends from Singapore companies are tax-exempt, so the interest on debt cannot be granted tax deduction relief. It is preferable for all debt financing to be raised by operating subsidiaries where taxable profits from carrying on a trade can be reduced by interest expense from debt financing.

Unless the ownership of a real estate investment is connected with an active trade – eg management of hotels, property development, management of sports complexes, etc – rental from a real estate investment is treated as passive investment income, for which tax deductions for expenses and losses can be quite restrictive. There is no relief for carry forward losses. No capital allowance relief is available for taxation of passive investment income.

Although the transfer of title in real estate assets attracts a higher stamp duty (about 3% of consideration) than stamp duty for transfer of shares (0.2% of consideration), there is generally no exception made for the transfer of shares in a company whose assets are substantially real estate. However anti-avoidance legislation exists to enable the revenue to counteract any artificial scheme that is designed to deliberately reduce stamp duty through a transfer of shares in SPV companies incorporated only to own real estate assets that are targeted for disposal.

10. Is there any particular issue to consider in the case of companies whose main assets are real estate?

There are no particular issues to consider in the case of companies whose assets are real estate.

11. Thinking about payment of dividends out of your country and a potential exit, is there any particular country that provides a tax efficient exit route to invest in your country?

There is no withholding tax on payment of dividends by Singapore resident companies. When a foreign shareholder of a Singapore company sells shares in a Singapore company, the right to tax the gains from the transaction belongs to the shareholder's country of residence, unless this right is varied by tax treaty arrangements. Some treaties (eg the Singapore/Germany treaty) may also provide that if the company whose shares are being alienated owns immovable property to the extent of 75% or more of its total assets, the right to tax gains from the alienation of the shares in such a company belongs to the country where the immovable property is situated.

12. How is foreign debt usually structured to finance acquisitions in your country?

Unless the terms of a foreign loan are more competitive than those offered by Singapore's capital markets, it is preferable for borrowings to be raised locally. Interest payable on foreign loans is usually subject to withholding tax at either treaty or domestic rates. Loans from countries like Mauritius may however be considered where tax treaty arrangements provide for no withholding tax to be charged in the country that hosts the borrower. The domestic withholding tax rate is 15% of gross interest income.

Merger and acquisition incentive scheme

In a move to support merger and acquisition activities for Singapore enterprises, the Ministry of Finance introduced a new Section 37L in the Singapore Income Tax Act in 2010. During the period from 1 April 2010 to 31 March 2015, Section 37L allows any Singapore company that seeks to acquire a controlling interest either through itself or through wholly owned special vehicle intermediate subsidiaries of more than 50% equity interest (or more than 75% if the acquiring company has already an interest of more than 50%) in another company to deduct 5% of the capital expenditure it incurs on the acquisition from the acquiring company's taxable income over a period of 5 years (otherwise referred to as a merger allowance). There is however a ceiling of S$100 million imposed on the capital expenditure eligible for relief in respect of all qualifying acquisitions falling within 1 basis period of the acquiring company. Moreover to be eligible for this merger allowance relief, the following conditions must be satisfied:

- The acquiring company is carrying on a business in Singapore on the date of acquisition
- It has in its employment at least 3 local employees at all times during the period of 12 months immediately before that date
- It is not connected to the target company for at least 2 years before that date
- The target company carries on a trade or business on the date of acquisition and has in its employment at least 3 local employees at all times during the period of 12 months immediately before that date

Subject to a ceiling of S$100,000 for any 1 year of assessment, a deduction of up to 2x transaction costs incurred for qualifying acquisitions made during the period from 17 February 2012 to 31 March 2015. In the absence of this incentive scheme capital expenditure incurred by a company on the acquisition of shares in another company (which include related transaction costs) does not qualify for tax deduction relief that normally applies only for the acquisition of plant and machinery.

From a Seller's Perspective

13. What are the main differences between share and asset deals?

When shares are sold by a company's shareholders, there are stamp duty implications unless the transaction is one to which stamp duty relief applies for company reconstructions and amalgamations.

In a sale of depreciable, capital assets for which capital allowance relief has been claimed, the selling company may be faced with a clawback of capital allowances – namely, a balancing charge, unless the transaction is a qualifying amalgamation of companies to which the new amalgamation regime applies. In a qualifying amalgamation, the amalgamating company and amalgamated company can elect to treat the asset transfer as being at tax written-down value (as if there is no transfer of ownership) notwithstanding the true consideration for the transfer. There would therefore be no balancing charge arising from the transfer.

14. How are capital gains taxed in your country? Is there any participation exemption regime available?

There is no capital gains tax in Singapore. But when a person earns a profit from the sale of shares or a real estate property that profit may be characterised as income earned following a trade or adventure in the nature of trade. This depends on whether or not it is a one-off deal on the asset's holding period and on whether the seller had pre-planned the transaction when acquiring the asset. This rule applies to both individuals and companies. In 2012 a new Section 13Z of the Income Tax Act was enacted, covering the period between 1 June 2012 and 31 May 2017, to provide certainty that any gains secured by a divesting company from a disposal of shares in an investee company is expressly treated as a capital gain and therefore exempt from income tax on the condition that the divesting company has, at all times, during a continuous period of 24 months prior to the date of disposal of such shares legally and beneficially owned at least 20% of the ordinary shares in that investee company.

15. Is there any fiscal advantage if the proceeds from the sale are reinvested?

There is no fiscal advantage to reinvesting the proceeds from a sale, although the reinvestment of proceeds can support an argument that the transaction if infrequent was entered into for changing the mix of an investment portfolio, not in pursuance of a trade.

Your Taxand contact for further queries is:

Singapore

Leon Kwong Wing

T. +65 6238 3018

E. leonkwongwing@khattarwong.com

SPAIN

Spain

From a Buyer's Perspective

1. What are the main differences among acquisitions made through a share deal versus an asset deal in your country?

Asset deals

Under Spain's general tax law rules an acquirer party (the buyer) may be deemed to be jointly liable for pre-closing tax liabilities of a target business if the transfer is deemed to constitute a transfer of an on-going concern. In such a case the buyer may be deemed to be the successor of the seller in the business acquired. Consequently it is crucial to analyse in detail the nature of assets acquired in every due diligence process. If the assets acquired are standalone assets not deemed to constitute an ongoing concern the pre-closing tax liabilities related such transferred assets in principle will remain with the seller unless there is a contractual agreement specifically providing for the transfer of such liabilities to the buyer.

To limit potential tax liabilities derived from the asset acquisition the buyer may request from the Spanish tax authorities a certification in respect of the tax liabilities and pending penalties due by the seller. This certificate has a binding effect for the Spanish tax authorities and a tax audit could only demand payment for the amounts shown.

In a taxable asset acquisition the purchase price paid by the buyer allocated to each asset will be regarded as its tax basis. Such allocation is often a contentious issue for parties to the transaction, as the buyer and seller's interests in this respect may differ. The tax basis of the assets acquired should be stepped up to represent the assets' fair market value. This step-up may increase the amount of the future tax depreciation or amortisation deductions corresponding to the assets acquired. The portion of the purchase price not allocated to specific assets will be deemed to be attributable to goodwill (in the case of acquisition of a business from an accounting point of view). The target's existing tax attributes, such as net operating losses (NOLs) however do not carry over to the buyer. In Spain NOLs can be offset within 18 years as from the tax year they were generated. It should be noted that under autonomous Basque regulations, NOLs can be offset without temporary limit.

Asset sales may also be subject to value-added tax (VAT) at 21% rate. If what is being transferred is a going concern, VAT would not apply. If real estate property is transferred within the context of a going concern, the transfer would in principle be subject not to VAT but to transfer tax at a rate that would vary between 7% and 11% (depending on the Spanish region that would be entitled to tax the transfer). Transfer tax is 6% in Basque country.

However if the real property is not transferred within the scope of a transfer of a going concern, the VAT exemption for real estate could be waived by the taxpayer provided certain conditions are met. (Law 7/2012 establishes that in certain cases the real property buyer is the taxable person, responsible for filing the VAT return and paying the tax due.) If the VAT exemption is waived, transfer tax would not be levied and VAT would apply.

From a buyer's perspective it is generally preferable to acquire business assets directly (to the extent the buyer can obtain a step-up in the assets' tax basis and could record an amortisable goodwill – see section 3 below for further information). In Spain sellers are generally not inclined to structuring sales transactions as asset deals, as a seller might prefer to avoid the double layer of taxes (at the level of seller and its shareholders at a later time) that could derive from an asset deal. However circumstances that might make the seller lean towards an asset deal include the existence of a pending offset to NOLs, entitlement to the Spanish corporate income tax reinvestment tax credit or, from an economic perspective, when the seller can factor into the sale price the buyer's potential savings in connection with the step-up in tax basis of the assets transferred, among others.

Asset purchases may also give rise to relevant non-tax issues. For instance from a corporate law perspective an asset purchase may sometimes not be advisable where licences, agreements and contracts might not be transferred (or renegotiated) without incurring additional costs or a cumbersome administrative procedure.

Share deals

In share deals the acquired entity (target) remains in existence, and any of its historical or contingent liabilities remain with it after the completion of the transaction. The target is entitled to carry over its tax attributes (such as NOLs or tax credits) as well.

However Royal Decree-Law 20/2012 provides for certain limitations on the compensation of unused losses in tax years commencing in 2011, 2012 and 2013 for companies whose turnover in the preceding 12 months exceeds certain amount. Accordingly compensation of unused losses is limited to:

- 50% of the taxable base if in those 12 months the company's turnover is between €20 million and €60 million
- 25% of the taxable base if the company's turnover exceeds €60 million

It should be noted that under autonomous Basque regulations in years 2012 and 2013 the use of tax losses is limited to 70% of taxable income exclusively for companies not qualifying as small and medium-sized enterprises (SMEs) for corporate income tax purposes.

With regard to NOLs, it should be noted that Spain's corporate income tax rules provide for certain anti-NOL trafficking rules where the majority of the target company's shares is acquired by one or more buyers (which held less than 25% of the shares of the target prior to the acquisition) that are related parties for corporate income tax purposes after the end of the fiscal year in which the NOLs are generated. In addition the target must not have carried out business activities within 6 months prior to the purchase of its majority stake.

Acquisitions of shares generally do not have immediate implications for the buyer. The basis in the target's underlying assets carries over and is not stepped up. Consequently it is not possible for the buyer to benefit from the additional tax amortisation of underlying assets. Nor can they benefit from the additional price paid that should be attributable to the goodwill of the business carried out by the entity whose shares the buyer acquires.

Note: Under Basque tax regulations the buyer may benefit of an indirect deduction for the depreciation of these items by means of the recognition of impairment in the value of the investment in the target or by means of a special deduction for the value of the target's goodwill embedded in the purchase price, as explained in section 2 below.

However the corporate income tax rules allow that the difference between the book value of the target company and the purchase price paid for it (the so-called financial goodwill) could be amortised by the buyer for tax purposes when the buyer merges with the target after the purchase (provided that the goodwill has been ultimately acquired from a third party) – see section 3 below. In this particular scenario such a merger should be carried out for valid economic reasons, not merely for tax reasons.

Finally the sale of shares of a Spanish company is not subject to any indirect tax, except transfer tax (from 7% to 11%, or 6% in the Basque country) if the purpose of the sale is to avoid the tax payable for the real estate properties owned by the companies represented by the shares.

Please note that it will be presumed that the purpose of the sale is to avoid tax in the following cases:

- When the transaction results in the buyer gaining control of an entity whose real estate assets located in Spain not destined to a particular economic activity are at least 50% of the total book value for all assets or, in the case that the buyer already has a controlling stake, when that stake is increased
- When the transaction results in the buyer gaining control of an entity whose assets include a controlling stake in an entity with real estate assets which fit the previous description
- When the shares received are the consequence of real estate contributed for the incorporation of entities or capital increases, if this real estate is not subject to economic activity and 3 years have not elapsed between the date it is contributed and the transaction date

2. What strategies are in place, if any, to step up the value of the tangible and intangible assets in case of share deals?

In principle there are no special provisions in the Spanish corporate income tax law that provide a step-up in value of the target's underlying assets upon acquisition of its shares. However a step-up might be achieved through a merger whereby the buyer absorbs the target after purchasing the target's shares. In this regard attention should be given also to the accounting aspects of the merger.

It should be noted that under Basque regulations it is possible, subject to certain requirements and anti-abuse provisions, to take an indirect deduction for the future depreciation of the higher value of the subsidiary's assets over their book value embedded in the acquisition cost of the investment in the subsidiary by means of the recognition of an impairment of such investment.

3. What are the particular rules of depreciation of goodwill in your country?

Goodwill acquired following an asset deal entered into with a third party could be amortised for tax purposes over a period of 20 years (at a maximum 5% annual rate) for those tax periods beginning before 1 January 2012.

A new legislation approved on 31 March 2012 lowered from 5% to 1% the maximum amount taxpayers can deduct in respect of financial goodwill on acquisitions of businesses and on corporate restructuring transactions (post-acquisition mergers) with effect for fiscal years commencing in 2012 and 2013. However under Basque regulations the maximum depreciation rate for goodwill is 20% in all the above circumstances.

In a share deal the goodwill gained (ie the difference between the book value of the target and the purchase price paid for it that cannot be allocated to other assets and/or liabilities) cannot be amortised for tax purposes, except if a further merger between buyer and target takes place. In this case, and subject to certain conditions the goodwill generated can be amortised for corporate income tax purposes with a maximum 1% (2012 and 2013), with certain limitations:

- The goodwill must have been acquired from a third party (eg if the seller is related to the buyer, the goodwill would nonetheless be amortisable if the target's shares could be deemed to be acquired from a non-related party in a previous transaction)
- The goodwill will be deductible if the seller was taxed (either in Spain or the EU) on the capital gain derived from the sale of the target's shares

Under Basque regulations, subject to certain requirements and anti-abuse provisions, the buyer can deduct for tax purposes in 5 years the part of the purchase price attributable to goodwill without the need of absorbing the target if a further merger between buyer and target takes place. This deduction does not require an impairment to be booked. In case of a merger of the target into the acquiring company, resulting goodwill can be amortised at a rate of 20% for tax purposes. There is no requirement that the seller is taxed in the sale.

For rules on the acquisition of shareholdings in foreign companies, see section 8 below.

4. Are there any limitations to the deductibility on interest of borrowings?

In principle for periods up to and including 2011 there was no limitation on the deductibility of interest on indebtedness for financing the purchase of assets or of shares of a target company in Spain or abroad. When a foreign buyer carried out the acquisition of a Spanish target through a Spanish subsidiary of the buyer, the deductions generated at the level of such entity could be offset against the target's income by means of the consolidated tax regime. This was probably the most common strategy used to push-down acquisition debt (see the following section for details).

However Spanish corporate income tax law provided for specific thin capitalisation rules that applied to indebtedness of non-residents that were:

- Deemed to be related parties to the debtor for Spanish tax purposes
- Not residents in an EU Member State, except tax haven jurisdictions

The thin capitalisation debt-to-equity ratio was 3:1 and the excess of interest paid over such ratio was treated as a dividend for Spanish tax purposes.

From 2012 onwards the above-mentioned thin capitalisation rule disappears and 2 new relevant measures have been introduced:

- Borrowing costs for the period are not deductible if they relate to debts generated within the corporate group incurred to acquire, from other entities in the same group, holdings in capital or equity of any type of entity, or to make contributions to capital or equity of other group entities

This restriction will not apply however (ie these borrowing costs will be deductible) if the taxpayer evidences the existence of valid economic reasons for performing these transactions:

- Net borrowing costs over and above a ceiling equal to 30% of operating income for the period are not deductible

The previous thin capitalisation rule has been replaced with a general rule that disallows more than 30% of the operating income for the period to be deducted. For these purposes:

- Net borrowing costs means the amount by which borrowing costs exceed the income derived from loans of company's funds to third parties in the tax period, not including any borrowing costs with group entities that are non-deductible under the rule related to borrowing costs described above
- Operating income is obtained from the earnings from income statement operations figures for the year, determined by reference to the Commercial Code and other implementing accounting legislation after:
  - Subtracting the amortisation and depreciation expense for fixed and other noncurrent assets
  - Subtracting subsidies for nonfinancial fixed assets and others
  - Subtracting any impairment loss on, and gains or losses on disposals of, fixed and other noncurrent assets
  - Adding any financial income from investments in equity instruments. This financial income only includes income from dividends or shares in income where either the taxpayer directly or indirectly holds at least 5% of the company concerned or the acquisition cost of the holding in the company was higher than €6 million, unless the holding was acquired with funds borrowed from group entities and the related borrowing costs are not deductible

This ceiling has been made subject to the following rules:

- Where the net borrowing costs for the tax period amount to €1 million or less, they will be deductible in all cases
- The portion that is not deducted in one period can be deducted in another period when operating income is higher or borrowing is lower

Therefore:

- Any net borrowing costs that have not been deducted in one period may be deducted in periods ending in the following 18-year period, together with those for the period concerned and subject to an aggregate ceiling of 30% of the period's operating income
- Where the period's net borrowing costs fall below the 30% ceiling that shortfall will be factored in to calculate the ceiling for tax periods ending in the 5 successive years immediately following

It is expressly stated that the above ceiling will not apply to credit institutions and insurance companies. In the case of credit institutions and insurance companies that are taxed as part of a consolidated tax group jointly with other entities that are not, it is specified that the 30% ceiling must be calculated by reference to the operating income and net borrowing costs of those other entities.

Under Basque regulations these new limitations to the deduction of interest have not been implemented. Instead a 3-to-1 thin capitalisation rule continues to apply. It is worth noting that this limitation does not apply to debt with non-related entities or with EU resident entities even if they belong to the same group of companies.

Moreover Spanish transfer pricing rules limit deductibility of interest expenses when the lending between related parties is not on an arm's length basis.

Spanish corporate income tax rules and regulations and Spanish case law do not provide specific criteria for the tax treatment of hybrid financing. There are however some alternatives available to finance investments through quasi-equity instruments (eg participating loans) or through other contractual arrangements (eg silent partnerships) that could be used for tax planning purposes within the limits already commented.

Silent partnerships (*contratos de cuenta en participación*) are agreements under which one party (the silent partner) acquires an interest in the business of another party (the principal) by contributing an agreed amount of capital and entering into a profit and loss sharing agreement. For Spanish accounting and tax purposes the amount contributed is treated as debt and profit distributions are treated as tax-deductible interest (which could be exempt from withholding tax if the recipient is an EU resident) within the limits mentioned above.

5. What are usual strategies to push-down the debt on acquisitions?

The use of a Spanish special purpose vehicle (SPV) by a foreign buyer to carry out the acquisition of a Spanish target, coupled with the Spanish consolidated tax regime, is a common way to push-down the indebtedness related to the acquisition of a Spanish target.

Streaming-up accumulated reserves and equity from affiliated companies to the SPV in exchange for debt, selling assets from the affiliated companies to the SPV, and merging the SPV with the target in a downstream merger are also strategies to consider for pushing down debt. All these strategies have to be carefully analysed to avoid the application of anti-abuse provisions in Spain or in some other countries, as well as to comply with transfer pricing rules and fulfil the new requirements introduced in 2012 regarding interest deductibility.

6. Are losses of the target company/ies available after an acquisition is made?

Generally the target's net operating losses at the date of the acquisition of its shares can be offset against the target's taxable income obtained in the same fiscal year or can be carried forward and used during the next 18 years (or Indefinitely under Basque tax regulations) considering the limitations described above in section 1.

Spanish corporate income tax law does not provide for a carry back rule, nor does it provide for change in control limitations (except as noted above and for the case of mergers, in which certain specific rules apply in order to avoid a double use of tax losses).

NOLs that could be deemed attributable to a business transferred following an asset sale are not transferred to the buyer. (Please see limitations on the application of NOLs as explained above in section 1.)

7. Is there any indirect tax on transfer of shares (stamp duty, transfer tax etc)?

Please see section 1 above.

8. Are there any particular issues to consider in the acquisition of foreign companies?

Where a Spanish buyer acquires a foreign target, the following aspects should be taken into account:

- Whether dividends and capital gains obtained by the buyer in connection with the participation held in the target would qualify for the participation exemption regime
- Whether the interposition of a company that benefits from the Spanish holding company regime (the ETVE regime, for *entidad de tenencia de valores extranjeros*) would be more advantageous from a tax perspective (eg from the perspective of repatriation of funds to a foreign shareholder)
- The tax incentives connected to the investment

In terms of tax incentives connected to the investment, Spanish corporate income tax law allows for the deduction of financial goodwill not attributable to any specific asset of the foreign target in 20 years (1% in 2012 and 2013) if the participation exemption regime is applicable on dividends and capital gains arising from the participation. This deduction is only available for investments in non-EU targets carried out before 21 May 2011 (and EU targets before 21 December 2007) and under the fulfilment of certain conditions.

It should be noted that under Basque regulations this deduction is available for the acquisition of both Spanish resident and non-resident targets. Therefore it has not been challenged as contrary to EU Law and the deduction of the target's goodwill embedded in the purchase price continues to be available to the buyer at a rate of 20% per year.

The ETVE regime provides the following features:

- A participation in a company that does not exceed the 5% threshold required under participation exemption rules may nonetheless qualify for the participation exemption regime if the acquisition cost of the mentioned participation is greater than €6 million. (NB This special rule does not exist under Basque regulations)
- Dividends and gains derived by non-resident shareholders from their participation in an ETVE that are ultimately related to tax-exempt reserves (due to the applicability of the participation exemption regime) are not subject to tax in Spain (provided the shareholder is not resident in a tax haven jurisdiction). The part of the gain attributable to the value of foreign subsidiaries qualifying for the participation exemption in excess of their book value (hidden reserves) is also not subject to tax in Spain

The use of Spanish holding companies entitled to the ETVE regime is common among multinational groups as a way to hold investments in foreign jurisdictions that have advantageous tax treaties in force with Spain (eg Latin American jurisdictions) and to hold shares of Spanish operating subsidiaries. In this latter scenario, a Spanish holding company entitled to the ETVE regime and its Spanish operating subsidiaries could benefit from the group relief provided by the consolidated tax regime; if the holding company is leveraged, interest expenses incurred at the level of holding company could be offset against the taxable income obtained by the operating subsidiaries.

9. Can the group reorganise after the acquisition in a tax neutral environment? What are the main caveats to consider?

The Spanish corporate income tax law provides for a special optional tax neutral regime applicable to certain qualifying corporate restructurings (such as mergers, spin-offs, special contributions-in-kind, exchanges of shares representing a company's share capital, among others), based on the tax regime of the EU Merger Directive.

This regime provides for a tax neutral treatment for restructuring transactions (both from a corporate income tax and indirect tax perspective), by providing that:

- Capital gains or losses realised on the transferred assets are not included in the corporate income tax taxable base of the transferor party
- The acquiring entities receive a carryover basis in the assets acquired. The rules governing the qualification of a transaction for purposes of the mentioned regime are complex, and its applicability should be carefully analysed on a case-by-case basis

The main caveat to consider for tax neutral restructurings under the Spanish tax regime based on the EU Merger Directive is the specific anti-abuse provision that requires the transaction be carried out for valid economic purposes and not with the sole purpose of obtaining a tax advantage.

Under Basque regulations this tax neutral regime can also apply to global transfers of assets and liabilities to shareholders owning 25% or more of the company's share capital provided certain conditions are met.

10. Is there any particular issue to consider in the case of companies whose main assets are real estate?

Capital gains obtained by non-residents in connection with transfers of shares of companies whose main assets are real estate located in Spain are deemed to be subject to tax in Spain, at a 19% rate (21% in 2012 and 2013). In cases where a tax treaty is applicable, its provisions must be analysed to determine whether such gain should be subject or exempted from Spanish taxes.

Capital gains obtained by resident entities in connection with transfers of companies whose main assets are real estate located in Spain are taxed at the ordinary corporate income tax rate (30% or 28% under Basque regulations) the final tax burden imposed on such gains may qualify for a reinvestment tax credit (see section 13 and 15 below for details).

In either case, it is important to note that Spanish transfer tax (from 7% to 11% or 6% in the Basque country) may apply in transfers of shares in case that the sale has the objective of avoiding tax payable for the real estate properties owned by the companies represented by the shares (see also notes relating to Basque exceptions in section 1 above). Transfer tax applies even if the shares transferred are shares of a company that indirectly owns real estate in Spain. The far-reaching scope of transfer tax rules should be borne in mind as transactions involving upper-tier entities could trigger Spanish transfer tax.

11. Thinking about payment of dividends out of your country and a potential exit, is there any particular country that provides a tax efficient exit route to invest in your country?

Dividend distributions made by a Spanish company to non-resident shareholders are generally subject to withholding tax at a 19% rate (21% rate in 2012 and 2013), however this rate may be reduced in the following situations:

- Where the parent company is a resident of an EU jurisdiction (or EEA entities according to the broadening of the application of this exemption through Law 2/2012) no withholding tax applies if certain conditions are met (eg participation over 5% held for more than 1 year)
- Where a tax treaty provides for a lower withholding tax rate, the treaty rate is applicable
- Where the Spanish company distributing the dividends is an ETVE, dividends paid by an ETVE to non-resident shareholders that are ultimately related to tax-exempt reserves (due to the

applicability of the participation exemption regime) are not subject to withholding tax (provided the shareholder is not resident in a tax-haven jurisdiction)

Spanish non-resident income tax law includes an anti-abuse clause whereby the exemption of withholding tax may be denied in cases where dividends are paid to an intermediate holding company resident in an EU jurisdiction, which is ultimately controlled by non-EU persons. In such a case the applicability of exemption depends on evidence that:

- The holding company effectively carries on a business activity directly related to the business activity carried out by the Spanish subsidiary
- The holding company manages the Spanish subsidiary and counts on the proper human and material resources
- The holding company was incorporated for valid economic reasons and not for purposes of benefiting from the withholding tax exemption

The implications of the sale of shares in a Spanish company are described in more detail in section 13 below.

12. How is foreign debt usually structured to finance acquisitions in your country?

Several strategies are commonly used to leverage Spanish acquisitions. In general a financing vehicle resident in an EU jurisdiction is used to benefit from the exemption from Spanish withholding taxes on interest payments (under Spanish domestic provisions, interest payments to EU lenders are tax-exempt).

In addition Spanish law provides for a special regime for the issuance of preferred shares and debt securities by Spanish and EU SPVs (provided such SPV are not deemed to be resident in tax-haven jurisdictions under Spanish tax law) that have as their exclusive corporate purposes the issuance of preferred shares or debt securities. The securities issued by the SPV must be publicly traded and both the SPV and its ultimate owner are subject to strict ownership, legal and information reporting requirements. From a tax perspective this regime provides advantages for both the issuer (eg deductibility of interest, exemption from capital gains tax in contributions of cash in exchange for preferred shares) and investors (ie exemption of interest paid to Spanish corporate and non-resident investors).

From a Seller's Perspective

13. What are the main differences between share and asset deals?

Share deals

If the seller and target are Spanish resident companies, capital gains derived from sales of shares are generally subject to a 30% corporate income tax rate. Capital losses derived from the sale of shares can be offset against the ordinary income and capital gains obtained in the same fiscal year without limitation or during the next 18 years with the limitations already commented.

The amount of an eventual capital gain could be reduced by the amount of the domestic double tax credit (which base is the lower from (i) the amount of the target's retained earnings during the period of ownership net from earnings offset with NOLs or (ii) the net income obtained on the sale) available if the seller had an interest in the transferred entity that amounted to at least 5% of its share capital held for at least 1 year.

When the purchase price obtained in connection with the sale of shares representing at least 5% of the target company's capital (acquired at least over 1 year prior to the sale) is reinvested in certain qualifying capital assets (eg goodwill or shares of other entities, provided that the interest acquired represents at least 5% of the acquired company's capital) the portion of the capital gain subject to corporate income tax may qualify for a reinvestment tax credit that could bring the effective tax burden on such amount down to 18% if some conditions are met.

Under Basque tax regulations the tax basis of the shares sold is adjusted for inflation, the domestic double tax credit is available in similar terms to those described above for general Spanish regulations, the gain can benefit of a partial (60%) exemption subject to reinvestment of the sale proceeds and the general corporate income tax rate is 28%. Losses not used in the year can be carried forward indefinitely.

If the seller is a Spanish resident company and target is a foreign company, capital gains derived from the sale of shares of a non-resident company may benefit from the Spanish participation exemption regime if the following requirements are met:

- The shares sold must represent at least 5% of the target's share capital (or if the seller is subject to the ETVE regime, the seller may still qualify for the exemption, even if the minimum 5% stake is not held if the acquisition cost is at least €6 million except in Basque country) and must have been acquired at least 1 year prior to the sale
- The target must be subject to a tax similar to Spanish corporate income tax (this requirement is deemed to be met if there is a tax treaty providing for an exchange of information clause in place between Spain and the seller's country of residence)

- Income obtained by the target must derive from business activities outside Spain
- Neither the target nor the buyer may be resident in a tax haven

If the participation exemption regime is not applicable, the capital gain obtained is taxable in Spain and a tax credit (for the amount of taxes imposed abroad on such gain) is granted. Fulfilment of the last requirement above should be carefully analysed on a case-by-case basis since certain anti-abuse rules might be applicable.

Please note that new rules that came into force in 2012 allow some flexibility in the fulfilment of certain requirements during the holding period introducing the possibility of a partial or proportional exemption regime.

If the seller is a non-resident company and target is a resident company, foreign persons resident in the EU or in a tax treaty jurisdiction are generally exempt from tax in Spain on gains from the sale of a company's shares, except where (i) the target is a company whose main assets are real property located in Spain or (ii) the stake transferred represents at least 25% of the transferred entity (or where the seller had held, directly or indirectly, a 25% stake at any time during the 12-month period prior to the sale).

Taxable capital gains obtained by non-residents are taxed at a flat 19% rate (21% rate in 2012 and 2013). However an exemption might be envisaged in line with the provisions of a tax treaty. If the target is a holding company that benefits from the Spanish ETVE regime, the capital gain obtained by the seller derived from the sale of the target's shares might not be taxed in Spain, to the extent of the amount of the target's accumulated tax-exempt reserves (ie reserves that ultimately derive from tax-exempt dividends and capital gains obtained by the target as a consequence of the applicability of the Spanish participation exemption regime) and hidden reserves attributable to foreign subsidiaries of the ETVE.

Asset sales

If the seller is a Spanish resident company: capital gains derived from asset sales performed by a Spanish resident entity are generally subject to corporate income tax at a 30% rate. In some cases the acquisition cost of the asset sold may be increased (eg the acquisition value of a building may be updated to reflect the effects of inflation). The amount of an eventual capital gain may be reduced by the reinvestment tax credit (if the purchase price is reinvested in qualifying assets and other requirements are met) mentioned above. An eventual capital gain can be offset against NOLs and other negative income, considering the limitations already described.

Under Basque regulations a full exemption of the gain is available subject to reinvestment of the sale proceeds. The general corporate income tax rate is 28%.

If the seller is a non-resident company capital gains obtained by a non-resident company in connection with the sale of assets located in Spanish territory are generally deemed to be subject to Spanish taxes, at a 19% rate (21% in 2012 and 2013). Note that this rate might be reduced under provisions of an applicable tax treaty. If the assets sold are attributable to a permanent establishment of the non-resident seller located in Spain, such a sale will be deemed to be a sale attributable to the permanent establishment and accordingly, it will be subject to Spanish corporate income tax (at a 30% rate or 28% under Basque regulations).

14. How are capital gains taxed in your country? Is there any participation exemption regime available?

See section 13 above.

15. Is there any fiscal advantage if the proceeds from the sale are reinvested?

Spanish corporate income tax law provides for a special reinvestment tax credit that could reduce the effective taxation on capital gains arising from transfers of certain qualifying capital assets (which include tangible and intangible assets which have been used for business activities at least 1 year prior to the transfer date and shares representing at least 5% of the capital of a company which have been held for at least 1 year prior to the date of transfer) to 18%, provided that the proceeds derived from the disposal of such assets are subsequently reinvested in certain qualifying assets which are not transferred by the seller within a certain time frame (in general 5 years; for movable property, 3 years is required).

For reinvestment purposes the assets that must be acquired are as follows: (i) tangible and intangible assets used in the business activity of the acquirer or (ii) shares representing at least 5% of the capital of a company. Some investments are expressly excluded from the definition of qualifying assets (eg the reinvestment cannot be carried out in non-resident companies that would not meet the requirement to benefit from the participation exemption regime). The reinvestment is not deemed to meet the reinvestment tax credit requirements if the assets were acquired as a consequence of a restructuring that qualifies for the Spanish tax neutral regime applicable to certain corporate reorganisations.

Again it should be noted that under Basque regulations a full or partial exemption is available subject to reinvestment of the sale proceeds. The exemption is full in the case of gains on the transfer of tangible or intangible fixed assets. The exemption is granted for 60% of the gain in the case of gains on transfers of qualifying shareholdings. A pro-rata exemption is granted if less that the full amount of the sale proceeds is reinvested.

Your Taxand contacts for further queries are:

Spain

Albert Collado

T. +34 93 253 37 00

E. albert.collado@garrigues.com

Paula Perez Fernandez

T. +34 91 514 52 00

E. paula.perez.fernandez@garrigues.com

SWEDEN

Sweden

From a Buyer's Perspective

1. What are the main differences among acquisitions made through a share deal versus an asset deal in your country?

Through an asset deal the buyer receives new acquisition or tax values on the assets acquired. If the acquisition is made through a share deal, the tax values of the assets remain the same. Therefore a step-up of the tax value of the acquired assets may be possible through an asset deal, but not with an acquisition made through a share deal.

Given that Sweden has participation exemption rules (see section 14 below), the purchase price does not have any direct Swedish tax implications for the buyer, provided that the acquisition is made through a shares deal and the acquired shares are deemed as business related.

On the other hand the target company's losses (with exceptions described in more detail below in section 6) may be used by the buyer with a shares deal but not an assets deal.

2. What strategies are in place, if any, to step up the value of the tangible and intangible assets in case of share deals?

It is not possible to step up the tax value of the underlying assets in case of a shares deal.

3. What are the particular rules of depreciation of goodwill in your country?

For tax purposes goodwill from a shares deal is as a general rule non-deductible.

In short depreciation on goodwill acquired through an assets deal is allowed over 5 years for Swedish income tax purposes.

4. Are there any limitations to the deductibility on interest of borrowings?

Swedish companies are as a starting point not permitted to deduct interest expenses on intra-group loans. There are also provisions that prevent deduction on interest expenses on loans obtained for intra-group acquisitions of shares when using back-to-back loans and only the intermediate lender or borrower is an external enterprise.

However a deduction is as a main rule allowed should the interest income had been subject to tax with at least 10% for the recipient (the beneficial owner) if the recipient only have had interest income (10% rule). If however a loan is deemed granted primarily to obtain a significant tax benefit, interest payments are not deductible even if the interest income is subject to at least 10% tax.

Deduction may also be allowed under the business purpose rule. The business purpose rule may only be applied in situations where the beneficial owner of the interest income is domiciled within the EEA or a state with which Sweden has concluded a tax treaty. According to the business purpose rule interest payments are deductible if the debt – and the acquisition of shares if the debt is attributable to the acquisition of shares – is deemed primarily business motivated.

Furthermore interest is deductible only as long as it is at arm's length. Whether or not an interest level is deemed to be at arm's length is mainly a question for loans between associated parties.

Swedish legislation does not include any specific thin capitalisation rules, nor does Sweden impose withholding tax on interest payments.

5. What are usual strategies to push-down the debt on acquisitions?

One frequently used strategy to push-down the debt on acquisitions is to acquire the shares of the target company through a Swedish holding company. The target company's taxable income may thereafter be offset against the holding company's taxable deficit by means of so-called group contributions. For group contribution purposes a company generally belongs to the same group of companies as another company if one of the companies holds more than 90% of the shares in the other company or if the companies have a common (ultimate) parent holding more than 90% of shares in both companies.

6. Are losses of the target company/ies available after an acquisition is made?

The Swedish tax regime permits losses to be carried forward indefinitely. Restrictions may however apply where a loss company is involved in a change in ownership (more than 50% change of votes). The restrictions may apply either if a loss company or group is subject to an ownership change or if the new owner is a loss company or group.

The restrictions may affect the losses in 2 ways:

- Tax losses in a loss company that has been subject to an ownership change, exceeding twice the purchase price are normally forfeited
- Losses maintained in spite of this restriction cannot be used to offset against profits in the purchasing company (the new owner) or its affiliates. This also applies where the new owner is the loss company or group – the new owner may not offset losses against profits of the acquired company or group

The restrictions do not apply to losses accrued during the financial year in which the change of ownership occurred.

7. Is there any indirect tax on transfer of shares (stamp duty, transfer tax etc)?

There is no indirect tax, such as stamp duty or transfer tax, on the transfer of shares in Sweden.

8. Are there any particular issues to consider in the acquisition of foreign companies?

When acquiring foreign companies, an assessment should be made on whether or not the shares of the foreign company fall under Sweden's participation exemption regime (see section 14 below).

Also under Sweden's controlled foreign corporation regime a Swedish resident company that directly or indirectly holds an interest in certain foreign legal entities is subject to immediate taxation on its proportionate share of the foreign legal entity's profits if the foreign entity is not taxed or if it is subject to low taxation, which according to the main rule is tax lower than 12.1% for the financial year 2013 (ie 55% of the Swedish tax rate of 22% for the year 2013). Income will however according to the supplementary rule not be deemed to be subject to low taxation if the legal foreign entity is a tax resident and liable to income tax in one of the countries on the so-called white list, provided that the income in question has not been specifically excluded.

9. Can the group reorganise after the acquisition in a tax neutral environment? What are the main caveats to consider?

Provided that the shares acquired fall under the participation exemption regime, the reorganisation can be made without any Swedish tax implications.

After a group reorganisation Swedish aspects that particularly have to be assessed are the rules for limitations on the deduction for interest expenses on intra-group loans, the controlled foreign corporation legislation and whether or not foreign shares acquired by a Swedish enterprise fall under the participation exemption regime.

10. Is there any particular issue to consider in the case of companies whose main assets are real estate?

No particular issues arise in the acquisition of companies whose main assets are real estate.

11. Thinking about payment of dividends out of your country and a potential exit, is there any particular country that provides a tax efficient exit route to invest in your country?

A general exemption from withholding tax applies to dividends on shares in Swedish companies paid to foreign corporate shareholders. This exemption requires that the foreign entity qualifies as a foreign company – a definition that includes companies tax-resident in jurisdictions with which Sweden has concluded a tax treaty if the foreign body is covered by the tax treaty.

However this exemption only applies to Swedish shares qualifying for the participation exemption. This means that shares in the distributing company may not be deemed as inventory for the shareholder (in the meaning that this term has in Swedish tax legislation). Also other exemptions from withholding tax may apply such as the rules under the EU Parent-Subsidiary Directive (90/435/EEC).

For a foreign corporate shareholder capital gains on shares are not subject to tax in Sweden provided the shareholder in question does not have a permanent establishment in Sweden and that the shares are not attributable to the permanent establishment. However capital gain is exempt for Swedish tax purposes even if the shares are attributable to a Swedish permanent establishment and the holding of the shares falls under the participation exemption regime.

For these rules to apply the jurisdiction of any foreign shareholder should be a state that has concluded a tax treaty with Sweden. The foreign corporate shareholder should also be a body covered by the tax treaty in question.

12. How is foreign debt usually structured to finance acquisitions in your country?

Any foreign debt should be structured in such a way that deduction for interest is not restricted under rules for limitations on deduction for interest expenses on intra-group loans.

From a Seller's Perspective

13. What are the main differences between share and asset deals?

A share deal does normally not have any tax implications for a corporate seller as the sale of shares normally fall under the Swedish participation exemption, while an asset deal as a general rule have tax implications for a seller. Any gain arising upon an asset deal is subject to normal corporate income tax. The gain equals the difference between the sales price and the tax value of the assets that have been disposed.

Transfer tax is not triggered as a result of a shares deal. The same normally applies to asset deals. However an asset deal may trigger stamp duty tax if it includes the transfer of real estate. The stamp duty tax is paid by the buyer unless something else has been agreed between the seller and the buyer.

An asset deal is normally not subject to VAT. However it should be assessed on a case to case basis if the asset deal meets the requirements for being exempt for VAT-purposes. A share deal is not subject to VAT.

14. How are capital gains taxed in your country? Is there any participation exemption regime available?

Sweden maintains a classic system for eliminating double taxation in the corporate sector. Capital gains are exempt from tax if the sold company is a corporate entity and the shares are held for business purposes. For unlisted shares generally all shares in Swedish limited liability companies or corporate entities resident and liable to tax in treaty countries are considered held for business purposes, except under certain specific conditions.

For holdings of listed shares there is a general minimum holding requirement of 10% of the voting rights and a minimum holding period of 1 year.

Based on the conditions described above, capital gains on shares are normally exempt in the corporate sector. Should the shares disposed not be regarded as business related, any gain is subject to tax at the normal corporate tax rate, which is 22% for financial years that started 1 January 2013 or later. Losses are deductible but normally only versus gains on securities.

For individuals capital gains are subject to tax with a rate of 30% for listed shares and with a rate of 25% for unlisted shares. Certain rules apply for closely held companies.

15. Is there any fiscal advantage if the proceeds from the sale are reinvested?

There is no fiscal advantage in Sweden as regards the reinvesting of proceeds from a sale.

Your Taxand contact for further queries is:

Sweden

Hakan Nylen

T. +46 40 10 71 93

E. hakan.nylen@skeppsbronskatt.se

SWITZERLAND

Switzerland

From a Buyer's Perspective

1. What are the main differences among acquisitions made through a share deal versus an asset deal in your country?

Share deal

The buyer can generally use the target company's carried-forward tax losses in Switzerland even after the transfer of the target company's shares. The buyer may not be able to offset financing costs against future profits of the target company. No tax consolidation is possible in Switzerland.

Asset deal

The buyer may be able to amortise the acquired assets tax effectively, including goodwill. The buyer may be able to offset financing costs against future profits of the transferred business. But the buyer cannot use any losses carried forward by the seller.

2. What strategies are in place, if any, to step up the value of the tangible and intangible assets in case of share deals?

There are no strategies to step up the value of assets in share deals in Switzerland. A step-up in value of tangible and intangible assets leads to a taxable profit.

3. What are the particular rules of depreciation of goodwill in your country?

In a share deal the tax base for the shares in the purchaser's books is equal to the purchase price. Except in exceptional cases (eg if the acquired company encounters serious financial difficulties), it is not possible to write off the goodwill component on shares for tax purposes. By contrast in asset purchases the goodwill may be recorded separately and written off against taxable income.

In an asset deal goodwill may generally be depreciated over a period of 5 years or longer.

4. Are there any limitations to the deductibility on interest of borrowings?

Under the federal thin capitalisation guidelines, the minimum capitalisation is calculated based on the maximum indebtedness of all of the assets. For each type of asset only a specified percentage may be financed with debt from related parties (directly or indirectly).

According to the practice of the Swiss Federal Tax Administration the maximum percentage of debt authorised for each type of asset is as follows:

- Liquidity – 100%
- Receivables on supplies and services – 85%
- Other receivables – 85%
- Stock – 85%
- Other circulating assets – 85%
- Swiss bonds and foreign bonds in Swiss francs (CHF) – 90%
- Foreign bonds in foreign currency – 80%
- Swiss and foreign quoted shares – 60%
- Other shares and investments in limited liability companies – 50%
- Participations – 70%
- Loans – 85%
- Installations, machines, tools, etc – 50%
- Operating real estate – 70%
- Villas, parts of real estate, vacation houses and constructible land – 70%
- Other real estate – 80%
- Cost of constitution, increase of capital and organisation – 0%
- Other tangible assets – 70%

The required equity is calculated on the basis of the fair market value of all assets as stated in the balance sheet at the end of the business year.

The federal tax authorities publish maximum interest rates on borrowings from related parties annually. For the fiscal year 2013 the maximum interest on loans between related parties denominated in Swiss francs amounted to 3.75% for business loans. For loans denominated in other currencies the maximum allowed interest rates for the most important currencies are also published by the federal tax authorities: for the fiscal year 2013, the maximal interest rates for loans denominated in US dollars amounted to 1.75% and for loans denominated in euros amounted to 1.75%. However different interest rates are applicable if the taxpayer can prove that the financing is at arm's length. In this case a tax ruling is recommended.

Should the interest rates not meet the above requirements, the exceeding interest is qualified as deemed dividend distribution and is not deductible for tax reasons. Furthermore Swiss withholding tax is levied on the deemed dividend distribution.

5. What are usual strategies to push-down the debt on acquisitions?

If a Swiss leveraged acquisition vehicle (SPV) purchases the shares of the Swiss target company and the SPV and the target company are then merged, the SPV's debts will be taken up into the operating company. However tax authorities will likely qualify this as an abuse, with the result that the interests paid on debt are not tax-deductible. If the SPV is not merged with the target company, dividends paid out by the target company may serve to finance the acquisition debt (participation exemption could be applied on the dividend distributed). In an acquisition by an operational company followed by a merger of the operational company with the target, Swiss tax authorities in general do not treat such debt push-down as misuse.

However there is a risk that tax authorities could qualify such a merger in the case where the shares have been purchased from a private individual seller as an indirect partial liquidation, triggering unfavourable tax effects for the seller.

6. Are losses of the target company/ies available after an acquisition is made?

The target company's carried-forward tax losses can be generally used within the maximum offset period of 7 years even after transfer of the target company's shares. In the case of an acquisition of a shell company (a mostly liquidated company holding cash) tax losses may not be used.

In an asset deal the target company's losses are not available.

7. Is there any indirect tax on transfer of shares (stamp duty, transfer tax etc)?

Transfer stamp duty (or security transfer tax) is due if taxable securities are transferred for consideration and if a securities dealer, as defined in the Swiss Federal Stamp Tax Act is involved either as a party or as an intermediary. Certain types of transactions or parties are exempt.

Securities dealers are banks, actual dealers in securities and, among others, Swiss companies that hold securities with a book value of more than CHF10 million according to their latest balance sheet. A new company should not be liable for stamp duty until 6 months after the first balance sheet showing taxable securities of at least CHF10 million.

Taxable securities are in particular shares, bonds and participations in mutual funds. The rate of transfer stamp duty is 0.15% for Swiss securities levied on the consideration. If foreign securities are transferred, the transfer stamp duty is 0.3%. Transfer stamp duty is payable by the securities dealer but usually paid by the parties to the transaction.

No VAT arises on the transfer of shares. VAT incurred on transaction costs in connection with the acquisition or sale of a share quota of more than 10% is basically deductible as input tax.

8. Are there any particular issues to consider in the acquisition of foreign companies?

Dividends from a target company may be subject to foreign source tax. Switzerland has concluded tax treaties with numerous countries. Not all of the Double Tax Treaties (DTTs) provide for a 0% rate for withholding taxes on dividend payments. For EU countries, Switzerland Article 15 of the Agreement between the European Community and the Swiss Confederation providing for measures equivalent to those laid down in the Directive 2003/48/EC on taxation of savings income in the form of interest payments provides for a 0% rate on dividend payments from a participation resident in the EU to a Swiss parent company, if the participation amounts to at least 25% and a holding period of at least 2 years is met.

Switzerland's federal decree on measures against the improper use of DTTs introduced in 1962 still applies in cases where a Swiss resident claims relief for foreign withholding taxes on the basis of a tax treaty. Under the general provision treaty relief is denied if the conditions of residence, registered office, and beneficial ownership or tax liability are not fulfilled or if it is abusive. The focus in practice is to ensure that there is not an abusive application of treaty benefits. This occurs in particular in the case of an abusive transfer of income to non-qualifying persons, inappropriate profit distributions and inappropriate financing and interest rates. The decree does not apply in cases where an applicable tax treaty contains specific or general misuse clauses.

A transfer to non-qualifying persons is regarded as abusive when a substantial part of income is used directly or indirectly to satisfy the rights or claims of persons not entitled to benefit from a tax treaty. In practice the Federal Tax Administration has defined more precisely the limits of this requirement. Not more than 50% of treaty-favoured income may be transferred directly or indirectly to persons not entitled to treaty benefits. However deductible payments made by a Swiss-resident company could exceed 50% of its treaty-favoured income as long as the payments are commercially justifiable and the company meets 1 of the following tests:

- Active trade or business test
- Direct (or indirect) stock exchange test
- Pure holding company test

Thin capitalisation rules apply in Switzerland. In addition the interest paid to foreign creditors may not exceed the appropriate fair market interest rates.

9. Can the group reorganise after the acquisition in a tax neutral environment? What are the main caveats to consider?

A company reorganisation can qualify as tax neutral reorganisation. Reorganisations mainly include:

Legal mergers

A legal merger qualifies as tax neutral reorganisation if the assets and liabilities are transferred at book value and the entity continues to be liable to tax in Switzerland. The tax neutrality covers corporation taxes, real estate gains taxes, transfer stamp duty, issue stamp duty and dividend withholding tax. The merger is also tax neutral for the shareholders. For shareholders holding the shares of the merged entity as their private assets, any cash consideration and increase in nominal value is subject to dividend withholding tax and subject to income tax.

Demergers

A demerger is tax neutral if the demerging company carries on at least 2 businesses, one of which is transferred to another company, the book values remain unchanged and the businesses concerned remain subject to taxation in Switzerland.

There is no disposal restriction period imposed on a tax neutral demerger. Demergers of holding, finance, licensing and real estate companies are possible, but these types of companies must meet certain requirements regarding their business activities and employees to qualify as a business.

Share for share exchanges

A share for share exchange is tax neutral if a company exchanges its own shares for shares in a different company and immediately after the transaction controls at least 50% of the voting rights in this company. The use of consideration other than its shares does not prevent the transaction from being tax neutral, provided the consideration does not exceed 50% of the total consideration's value, including the shares.

Hive-downs

A company can transfer a trade of business or a fixed asset tax neutrally at book value to a newly established or an existing subsidiary in Switzerland. A disposal restriction period of 5 years applies. A company can transfer participations of at least 20%, tax neutrally at book value, to subsidiaries in Switzerland or abroad without having to observe a disposal restriction period.

Intra-group transfer of assets

A company can transfer tax neutrally at book value a participation of at least 20%, a trade or business or a fixed asset to a group company within Switzerland. Group companies are defined as companies that are ultimately controlled by the same entity with at least 50% of the voting rights. A disposal restriction period of 5 years applies both to the asset transferred and the group membership. The transfer is only tax neutral if the acquiring entity is subject to tax in Switzerland.

10. Is there any particular issue to consider in the case of companies whose main assets are real estate?

A transfer of shares of a company whose main assets are real estate may be subject to real estate capital gains tax. This is dependent on the canton where the real estate property is located. Depending on the cantonal laws at the location of the property, the transfer of shares may also attract a real estate transfer tax on the property's transaction price (the tax is normally due by the buyer). In general an economic transfer of real estate property in a sale of shares is deemed taxable if all of the following conditions are met:

- The owner holds real estate property indirectly through a Swiss corporation
- The owner transfers major parts of the shares in the Swiss real estate corporation (ie, generally more than 50%) to a new shareholder
- The new shareholder obtains by the acquisition of the shares the economic power of control on the real estate

In international transactions some of the double tax treaties provide for treaty protection for real estate capital gains in share deals with a Swiss real estate corporation.

11. Thinking about payment of dividends out of your country and a potential exit, is there any particular country that provides a tax efficient exit route to invest in your country?

Dividend withholding tax applies on any open or deemed dividend distribution of Swiss companies. The tax rate is 35%. It can be fully reclaimed by a Swiss resident shareholder. Foreign shareholders are entitled to a refund according to the applicable double taxation treaties or under Article 15 of the Agreement between the European Community and the Swiss Confederation providing for measures equivalent to those laid down in the Directive 2003/48/EC on taxation of savings income in the form of interest payments. A notification procedure applies to intra-group dividends paid to certain corporate shareholders resident in the EU or a state with which Switzerland has a DTT.

Therefore any EU country or any country providing for a 0% rate on dividend payments provides a tax efficient exit route to investing in Switzerland with regard to withholding tax on dividend payments.

12. How is foreign debt usually structured to finance acquisitions in your country?

There are no commonly used structures to finance acquisitions in Switzerland. Any interest on debt is tax deductible in Switzerland if the thin capitalisation rules are met and the maximum interest rate on loans from related parties is set. In particular the treatment of debt in the creditor's country is irrelevant from a Swiss tax perspective. Therefore hybrid loans are in general considered as debt from a Swiss perspective if the loan is treated as equity in the country of residence of the creditor.

Interest payments on inter-company loans from a Swiss company are in general not subject to Swiss withholding tax. However if the Swiss company is considered to be a savings institution in the sense of the Swiss withholding tax act, interest payments are subject to Swiss federal withholding tax. Furthermore if the Swiss entity issues bonds the interest payments on such bonds are subject to Swiss withholding tax at 35%.

A Swiss company becomes a savings institution from withholding tax point of view if it has interest-bearing liabilities against more than 100 non-bank creditors and the financing amount exceeds CHF5 million. A liability is deemed to be a bond if a Swiss company issues liabilities with more than 10 non-bank creditors with identical conditions or with more than 20 non-bank creditors with similar conditions, for both if the financing amount exceeds CHF500,000. Therefore the foreign debt needs to be structured in a way that it may not be qualified as a bond and the Swiss company does not become a savings institution.

Inter-company loans between fully consolidated group companies are not considered bonds and are not subject to Swiss withholding tax on interest and not subject to Swiss issuance stamp tax.

13. What are the main differences between share and asset deals?

Share deals

Business assets: corporation tax on the sale may be reduced under Switzerland's participation exemption. Losses carried forward in the target company cannot be offset against a capital gain from the sale of the shares.

Private property: for individuals holding the shares as part of their private wealth, the gain in general is considered as tax free capital gain. In specific cases the tax authorities re-qualify a capital gain as taxable income:

- Transformations: the individual sells his or her shares to a company he or she controls
- Securities dealer: if the seller qualifies as professional securities dealer – or if, according to the Swiss Supreme Court, if an individual seller regularly and systematically deals with securities – the capital gain is subject to Swiss income tax and social security contributions
- Indirect partial liquidation: the purchase price is financed with the assets of the acquired company. An indirect partial liquidation will be assumed if shares representing at least 20% of the share capital of a company is sold from the private assets of an individual investor to the business assets of a corporate or a individual buyer and the target company distributes current assets not needed for business operations out of distributable profits or reserves within a period of 5 years after the sale of shares with the seller's cooperation

The transfer of shares is not subject to Swiss VAT.

Asset deals

Corporation taxes are generally payable on capital gains from the sale of assets. Losses carried forward by the seller can be set off against a capital gain from the sale of the assets. A potential loss from the sale of assets can be offset against profits by the seller.

From a VAT perspective the transfer of assets is basically subject to VAT. Depending on the transaction, the VAT due may be notified to the VAT authorities (ie no cash flow).

14. How are capital gains taxed in your country? Is there any participation exemption regime available?

Capital gains are taxed with federal income tax and cantonal or communal income tax for entities and individuals holding the assets as business assets.

Participation relief applies for capital gains derived from the disposal of qualifying participations. However recaptured depreciations on a participation are not subject to participation relief. The requirement to qualify for participation relief requires a participation of at least 10% and a holding period of at least 1 year.

The participation exemption does not lead to an exemption of the capital gain from the tax base but is rather a tax abatement mechanism. From the gross participation income, administration costs and financing cost need to be deducted. The percentage of the so-calculated net participation income to the total taxable income determines the participation income tax abatement.

For individuals holding their assets as part of their private wealth capital gains are not taxable (except for gains on immovable properties).

15. Is there any fiscal advantage if the proceeds from the sale are reinvested?

As mentioned above a sale of assets is basically taxable. Reinvestment of the consideration received in a new fixed asset is an exception to that rule. If the conditions of a reinvestment are met, the taxation is carried over until future realisation of the new asset.

5 cumulative conditions must be fulfilled:

- The replaced asset and the new one must be fixed assets necessary to the exploitation
- The reinvestment must be done within a reasonable period of time. A period of 2 years qualifies and a longer period must be objectively justified
- The reinvestment must take place in Switzerland, but not necessarily in the same canton for cantonal tax purposes
- The book value of the replaced asset must be kept. This ensures the tax-neutrality of the operation. If the company sells and reinvests the asset during the same tax period, a depreciation of the same amount of the undisclosed reserve must be accounted. If not a provision of the same amount must be booked. When the new asset is acquired the provision will be dissolved and used for depreciation. If the company reinvests only after the reasonable period, the provision is dissolved and the amount is added to the taxable profit

Your Taxand contacts for further queries are:

Switzerland

Roger Dall'O

T. +41 44 215 77 31

E. roger.dallo@taxpartner.ch

Oliver Jaeggi

T. +41 44 215 77 41

E. oliver.jaeggi@taxpartner.ch

THAILAND

Thailand

From a Buyer's Perspective

1. What are the main differences among acquisitions made through a share deal versus an asset deal in your country?

The differences in acquiring a target company in Thailand through share and asset deals are briefly discussed below.

Key consideration	Share deal	Asset deal
Restriction of foreign buyer	Acquisition of shares by a foreign buyer is subject to restriction under Thai Foreign Business Act (FBA). Generally under Thai FBA shareholding ratio of foreigner shall not exceed 49% of total shares of a Thai company except under certain circumstances, eg the Thai company obtains relaxation of this restriction under the promotion of board of investment	There is no restriction for foreign buyer for acquisition of assets except land
Contractual arrangement	Generally the transfer of shares shall not have effect on the existing contracts executed by the target company in Thailand	Under the asset deal there may be contracts assigned or transferred to the buyer and/or new contracts may be made in the name of the buyer. The contracts would have to be reviewed to determine the approval required from the contractual parties and any applicable conditions that must be satisfied to assign or transfer a contract to the buyer
Existing tax liabilities of the target company	The obligation is transferred to the buyer	The obligation remains with the selling entity
Loss carried forward in the target company	The buyer can utilise any loss for tax purposes available in the target company	Any loss available in the target company cannot be transferred to the buyer
Step up opportunity in the value of asset	There is no step up opportunity in the value of asset for the share deal	Provided the selling price can be justified as a market value consideration, it is possible to step up the cost base on the asset deal
Goodwill	Total payment made by the buyer for the share deal will be treated as the cost of investment. No amortisation is allowed for such cost of investment	If there is goodwill as part of the price of the transferred asset, it is required to be capitalized by the buyer and is amortised under Thai tax law. Amortised goodwill is tax-deductible expense

2. What strategies are in place, if any, to step up the value of the tangible and intangible assets in case of share deals?

The buyer will not be able to obtain a step up in the value of the assets in case of shares deals.

3. What are the particular rules of depreciation of goodwill in your country?

Under Thai tax law goodwill is amortised in proportion to the period of time since acquisition at the following rate:

Useful life of goodwill	Rate
Not limited	10%
Limited	100% divided by useful life

4. Are there any limitations to the deductibility on interest of borrowings?

There is no tax restriction in relation to the deductibility of interest on loans obtained for the acquisition of assets or shares. Therefore such interest is fully deductible for Thai tax purposes on the basis that it is charged on an arm's length basis. Note that there are currently no thin capitalisation rules or any fixed debt-to-equity ratio in Thailand, except for certain companies promoted by board of investment, which may have certain capital requirements.

5. What are usual strategies to push-down the debt on acquisitions?

We have experienced several companies pushing down the debt for share deals through setting up a holding company in Thailand to hold the shares in the target company. While the foreign investor grants the loan to the Thai holding company, the interest paid by the Thai holding company is tax deductible on the basis that the interest is charged on an arm's length basis. The dividend received by the Thai holding company may be exempted from Thai income tax provided that certain conditions are met, ie having share in the dividend paying company for not less than 25% of all shares with voting right and shares shall be acquired for not less than 3 months.

However we note that as Thailand has no tax loss grouping provisions, the above-mentioned strategy may not be beneficial. For interest costs to be deducted against trading profits, the alternative that the operating company will be debt funded and incur the interest expenditure directly should also be taken into consideration.

6. Are losses of the target company/ies available after an acquisition is made?

For the share deal the buyer can utilise any losses for tax purposes available in the target company. However for the asset deal any loss of the seller cannot be transferred to the buyer.

7. Is there any indirect tax on transfer of shares (stamp duty, transfer tax etc)?

Under Thai tax law the share transfer agreement executed in Thailand would be subject to stamp duty of 1 Baht for every 1,000 Baht of the higher of paid-up value of shares or the nominal share transfer agreement value. The stamp duty is normally payable by the seller unless agreed otherwise in the share transfer agreement. Note that if the share transfer agreement is executed outside Thailand, the first holder of the original signed document in Thailand is required to pay the duty. However a photocopy of the document in Thailand does not attract duty.

Transfer of share is not subject to VAT and specific business tax in Thailand.

8. Are there any particular issues to consider in the acquisition of foreign companies?

There are foreign exchange control regulations in relation to remittance for share investment in foreign companies as follows:

- A Thai company is allowed to invest in a foreign company whose shares are held by such Thai company not less than 10% or to invest in affiliates business entities aboard as necessary
- A Thai individual is allowed to invest in a foreign company whose shares are held by such person not less than 10% in an amount not exceeding US$100 million per year

Foreign dividends received by a Thai company are taxable in Thailand. However any income tax paid offshore on such dividends can be used as a credit against income tax liability payable in Thailand, but not exceeding Thai income tax liability payable on such dividends.

Foreign dividends could be exempted from Thai income tax if:

- A Thai company holding shares at least 25% of the voting shares in the paying company for not less than 6 months before the dividend is paid

- Such dividends are paid from the net profit on which the foreign tax has been paid in the country of the payer at a rate not less than 15% (unless the payer is qualified for an investment promotion that results in a reduction of the tax rate or an exemption from the foreign tax)

9. Can the group reorganise after the acquisition in a tax neutral environment? What are the main caveats to consider?

Thai government provides many tax privileges to corporate reorganisation by ways of amalgamation, entire business transfer and partial business transfer. Such reorganisation mechanisms have widely been used by many investors and business operators in Thailand because of tax savings.

Provided that certain conditions are met an amalgamation and entire business transfer may be exempted from corporate income tax, VAT, stamp duty and specific business tax (on sale of an immovable property). The main conditions for exemption are:

- The reorganisation must be amalgamation or transfer of entire business
- The transferor and transferee must be VAT registered in Thailand
- In case of entire business transfer, the transferor company must liquidate within the same accounting period of the transfer

For partial business transfer provided that certain conditions are met there is exemption from VAT, specific business tax and stamp duty on income derived from partial business transfer. The main conditions for exemption are:

- The transfer must be undertaken between affiliates that are Thai public company or limited companies. The term affiliate refers to holding of more than 50% of shares in transferee company or vice versa
- The status of affiliated company must continue to exist for period of at least 6 months from end of the transfer accounting period
- The registered and paid-up capital of the transferee shall not be less than the net value of the assets transferred
- The value of assets transferred shall not be lower than the market price at the time of transfer

10. Is there any particular issue to consider in the case of companies whose main assets are real estate?

We do not see any particular issue to consider from the buyer’s perspective.

11. Thinking about payment of dividends out of your country and a potential exit, is there any particular country that provides a tax efficient exit route to invest in your country?

From the Double Tax Treaties (DTTs) between Thailand and 45 countries, generally no provision under any DTA provides Thai tax exemption on dividend paid by a Thai company to an offshore shareholder. Therefore the 10% Thai withholding tax shall be deducted from the dividend paid by the Thai company to the offshore shareholder.

The country for locating a company to hold shares in the Thai company that will provide a tax efficient exit route depends on several factors. Hong Kong may be one alternative. Offshore dividend income derived by a Hong Kong company is not taxed in Hong Kong. In addition dividend paid by a Hong Kong company to its offshore shareholder is also not taxed in Hong Kong. However as mentioned above other factors must also be considered.

12. How is foreign debt usually structured to finance acquisitions in your country?

Under Thai tax law there is no tax benefit provided to any structure of foreign debt obtained to finance acquisition in Thailand. Any interest charged on the foreign debt is fully deductible for Thai tax purposes provided it is charged on an arm's length basis. The interest paid to a foreign lender is subject to Thai withholding tax at a rate of 15%. However if a lender is a financial institution a resident in a country that has DTA with Thailand, the Thai withholding tax on the interest payment could be reduced to 10%.

Thailand has no thin capitalisation rules. However the Thai Revenue Department is in the process of bringing the thin capitalisation rule in to control intra-company transactions in the near future.

From a Seller's Perspective

13. What are the main differences between share and asset deals?

For seller's perspective share and asset deals are subject to different transaction tax cost. However there are some available mechanisms under both asset and share deals which may relieve tax burden of the seller.

Tax implications on share deal and asset deal is briefly discussed below.

Share deals

In general for share deals capital gain from the transfer of shares (if any) paid by a buyer in Thailand to a seller, which is a foreign company not carrying on business in Thailand, is subject to the 15% withholding tax under Thai tax law. The withholding tax may be exempted under provision of certain tax treaties. Also share deals outside Thailand between non-residents of Thailand are considered not to fall under Thai tax jurisdiction, even though the target company is in Thailand and accordingly any capital gain is not subject to Thai taxes.

Asset deals

In the case of assets deals in general the seller will be subject to direct and indirect tax in Thailand as briefly discussed below:

Type of tax	Tax implication
Corporate income tax	30% corporate income tax on net profit including gain received from sale of asset (reduced to 23% for FY2012 and 20% for FY2013 and FY2014)
VAT	7% VAT on value of transferred movable assets
Specific Business Tax (SBT)	3.3% SBT on the higher of selling price or appraised value for the transfer of immovable assets. Note that SBT is a deductible expense for corporate income tax purposes
Withholding tax	1% withholding tax on the higher of selling price or appraised value for the transfer of immovable assets (This withholding tax can be used as a credit against the corporate income tax liability)
Transfer fee	2% transfer fee on the appraised value for the transfer of immovable assets. Note that transfer fee is deductible expense for corporate income tax purpose

We note however the above taxes, except transfer fees, maybe exempted by way of corporate reorganisation, eg amalgamation, the entire or partial business transfer. To eligible for exemption, there are certain conditions required. The above form of exit is always preferable for the seller.

14. How are capital gains taxed in your country? Is there any participation exemption regime available?

There is no specific capital gain tax in Thailand. Capital gains incurred from the sale of any kind of asset, including sale of shares, shall be treated as taxable income subject to the normal personal income tax or corporate income tax as the case may be.

Thailand has recently introduced new tax rates for corporation and individual as shown below.

New corporate income tax rate

Year	Corporate income tax rate
Normal rate	30%
2012	23%
2013 and 2014	20%

New personal income tax rate

Net taxable income (Baht)	2012 Tax rate	2013 Tax rate
1 – 150,000	exempt	exempt
150,001 – 300,000	10	5
300,001 – 500,000	10	10
500,001 – 750,000	20	15
750,001 – 1,000,000	20	20
1,000,001 – 2,000,000	30	25
2,000,001 – 4,000,000	30	30
4,000,000 onwards	37	35

Under the Thai Revenue Code personal income tax exemption is available for the case of listed shares made on the Thai Stock Exchange through licenced securities brokers.

15. Is there any fiscal advantage if the proceeds from the sale are reinvested?

Under Thai tax law there are no any fiscal advantages provided for the reinvestment of proceeds from the sale of shares or assets.

Your Taxand contacts for further queries are:

Thailand

Chinapat Visuttipat

T. +66 2632 1800 ext 181

E. chinapat.vs@hnpcounsel.com

Hatasakdi Na Pombejra

T. +66 26 32 18 00 ext 111

E. hatasakdi.np@hnpcounsel.com

TURKEY

Turkey

From a Seller's Perspective

1. What are the main differences among acquisitions made through a share deal versus an asset deal in your country?

Asset deals and share deals have different results for capital gains taxes, VAT, stamp duty and other taxes in Turkey.

Asset deals

The capital gain on a sale of assets is subject to 20% corporate income tax. Capital gains are based on the difference between the net book value of the assets on the balance sheet and the sale price.

There is VAT of 18% on the sale price.

Where there is a written agreement between the buyer and seller, there might be stamp tax of 0.948% on the amount mentioned in the agreement.

Depending on the nature of the assets, there can be other taxes, eg title deed charges of 4% paid equally by the buyer and the seller of the real estate.

Share deals

If the shareholder is an individual:

- If the seller has held the shares of a joint stock company for more than 2 years, there is no taxation on the capital gain. Otherwise the capital gain is subject to taxation as per the tariff in Turkey's Income Tax Code, ie from 15% to 35%. If the company being sold is a limited liability company that does not have share certificates then the capital gain is subject to taxation as per the tariff in the Income Tax Code, ie there is no exemption
- Share sales to individuals are not subject to VAT

If the shareholder is a Turkish resident company:

- If the Turkish resident company has held the shares of the company (a joint stock company or a limited liability company) for more than 2 years, then 75% of the capital gain is exempt from taxation and the remaining 25% is subject to corporate income tax of 20%. In other words the effective tax rate is 5%:

- Sale price: 200
- Cost price: (100)
- Capital gain: 100
- Exempt income: 75
- Taxable income: 25
- Corporate income tax (20%): 5

- For a seller to benefit from this exemption the sale price should be collected until the end of the second year in which the sale transaction is realised. Additionally the exempt amount cannot be distributed for 5 years
- If the holding period is less than 2 years, there is 20% corporate income tax

If the shareholder company is not resident in Turkey:

- If the buyer is also not resident in Turkey, there is no taxation in Turkey. Taxation will be in the country where the shareholder of the company is resident
- If there is a Double Tax Treaty (DTT) between Turkey and the country where the seller is resident, the treaty is applicable

If there are share certificates of the company, there is no VAT on the transfer of shares.

In case there are no share certificates, if the shareholder is a company that has held the shares for more than 2 years, there is no VAT on the sale transaction.

If there is a written agreement between the parties, there might be stamp tax payable on the agreement depending on the nature of the agreement.

As explained above depending on the details of the transaction, an asset deal can be subject to more tax than a share sale.

Merger, demerger and share exchange transactions where applicable are tax-free transactions under Turkish tax legislation provided that the conditions stated in the legislation are fulfilled.

2. What strategies are in place, if any, to step up the value of the tangible and intangible assets in case of share deals?

For statutory accounting and tax purposes, it is not possible to step up the value of the assets in the books, since the assets are booked on the purchase values and subject to depreciation on the accounts.

Again it is not possible to step up the value of shares in the books.

These assets can be subject to valuation, which may affect the sale price of the shares.

Transfer pricing rules – ie the arm's length principle – apply in the case of a sale to related parties.

3. What are the particular rules of depreciation of goodwill in your country?

Depreciation rates are determined and announced by the Ministry of Finance, under the Tax Procedures Code General Communiqué Series numbers 333, 339, 365 and 389, based on the useful life of the assets. The latest rules are applicable to fixed assets purchased after 1 January 2004.

For fixed assets other than passenger cars, depreciation is granted for the full year, regardless of the acquisition date of the asset. For passenger cars only, depreciation for the year of acquisition is calculated on pro-rata basis.

Two methods are available to taxpayers, the straight-line method and the declining balance method. A taxpayer who initially chooses the declining balance method for an asset may switch to the straight-line method. The taxpayer then spreads the written-down value over the remaining years, allowing for equal depreciation. However those who begin with straight-line method may not switch to the double-declining method.

Intangible assets, like capitalised start-up costs and goodwill, are depreciated over 5 years. For start-up costs and goodwill, the declining balance method is not allowed under the Turkish Procedures Code.

4. Are they any limitations to the deductibility on interest of borrowings?

In principle there is no limitation on deductibility on interest of borrowings. However a number of issues should be taken into consideration.

Deductibility of interest on borrowing

The portion of the interest expenses relating to the loans used to finance investments and the foreign exchange differences relating to the loans in foreign currency used to import fixed assets that have incurred until the year-end date of capitalisation (acquisition) must be carried to cost, under Tax Procedures Code General Communiqué Series No. 163. The portion of the interest expenses relevant to the period subsequent to the capitalisation (acquisition) must either be recorded as expense directly or be carried to the cost of the concerned investment or fixed assets and become subject to depreciation, depending on the taxpayer's preference.

Meanwhile Tax Procedures Code General Communiqué Series No. 334 states that the portion of the foreign exchange differences that have occurred until the date of capitalisation must be associated with the cost. The favourable or negative foreign exchange differences that occur subsequent to the date of capitalisation must either be treated as foreign exchange gains or be deducted from the cost and become subject to depreciation. Moreover during subsequent periods, the concerned taxpayer is obliged to adhere to the method selected during the previous period and to continue to apply the same method on the transactions.

Transfer pricing

Transfer pricing through disguised profit distribution is defined in Article 13 of Corporation Tax Code No. 5520:

> *'Corporations shall be deemed to have distributed profits in a disguised manner through transfer pricing, if they are engaged in buying of goods and services from persons or entities that are in the position of related parties, at prices or amounts that are not in conformity with the arm's length prices or values.'*

The same provision also states definitively that all transactions that involve buying, selling, manufacturing, construction operations, lending and borrowing of money and the payments of monthly salaries, bonuses, wages or the like must be considered as the purchase of goods and services under whatever circumstances.

The concept of related parties in the regulation refers to the real persons or entities to which the corporation, its own partners or the real persons or entities which have ongoing relations with the partners are affiliated, or which are under the control of the corporation, its partners or their related parties, from the standpoint of management, supervision or capital.

Thin capitalisation rules

According to the rules on thin capitalisation, the minimum required debt-to-equity ratio is 3:1. Any portion of the related-party borrowing that exceeds 3:1 ratio (3 times the equity) is treated as disguised capital. Interest payments and exchange losses corresponding to that portion of the borrowings from the related party are not deductible from the corporate profit. There is also a dividend withholding tax over the disallowable interest.

Interest and exchange losses corresponding to the related-party borrowing up to 3 times the equity are deductible without any limitation (and without any dividend withholding tax liability), provided that the interest rate is determined according to the arm's length principle.

Borrowings from third parties are not taken into account while making the debt-to-equity comparison.

Borrowings from a related party bank or a similar credit institution whose main field of activity is lending are taken into consideration at a rate of 50%. (Hence the minimum required debt-to-equity ratio is 6:1 for borrowings from related credit institutions.) However if the activity of the credit institution is the procurement of funds among the group companies only, the whole amount of borrowing is taken into account when making the comparison (ie a 3:1 ratio is applied).

Loans from third parties under a cash guarantee are treated as a borrowing from a related party and are subject to thin capitalisation rules. However loans from third parties under a non-cash guarantee (eg a letter of guarantee) of a related party are treated as external loans and are not subject to thin capitalisation rules.

Tax burden on interest

Withholding tax: according to local legislation, the rate of withholding tax on interest payments is 10%. However the withholding tax rate is 0% for the following interest payments:

- Interest payments on loans from local banks and credit institutions
- Interest payments on loans from foreign banks or credit institutions

Loans from related party credit institutions are eligible for 0% withholding tax only if the credit institution is procuring funds to the third parties as well as the group companies. Therefore credit institutions whose main purpose is the procurement of funds only among the group companies are not eligible for 0% withholding tax.

In principle, interest payments are subject to VAT at 18%. However interest payments to local banks and credit institutions are exempt from VAT.

Interest payments to foreign loan providers are subject to reverse-charge VAT at 18%. However interest payments to foreign loan providers are treated as financial institutions as per the domestic laws and regulations of the country of their residence (including banks) are not subject to VAT.

5. What are usual strategies to push-down the debt on acquisitions?

Debt push-down strategies are generally criticised by Turkish tax inspectors.

6. Are losses of the target company/ies available after an acquisition is made?

According to the corporate income tax code, the previous 5 years’ losses are available provided that the losses are shown on the previous years’ corporate income tax declarations separately.

7. Is there any indirect tax on transfer of shares (stamp duty, transfer tax etc)?

According to the stamp tax code, written agreements are subject to stamp tax of 0.948% (general rate) in principle.

There is no need to make a written share purchase agreement for a sale of the shares of a joint stock company but the parties may decide to have a written agreement. This agreement may be subject to stamp tax. On the other hand there are court decisions declaring that a share purchase agreement there is no need to pay stamp tax provided that this agreement is only a simple sale share agreement. For different obligations, guarantees etc determined in this agreement, there may be stamp tax payable.

For the transfer of the participation shares of a limited liability company, since notaries should carry out this transfer, notaries apply stamp tax as 0.948% on the sale price.

8. Are there any particular issues to consider in the acquisition of foreign companies?

Double Tax Treaty effect

If the target company is registered in a country with which Turkey has a Double Tax Treaty (DTT), dividend withholding and capital gains taxes can be reduced.

Controlled foreign corporation regime

Turkey applies controlled foreign corporation legislation. According to Article 7 of Turkey's corporate income tax code, if participation of the Turkish company is more than 50% in the target company, the target company's income may also be taxed in Turkey even if it is not distributed, provided that the following conditions are also fulfilled:

- More than 25% of the gross sales of the target company are passive income
- The total tax burden of the income of the target company is less than 10%
- The gross sale of the target company is more than TL100,000

Turkish holding regime

According to Article 5/1-c of Turkey's corporate income tax code, tax exemption on capital gains is possible, provided the following conditions are fulfilled:

- At least 75% of the assets other than the liquid assets of the company consist of participations in non-resident countries
- Each subsidiary has at least 10% participation
- The participation period is more than 2 years

Additionally under the following conditions the dividend income from non-resident companies is tax exempt in Turkey when:

- Participation is at least 10%
- The holding period is at least 2 years
- There is a total 15% tax on the dividend in the source country
- The dividend income is transferred to Turkey until the related year corporate income tax file is submitted

9. Can the group reorganise after the acquisition in a tax neutral environment? What are the main caveats to consider?

After an acquisition a group can reorganise in a tax neutral manner. But this transaction may have tax results depending on the reorganisation. See section 1 above for more detail on share deal considerations.

A tax-free merger with another company that is not resident in Turkey is not possible. Also, the EU Merger Directive is not applicable since Turkey is not a part of EU.

10. Is there any particular issue to consider in the case of companies whose main assets are real estate?

According to Article 5/1-e of the corporate income tax code, if a Turkish resident company is selling real estate that has held for more than 2 years, then 75% of the capital gain is exempt from taxation and the remaining 25% is subject to corporate income tax of 20%, ie the effective tax rate is 5%. To benefit from this exemption the sale price should not be collected until the end of the second year after the sale transaction realised. Additionally the exempt amount cannot be distributed for 5 years and the seller company cannot be involved in real estate trading activities.

If the holding period is less than 2 years or the company is in the business of trading real estate 20% taxation is due on the capital gain.

11. Thinking about payment of dividends out of your country and a potential exit, is there any particular country that provides a tax efficient exit route to invest in your country?

The dividend withholding rate according to Turkey's corporate income tax code is 15% and is applied to resident individuals, non-resident individuals and non-resident companies.

But the dividend withholding is less than 15% for non-residents in countries that Turkey has advantageous Double Tax Treaties. For example, the dividend withholding rate is 10% to the Netherlands, 5% to Spain and 10% to Luxembourg.

12. How is foreign debt usually structured to finance acquisitions in your country?

When structuring foreign debt to finance an acquisition, Turkey's thin capitalisation rules, withholding tax and VAT should be taken into consideration (see section 4 above).

Under Turkey's Resource Utilisation and Support Fund the following levy applies on the principal at the granting of the loans:

Options	**1**	**2**	**3**	**4**	**5**	**6**
Lender	Bank in Turkey (Onshore)	Bank in Turkey (Onshore)	Bank overseas (Offshore)	Bank overseas (Offshore)	Non-financial group company (Belgium)	Non-financial group company (Belgium)
Currency of loan	TRY	Foreign Currency	TRY	Foreign Currency	TRY	Foreign Currency
RUSF (average maturity < 1 year)	0%	0%	3% on interest	3% on principal amount	3% on interest	3% on principal amount
RUSF (average maturity between 1 and 2 year (1 year included))	0%	0%	3% on interest	1% on principal amount	3% on interest	1% on principal amount
RUSF (average maturity between 2 and 3 year (2 years included))	0%	0%	3% on interest	0.5% on principal amount	3% on interest	0.5% on principal amount
RUSF (average maturity > 3 year (3 years included))	0%	0%	3% on interest	0%	3% on interest	0%

Loan agreements are subject to stamp tax at 0.948% over the principal. Loans obtained from local and foreign sources are subject to this tax. However loans obtained from local and foreign financial institutions are exempt.

Interest payments to local banks and credit institutions are subject to a banking and insurance transaction tax at 5%. However interest payments to foreign loan providers are also tax exempt.

It is also generally recommended to finance the special purpose vehicle (SPV) and not the holding company, in order to take advantage of the deductibility of the financial expenses at the level of the SPV, depending on the structure.

From a Seller's Perspective

13. What are the main differences between share and asset deals?

Depending on the nature of the transaction, asset sales can be liable for more tax in Turkey. Indeed share sales can even be non-taxable in Turkey, depending on the structure (see section 1 above.)

14. How are capital gains taxed in your country? Is there any participation exemption regime available?

There is no separate capital gains taxation in Turkey, as capital gains tax is part of the corporate income tax base. But there are some exemptions to capital gains tax (see sections 1 and 10 above).

15. Is there any fiscal advantage if the proceeds from the sale are reinvested?

Depending on the nature of the transaction, there can be fiscal advantages to reinvesting the proceeds from a sale.

Your Taxand contact for further queries is:

Turkey

Uluc Ozcan

T. +90 212 337 00 00

E. uluc.ozcan@erdikler.com

UK

UK

From a Buyer's Perspective

1. What are the main differences among acquisitions made through a share deal versus an asset deal in your country?

Share deals

The purchase of shares means that the purchasers acquire the entire company. This includes all assets and all liabilities including any historical liabilities.

The purchase of shares in the UK results in few immediate tax deductions – there is no form of deductible amortisation on the purchase price of shares and no ability to rollover qualifying gains from the sale of other assets into the shares purchase price.

One advantage of purchasing the shares in a target company is the possible use of losses in the target company against profits of the same trade. Losses from pre-acquisition periods in the target company cannot be offset against profits arising from the corresponding period in the acquiring company. But post-acquisition, it should be possible to group relief profits and losses between the target company and the acquiring company, provided the ownership conditions are met (broadly, being 75% ownership of the ordinary shares).

Stamp duty at 0.5% of the consideration is payable on the acquisition of shares.

The future sale of the shares in the target company may qualify as a tax-free disposal – there is an exemption whereby gains (and losses) on the disposal of shareholdings of 10% of more in trading companies or trading groups are exempt from tax, the substantial shareholding exemption.

The sale of shares is often more attractive to vendors because there are more reliefs and lower rates of tax on gains. A corporate seller may benefit from the substantial shareholding exemption, which can exempt the capital gain. UK-resident individual sellers of shares are typically taxed at 28%. This compares favourably with the highest rate of income tax in the UK, which is currently 45%.

Asset deals

In asset deals purchasers can cherry pick the assets they want and leave any unknown liabilities behind.

There is also greater scope for immediate and future tax deductions. For example on stock assets that qualify for capital allowances and goodwill, would typically qualify for tax deductions. Certain assets purchased may qualify for rollover relief so a purchaser can defer other gains into these acquisitions.

There are potentially higher base costs in assets acquired for capital gains tax purposes. Broadly the tax basis of each relevant asset will be the amount paid for it.

The purchase of assets may qualify as a transfer of a going concern and, as such, VAT need not be accounted for on the sale.

However there are potentially higher stamp duty costs, as stamp duty land tax of up to 4% of the consideration is payable for transactions relating to UK non-residential land or real estate.

An asset deal is often less attractive for vendors than a share deal because of the potential double tax charge for shareholders, as balancing charges and capital gains arising will fall on the disposing company.

2. What strategies are in place, if any, to step up the value of the tangible and intangible assets in case of share deals?

Historically it was difficult to achieve a step-up in basis of the tangible and intangible assets in the case of share deals. This was because UK tax legislation contains anti-avoidance measures designed to counteract such planning, ie primarily the de-grouping rules. Broadly these de-grouping rules hold that, where a company leaves a capital gains group holding assets that have been transferred to it from other group companies, these assets are deemed to have been disposed of at market value and then re-acquired. This crystallises capital gain in the transferee company.

However since 1 April 2011 these rules have been relaxed. When a company that has had trade and assets transferred into it and is then sold, the de-grouping charge is calculated in the same way. However the gain is now not crystallised in the transferee company, instead it is added to proceeds for the sale of shares. Where the trade and assets transferred were used for the purposes of the transferor group's trade, the gain on shares disposal may be exempted under the substantial shareholdings exemption. The combined result of this is that the purchaser gets a clean company holding assets which have been re-based to market value and the vendor is exempted from tax on the disposal.

3. What are the particular rules of depreciation of goodwill in your country?

UK tax legislation enables a company that has purchased intangible assets to claim tax relief against taxable profits for the cost of the acquisition broadly to the extent that the acquisition cost is amortised in the company's accounts. A buyer can elect to have the goodwill depreciated at a fixed rate of 4% per year regardless of the amount of depreciation taken through to the profit and loss account. This is particularly relevant for companies that account under International Accounting Standards (IAS). This tax-deductible goodwill arises on asset acquisitions.

Tax-deductible goodwill depreciation is not available on share deals. Relief for the acquisition cost (plus indexation) is given as a deduction against sale proceeds on eventual sale.

4. Are there any limitations to the deductibility on interest of borrowings?

UK revenue authorities may restrict interest deductions on intra-group debt (eg a push-down of acquisition debt) in the UK unless it can be demonstrated that an independent third party lender would enter into the transaction. To the extent that interest charged on connected party lending is deemed to be excessive it will be disallowed for tax purposes.

For justification that the lending is at arm's length rates typically UK revenue would want to see forecasts and would consider interest cover and gearing ratios, comparing these to what would be required by a third party lender. An offer from a third party lender, where that offer had received approval from the credit committee, would also be useful. It is possible to obtain an Advance Thin Capitalisation Agreement (ATCA) with the UK revenue, which would give certainty on the amount of interest that will be deductible. But this will often include gearing covenants.

UK revenue authorities may also impute interest received by a UK company on outbound funding under the same principles. For example a non-interest bearing upstream loan to a foreign parent would fall within this scope.

Worldwide debt cap legislation also applies to interest deductions available to UK companies. Under these rules the interest deduction is capped by reference to the net external finance costs of the worldwide group.

UK tax legislation also contains anti-avoidance provisions that can deny interest deductions where the loan is deemed to have been borrowed for unallowable purposes (which broadly means the loan was obtained to secure a tax advantage).

5. What are usual strategies to push-down the debt on acquisitions?

Typically from a UK standpoint in order to push down debt on an acquisition, a new local holding company is established to carry out the acquisition so interest on the debt can be relieved against the target company's trading profits under the group relief provisions in UK tax legislation. Broadly UK companies can surrender profits and losses within a group providing that a common parent holds at least 75% of the ordinary share capital.

It is possible post-acquisition for the trade of the target's assets to be hived up to the holding company on a tax neutral basis, such that the trading profits are matched with interest deductions. The target company can be liquidated if desired.

6. Are losses of the target company/ies available after an acquisition is made?

There are 4 main categories of tax losses in the UK:

- Trading losses
- Management expenses
- Losses arising from interest deductions in excess of profits
- Capital losses

These losses remain with the corporate entity and do not transfer on a sale of assets.

A comprehensive set of anti-avoidance rules have been introduced to block transactions where the primary benefit to the buyer or to the seller was the existence of tax losses within the target company. The rules cover trading losses (excess interest losses) and capital losses.

Trading losses

If a target company has incurred trading losses in its current or earlier accounting periods, a buyer will need to know whether the losses will be available to the target company in future accounting periods. The UK anti-avoidance rules on trading losses apply where there is a change in ownership and either:

- There is a major change in the nature or conduct of the company's trade within 3 years on either side of the change in ownership change
- The change of ownership occurs between the scale of the company's activities becoming small or negligible and a considerable revival of its trade

Where the above applies, losses arising before the change in ownership will not be allowed against profits after the change of ownership.

Anti-avoidance in certain circumstances also prevents the carryforward of surplus management expenses and excess interest losses. Such losses arise in UK companies with investment status for UK tax purposes.

Capital losses

UK tax legislation contains anti-avoidance rules designed to restrict the offset of losses against gains where a company becomes a member of a group. Such losses can only be set against gains on assets that are used for the continuing business of the company joining the group.

7. Is there any indirect tax on transfer of shares (stamp duty, transfer tax etc)?

Stamp duty is generally charged at 0.5% of the consideration paid to acquire shares. Where shares are transferred within a group of companies, relief may be available dependent upon specific ownership requirements. Typically these requirements hold that the companies must form part of a group in which they are 75% subsidiaries of a common parent or have at least a 75% parent-subsidiary relationship.

There should be no significant VAT issues. VAT is not charged on the shares acquired, although there may be restrictions on the recovery of VAT on legal and professional costs associated with the share disposal.

8. Are there any particular issues to consider in the acquisition of foreign companies?

Tax relief for interest payments

No particular tax problems normally arise where a loan is taken to fund the purchase of an overseas company. Interest on a third party loan usually qualifies for relief on an accruals basis. It makes no difference for this purpose whether the loan is taken from a UK bank or a foreign lender. Many groups form a new company and fund it sufficiently to make the acquisition (which is tax-resident in the same territory as the target company). Post-acquisition interest costs should be available to offset against trading profits, either via group relief or through a merger of the foreign target and new company. This should be reviewed on a territory-by-territory basis because of the differences in local domestic law.

Controlled foreign company legislation

New Controlled Foreign Company (CFC) rules have been introduced for periods beginning after 1 January 2013. The rules are focused on the artificial diversion of profits from the UK and are generally a relaxation of the previous rules.

A CFC is a non-UK resident company that is controlled by a UK resident company or companies (control being effectively 50% or 40% in the case of joint ventures). Unless one of the exemptions applies, the CFC rules look to impose UK tax on the profits of the CFC.

There are gateway provisions into the rules that consider income, which has been artificially diverted from the UK and would therefore be subject to a UK tax charge. If profits do not fall in the gateway provisions they are excluded.

Provided the CFC has sufficient local substance and generates the majority (ie more than 80%) of its income outside of the UK, it is then likely to fall out of the gateway and be exempt from charge. There are a number of tests within the legislation that can exempt the income from the charge.

The new rules also introduced a finance company exemption for offshore group financing companies. Subject to certain conditions the rules can exempt 75% of the income of the financing company.

Transfer pricing

Cross-border transactions between companies within a group are subject to the transfer pricing regime, which means related-party transactions must be undertaken using the arm's length principle.

Holding company

The UK tax system offers a substantial shareholdings exemption, and corporation tax rules now give a full exemption for dividend income received. Direct investment in non-UK companies may not, therefore, introduce tax inefficiencies into the buyer's enlarged group. Large and medium-sized groups are no longer taxable on dividend receipts regardless of their source, whether UK or foreign. There is neither a minimum ownership requirement nor a minimum holding period. Following the introduction of these rules, groups that have accumulated large amounts of low-taxed earnings overseas now have the opportunity to return these funds to the UK.

New legislation was introduced in 2011, which provides for an exemption from UK tax for profits of foreign branches.

9. Can the group reorganise after the acquisition in a tax neutral environment? What are the main caveats to consider?

UK tax legislation contains provisions that enable a tax-neutral reorganisation, such as divisionalisation. These include:

- The ability to transfer assets of a trade within a group without a charge to tax. For tax purposes such a transfer would take place on a no-gain, no-loss basis
- The tax neutral transfer of assets within a group under the chargeable gains regime
- The ability to surrender tax losses within in a group (but see above regarding restrictions)
- Tax free share-for-share exchanges, provided certain conditions are met
- Group relief provisions for stamp duty and stamp duty land tax
- Group provisions for reorganisations that take place within a VAT group

When considering a group reorganisation post-acquisition, care needs to be taken with regard to future de-grouping charges that do not extinguish for 6 years. There are also stamp duty and stamp duty land tax clawback provisions that apply for 3 years respectively.

Care also needs to be taken regarding the availability of corporate tax group relief when a sale is in contemplation. UK revenue will seek to argue that once arrangements are in place for another company outside the group to take control of the surrendering company, then the group relief group is broken. UK case law shows that beneficial ownership of at least 75% of the ordinary shares in subsidiary companies needs to be maintained for a valid group relief group. UK revenue looks to contractual arrangements to determine whether arrangements eg exchange of contracts) are in place with a potential purchaser such that beneficial ownership is lost (even though the sale may not have been completed yet and legal title remains).

10. Is there any particular issue to consider in the case of companies whose main assets are real estate?

Anti-avoidance legislation can cause special problems for companies that own valuable UK land. This legislation can apply where shares are sold and the shares derive their value from that land. For the provision to apply, the profit must in some way arise from UK land or assets deriving their value from the land. Where the legislation is in point, all or part of what would otherwise be treated as capital is charged to tax as income at the statutory rate in force (currently 24%, reducing to 23% in 2013 and 21% in 2014). Where shares that derive their value from land are being sold, the seller should consider (and the buyer should ask the seller to consider) seeking clearance from the Inspector of Taxes that the disposal will not be affected by this legislation.

11. Thinking about payment of dividends out of your country and a potential exit, is there any particular country that provides a tax efficient exit route to invest in your country?

The UK does not withhold tax on dividends.

Therefore the main consideration when exiting a UK company is whether the vendor would qualify for a participation exemption.

12. How is foreign debt usually structured to finance acquisitions in your country?

Where the purchasing company is not resident in the UK, other tax planning opportunities require consideration. A non-resident company may be able to create a structure, enabling its finance costs to be relieved against the UK target company's taxable profits. The non-resident company basically achieves this by forming a UK holding company capitalised with debt and equity that may also borrow from a bank to acquire the target company. Interest paid by the UK holding company can then be surrendered to the target group as group relief. A non-resident buyer may also wish to have an intermediate holding company located in a country where it can receive distributions of profit from the UK (interest or dividends) in a beneficial way. However anti-conduit rules would need to be carefully considered.

From a Seller's Perspective

13. What are the main differences between share and asset deals?

Share deals

A general point to consider in a sale of shares is that the vendor sells the entire company. This includes all assets and all liabilities including any historical liabilities but also includes historic tax losses.

The consideration received by the seller need not be in the form of cash; it could be in the form of shares, loan notes etc and there are special tax rules for such arrangements. The sale of shares creates either a chargeable gain or an allowable capital loss for tax purposes. (This loss can only be used against other capital gains.) However the substantial shareholding exemption may apply for the seller so any gain is not subject to tax and any loss is not an allowable loss.

There may be a de-grouping charge in the company being sold, where assets are held that were acquired by means of intra-group transfer in the previous 6 years (as explained in section 2 above) unless the new relaxed rules apply. Although this is not a liability for the vendor, the purchaser may want a discount on the price or a tax indemnity. With regard to stamp duty and stamp duty land tax, there is a potential clawback of group relief previously claimed if the transferee company leaves the group within 3 years.

Asset deals

In general the disposal of the business through an asset sale may result in a cessation of a trade. (This in turn can result in trading losses no longer being available to carry forward.) There are special provision by which a complete trade can be transferred from one company to another without a deemed cessation for capital allowances and loss relief purposes. These generally apply where the companies are in common 75% ownership but not otherwise. In cases where this does not apply trading losses are extinguished.

In many cases and subject to various conditions the transfer of the trade and assets will qualify as a VAT-free transfer of a going concern. There are special rules if some of the assets consist of interests in land and property that would be subject to VAT if sold separately. If the transfer does not qualify as a transfer of a going concern, the transfer of assets will be a taxable supply for VAT purposes and it will be necessary to account for VAT on the individual items as appropriate.

Computational matters

The main issue to consider in an asset sale is the allocation of the purchase consideration between the various assets acquired, including intangible assets such as goodwill, in order to achieve tax efficiency. The allocation must be reasonable and capable of commercial justification.

A trading profit or loss may arise on the sale of stock. However UK tax legislation allows an acceptable range of values for the transfer of stock in trade, which usually leads to stock being transferred on a no-gain, no-loss basis.

Balancing adjustments may arise on assets qualifying for capital allowances.

Any trading losses unused in the transferor company maybe extinguished and may be lost altogether if they are not subject to a group relief claim by other group companies in the year of disposal, used against any tax charges arising on the sale of assets, carried back as a terminal loss, or transferred under the 75% common ownership rules mentioned above.

As the vendor is the company, any balancing charges or capital gains will fall on the company. The holding company or the shareholders would also need to consider how they are going to extract the sale proceeds from the subsidiary company in a way that minimises the potential double tax charge.

14. How are capital gains taxed in your country? Is there any participation exemption regime available?

The only participation exemption for capital gains taxes is in the substantial shareholding exemption in effect since 1 April 2002, where a company's gains (and losses) on long-term (12 months at least) shareholdings of 10% or more in trading companies or trading groups are exempt from tax. This exemption provides an opportunity to sell shares in subsidiaries tax-free. Detailed advice should be sought on this relief, as there are various conditions to be satisfied and anti-avoidance provisions to be considered. If there is doubt regarding the availability of the exemption, it is possible for the taxpayer to seek a clearance from UK revenue (clearance is not through a statutory procedure).

15. Is there any fiscal advantage if the proceeds from the sale are reinvested?

There is a fiscal advantage to reinvesting proceeds from an asset sale only. Rollover relief may be claimed if an amount equal to the proceeds from the sale of qualifying assets is reinvested into other qualifying assets within either 12 months prior to the sale or 3 years following the sale. Alternatively a separate form of relief is available on the acquisition of depreciating assets (eg leasehold property), so that the gain can be held over for a maximum of 10 years with potential for further rollover. For this purpose qualifying assets include freehold land and buildings, as well as plant and machinery.

Rollover relief in effect since 6 April 2002 allows income profits from the sale of intangibles to be rolled over in the base cost of other qualifying intangibles. A sale of pre-existing goodwill at 1 April 2002 would be taxable as a capital gain under the old regime and a gain could be then rolled over only into tangible assets.

For each of the above reliefs conditions need to be met regarding the previous use of the asset disposed and the continuing use of the reinvestment asset.

Shares are not qualifying business assets for the purposes of rollover relief, so the vendor is not able to match the gain on any sale of shares with the purchase of another asset even if that asset does qualify for relief.

Your Taxand contact for further queries is:

UK

Ian Fleming

T. +44 207 663 0425

E. ifleming@alvarezandmarsal.com

USA

USA

From a Buyer's Perspective

1. What are the main differences among acquisitions made through a share deal versus an asset deal in your country?

Asset deals

A significant reason for structuring a transaction as an asset acquisition is that historical business liabilities (including income taxes) of the target business ordinarily do not carry over to the acquirer. These liabilities remain with the seller unless there is a contractual agreement specifically providing otherwise. A major exception however exists in the case of certain non-income taxes (sales use, payroll and property). Here a buyer may succeed to the seller's historical obligations under local law.

Asset acquisitions may be taxable or non-taxable, depending on the structure chosen by the parties. In addition it may be possible to treat the acquisition of certain entities as if an asset purchase occurred for income tax purposes even though it is the ownership interests that are legally acquired.

A major advantage of a taxable asset purchase is that, in the instance where the seller would recognise gain, the buyer receives a corresponding step-up in the basis of the assets acquired to fair market value often resulting in increased future depreciation or amortisation deductions for the buyer. Existing tax attributes such as Net Operating Losses (NOLs) however do not carry over to the purchaser.

If assets are acquired in a tax-free exchange, the acquirer generally takes over the target's historical basis in the assets. Other tax attributes are generally lost unless the acquisition is structured as a business combination that is classified as a tax-free reorganisation. Here the survivor succeeds to the target's historical attributes and liabilities, though the attributes may become restricted under various rules.

If material appreciation exists in the hands of the seller, asset purchases are usually most viable when the target assets are held in a pass-through entity such as a partnership or an S corporation (which is not subject to an entity-level income tax) or where the assets are held by a subsidiary of a consolidated group of corporations. By contrast where the target assets are appreciated and held in a C corporation, an asset sale may not be practical because there are 2 levels of income tax:

- Corporate-level tax on the gain
- Shareholder-level tax on any subsequent distribution to shareholders

If on the other hand assets are depreciated, a C corporation with operating income may be motivated to sell assets in order to recognise loss and offset such operating income.

Asset sales may result in significant transfer taxes. Many States and local jurisdictions impose sales and use tax on asset transfers, though occasional or isolated sale exemptions often apply. Real property is generally subject to realty transfer or documentary stamp tax.

Asset purchases may also create issues for many non-tax reasons. For instance an asset purchase may not be feasible where the target business has significant assets, licences or contracts that would be incur administrative burden or expense to transfer or renegotiate.

Stock acquisitions

In a stock acquisition the target corporation remains intact and any pre-closing historical or contingent liabilities remain with the acquired company. Moreover where a corporation is acquired from a consolidated group, it remains liable for the entire group's federal income tax during the period in which it was a member.

Stock acquisitions may or may not be taxable, depending on the structure chosen by the parties. Either way the basis in the underlying assets of the target company carries over and is not stepped up. Although where the target is a subsidiary within a consolidated group, complex rules may result in a step-down of the subsidiary's assets to avoid loss duplication. However where the target corporation is an S corporation or a subsidiary in a consolidated group, it may be possible to make an election under Internal Revenue Code (IRC) Section 338 to treat the stock acquisition as if it were an asset purchase for tax purposes. This would result in a step-up in the basis of assets to fair market value.

In the case of a stock acquisition without any deemed asset purchase election under IRC Section 338, any tax attributes, such as NOLs or tax credits, continue with the acquired corporation (subject to the aforementioned loss duplication rules) but change in control limitations may be imposed on their use.

A stock acquisition often makes sense where an asset acquisition is not practical because it would subject the seller to 2 levels of income tax or because it would be too difficult to transfer the assets, contracts and licences into the acquirer's name.

The sale of stock in a corporation generally does not result in transfer tax. However where the corporation owns real estate some jurisdictions impose a controlling interest transfer tax on the underlying real estate of the acquired entity in the taxing State.

Additionally certain disclosure and withholding rules may apply to non-US resident buyers and sellers of stock.

2. What strategies are in place, if any, to step up the value of the tangible and intangible assets in case of share deals?

Where a corporate buyer purchases at least 80% of the stock (vote and value) of another corporation in one or a series of transactions within a 12-month period from an unrelated seller, it may be possible to make an election under IRC Section 338 to treat the stock acquisition as an acquisition of assets for income tax purposes. Depending on the nature of the transaction, the election may be made unilaterally by the buyer or jointly by the buyer and seller. Situations where the target is an S corporation or a member of a consolidated group often provide the best opportunity for this type of planning.

If a partnership interest is acquired, it may be possible for a buyer to step up its proportionate share of the partnership's underlying assets by making an election under IRC Section 754. Otherwise the partnership's assets are not ordinarily stepped up.

3. What are the particular rules of depreciation of goodwill in your country?

Depreciation rules vary depending on the nature of the asset. These can include:

- Furniture, fixtures, machinery, equipment and computers are generally depreciated using an accelerated method over a 5 to 7-year period
- Buildings are generally depreciated using a straight-line basis over a 27.5-year period (residential real estate) or 39-year period (non-residential real estate). Improvements are depreciated in the same way as the underlying property, but leasehold improvements may qualify for 15-year depreciation
- Land is generally not depreciable, though land improvements may be depreciable over 15 years
- Intangible assets (including goodwill) acquired as part of a trade or business are amortised using the straight-line method over a 15-year period. Intangible assets not acquired as part of a trade or business are generally amortised using a straight-line basis over their estimated useful lives. Software not acquired as part of a trade or business may be amortised using the straight-line method over 3 years

4. Are there any limitations to the deductibility on interest of borrowings?

In general a deduction is allowed for interest paid or accrued within a tax year on valid indebtedness of the taxpayer. However numerous exceptions and provisions may limit or bar the deduction. Some of the major limitations are highlighted below.

Debt or equity considerations

Purported indebtedness may be reclassified as equity if the instrument characteristics create a sufficient resemblance to such. Interest on debt that is reclassified may be recast as a non-deductible dividend. Whether an instrument is reclassified is highly subjective and fact intensive. Courts rely on a number of factors and no one factor is determinative. Here are just a few of the many factors:

- The intent of the parties and the adherence to formalities
- The identity of the creditors and shareholders
- The ability of the corporation to obtain funds from outside sources
- The thinness of the capital structure and the risk involved

Transfer pricing

The IRS has the ability under Section 482 to adjust the interest rate on loans between related parties to reflect an arm's length standard.

Interest owed to related foreign persons

In general interest owed to a related foreign person that is otherwise deductible may not be deducted until it is paid.

Earnings stripping

IRC Section 163(j) limits the deductibility of interest paid by a US corporation if the debt is borrowed from or guaranteed by a related foreign person and the interest is exempt from US tax. Section 163(j) applies if the US corporation's debt-to-equity ratio exceeds 1.5 to 1. In general the rule prohibits a corporation from deducting the interest paid to a related foreign person (or paid on debt guaranteed by a related foreign person) to the extent its net interest expense exceeds 50% of the corporation's adjusted taxable income as those terms are defined by the IRC. Interest in excess of this 50% limit can be carried forward indefinitely.

AHYDO

If an instrument is classified as an applicable high-yield discount obligation (AHYDO), a portion of the interest deduction is deferred until paid and a portion may be permanently disallowed and treated as a non-deductible dividend. In general debt issued by a corporation may constitute AHYDO if it:

- Has a maturity date of more than 5 years
- Has a yield to maturity of 5% over the applicable federal rate (as published by the IRS)

- Has significant original issue discount (ie an excess of original issue discount accruals over actual interest payments)

5. What are usual strategies to push-down the debt on acquisitions?

There are many ways to push-down debt in acquisitions of US corporations. One common strategy is to form a domestic holding company which in turn forms a temporary merger subsidiary used to effect the acquisition. Upon the consummation of the transaction, the merger subsidiary is merged into the target and proceeds are disbursed to the selling shareholders in exchange for their stock. Financing is arranged for the merger subsidiary, which is subsequently assumed by the target as the successor to the merger. Financing may come directly from third parties or internally through back-to-back loans (subject to conduit financing rules).

If the acquisition is initially done without using debt at the local level, it can subsequently be introduced in the US through a variety of means. Direct financing of the target and a distribution of the proceeds may be one way. Causing the target to be sold to a newly formed domestic subsidiary of the foreign parent for a note may be another. Caution should be exercised however as such transactions may create a dividend, giving rise to withholding tax.

6. Are losses of the target company/ies available after an acquisition is made?

Generally, a NOL may be carried back to the 2 years preceding the loss and then forward to the subsequent 20 years to offset the taxable income in those years. Where the stock of a corporation is acquired, any NOLs remain intact and may be used by the acquiring corporation, subject to certain change in control limitations. IRC Section 382 imposes the most common limitation. Here where a corporation undergoes an ownership change, generally defined as a more than 50% change in its ownership over a 3-year period, US tax rules impose an annual limitation called a Section 382 limitation on the amount of taxable income that can be offset by any pre-change NOL carryovers and built-in losses.

This limitation equals the product of the value of the loss corporation's equity immediately before the ownership change and the applicable federal long-term tax exempt rate. The limit may be adjusted in certain circumstances that commonly include stuffing transactions and corporate contractions. If the Section 382 limitation for a post-change year exceeds the taxable income that is offset by pre-change loss, the Section 382 limitation for the next post-change year is increased by the amount of such excess. Special rules also apply for corporations with built-in gain (or loss) and those in bankruptcy.

7. Is there any indirect tax on transfer of shares (stamp duty, transfer tax etc)?

As indicated in section 1 above the sale of stock in a corporation generally does not result in transfer tax. However where the corporation owns real estate, some jurisdictions may impose a controlling interest transfer tax on the underlying real estate of the acquired entity in the taxing State.

8. Are there any particular issues to consider in the acquisition of foreign companies?

Where a US corporation acquires a foreign corporation, an IRC Section 338(g) election should be considered. Such an election causes the transaction to be treated as an asset purchase for US tax purposes, enabling the target to step up the basis in its assets and purge its pre-closing earnings and profits, so making it easier to push down debt and repatriate profits efficiently.

A buyer should also consider the impact of the acquired operations on the US company's ability to efficiently repatriate funds and claim foreign tax credits in the US. The use of separate legal entities and step-up elections discussed above can have a significant impact on the tax effect of future distributions. The use of such planning will depend on the particular profile of the buyer and seller.

Where a foreign buyer with a US subsidiary is acquiring a foreign target, consideration should be given to causing the target to be acquired by the foreign parent so as not to create an inefficient sandwich structure.

9. Can the group reorganise after the acquisition in a tax neutral environment? What are the main caveats to consider?

A group may reorganise after an acquisition, but care should be given to the step-transaction doctrine, which courts often apply to integrate a series of otherwise separate steps, resulting in unanticipated or unfavourable tax consequences. Recent US law also codified the use of economic substance doctrine. In general this doctrine denies tax benefits arising from transactions that do not result in a meaningful change to the taxpayer's economic position other than a purported reduction in federal income tax. If a transaction is found to lack economic substance, a strict liability penalty from 20% to 40% of the underpaid tax attributable to the disallowance of the claimed tax benefit applies.

It is challenging to achieve tax advantages from a post-acquisition restructuring because of the general business purpose and economic substance requirements under US tax law. Therefore a buyer should focus on the tax planning alternatives as early in the acquisition process as possible.

10. Is there any particular issue to consider in the case of companies whose main assets are real estate?

In general foreign persons are not taxed in the US on gains from the sale of a corporation's stock. A major exception exists however where the corporation is a US real property holding corporation, in which case the gain on disposition is treated as effectively connected income and subject to US tax.

In general a domestic corporation is a US real property holding corporation if the market value of its US real property interests constitutes 50% or more of the sum of the fair market value of:

- Its US real property interests
- Its real property interests located outside the US
- Any of its other trade or business assets

11. Thinking about payment of dividends out of your country and a potential exit, is there any particular country that provides a tax efficient exit route to invest in your country?

Generally choosing a holding company jurisdiction for the purpose of avoiding or reducing withholding tax can be challenging in the US because of anti-conduit provisions under US law and the constantly intensifying limitations on benefits clauses in the various US treaties. Generally substance in the holding company jurisdiction is required. That said, various treaties provide reduced treaty rates. For example assuming the company has adequate substance in a UK holding company, the dividend withholding rate could be eliminated entirely.

Careful consideration should be given to the impact of the choice of jurisdiction of the holding company on other applications of withholding tax, including on interest and royalties paid by the US company to related parties.

12. How is foreign debt usually structured to finance acquisitions in your country?

Foreign debt may be structured in multiple ways. Consideration should be given to the debt-to-equity classification issues and earnings stripping rules previously discussed, especially in the context of related-party lending. Foreign debt into the US can typically be structured in a tax-advantageous manner using different legal entities or different forms of lending instruments.

Typically related-party debt is denominated in the currency of the borrowing country, and the currency risk is borne by the lender (see also section 5 above).

From a Seller's Perspective

13. What are the main differences between share and asset deals?

Share deals

Gain on the sale of stock is generally capital and therefore subject to preferential rates if the seller is an individual. As described above under section 10, foreign persons are not generally taxed in the US on gains from the sale of a corporation's stock except where the corporation is a US real property holding corporation.

Asset sales

Asset sales may give rise to both ordinary and capital gain (taxed at a reduced rate for individuals). In the case of a disposition by a foreign person gain is ordinarily treated as effectively connected income subject to US tax.

14. How are capital gains taxed in your country? Is there any participation exemption regime available?

Capital gains recognised by individuals are taxed at a preferential rate (currently a 20% to 23.8% federal rate), while those recognised by corporations are taxed at the corporate rate (currently a maximum 35% federal rate). Capital gains are also subject to state income taxes with rates ranging from 0% to 10%. Capital gains recognised by foreign persons are not generally taxed in the US.

15. Is there any fiscal advantage if the proceeds from the sale are reinvested?

Depending on the nature of the target business and the business objectives of the parties, it is possible for sellers to defer gain by reinvesting in the continuing enterprise. Caution should be exercised however to ensure these complex rules are satisfied.

Your Taxand contacts for further queries are:

USA

Martin Williams

T. +1 212 328 8503

E. mawilliams@alvarezandmarsal.com

Ernesto Perez

T. +1 305 704 6720

E. eperez@alvarezandmarsal.com

VENEZUELA

Venezuela

From a Seller's Perspective

1. Which are the main differences among acquisitions made through a share deal versus an asset deal?

Share deals

In a share deal in Venezuela the seller's pre-closing tax losses are transferred to the buyer. This means that the buyer may be able to benefit from the target company's tax liabilities by carrying over losses and using them to offset the taxation of future profits.

Share deals are not subject to VAT. But the sale of shares is subject to income withholding tax at a rate of 5% of the gross sales price. Withholding tax is withheld by the buyer and paid to the national treasury.

If the sale is executed through the Venezuelan stock exchange, the shares are subject to a tax of 1% of the gross purchase price withheld by the stock exchange.

After a share deal the amendment of the target company's document of incorporation and bylaws must be registered with the Mercantile Registry Office, something that is subject to registration fees in the form of tax units. Taxation in Venezuela is in tax units (*unidad tributaria*), which represents an adjustment index. The tax bands are all in tax units whose monetary value changes in line with the consumer price index.

A share deal with foreign investors must also be registered with the superintendent of foreign investments (SIEX) within 60 days of the sale. This triggers a stamp tax of 15 tax units.

Asset deals

Asset deals give buyers the opportunity to purchase only the assets desired.

In an asset deal the seller's existing tax attributes, such as net operating losses (NOLs), are not transferred to the buyer.

If the purchase price is higher than the total tax basis of the underlying assets, the buyer receives a step-up in the value of the assets.

The purchase of tangible assets including movable assets and property is subject to VAT.

If the asset deal qualifies as a transfer of an ongoing business, the buyer must withhold income tax at a rate of 5% of the sale price. The buyer is liable for any unpaid tax, fines or interest, limited to the value of the goods acquired.

Documents of sale and other documents related to the deal are subject to registration fees. Stamp tax rates vary depending on the state in which the transaction is completed and registered.

2. What strategies are in place, if any, to step up the value of the tangible and intangible assets in case of share deals?

In a share transaction the tax basis of the target company's assets cannot generally be stepped up, as Venezuelan tax law contains anti-avoidance measures designed to counteract such planning.

3. What are the particular rules of depreciation of goodwill in your country?

Goodwill can be amortised and deducted for tax purposes over a reasonable period of time, depending on the facts of a particular deal. A Venezuelan holding company can be used to structure a share deal so that goodwill can be used.

4. Are there any limitations to the deductibility on interest of borrowings?

Venezuela's thin capitalisation rules, effective as of February 2007, limit the deduction of interest on borrowings with related parties to a debt-to-equity ratio of 1:1. In other words the debt cannot be more than the net worth of the Venezuelan borrower.

5. What are usual strategies to push-down the debt on acquisitions?

Interest paid on debt from funding an acquisition can be deducted as long as the capital is used in Venezuela to finance the company's regular taxable operations.

One strategy to push-down debt involves the foreign acquisition company receiving financing from the parent company or a related party to acquire the target company. Following the purchase the acquisition and target companies are merged. However since interest paid to related companies is subject to transfer pricing rules and thin capitalisation rules, this type of strategy is not common.

6. Are losses of the target company/ies available after an acquisition is made?

The target company's losses can be carried forward for up to 3 fiscal years after they were generated. Losses cannot be carried back.

7. Is there any indirect tax on transfer of shares (stamp duty, transfer tax etc)?

Share deals are not subject to VAT.

8. In the case of acquisition of foreign companies, is there any particular issue to consider?

Although Venezuela does not have controlled foreign corporation rules, it does have fiscal transparency, or 'look-through' rules. Venezuelan individuals or companies that invest directly or indirectly in an entity in a low-tax or tax-haven jurisdiction (in which income is taxed at a rate lower than 20%) must report that entity's income, even if the income has not been distributed. The income is considered foreign-source income for tax purposes.

9. Can the group reorganise after the acquisition in a tax neutral environment? What are the main caveats to consider?

Venezuelan income tax law provides for tax-free reorganisation through mergers. In a merger by absorption or a merger of companies to form a new company the absorbing company or the new company is liable for all taxes, withholdings, fines, interest and any other tax obligations of the absorbed or merged companies. These tax losses may be used to offset tax obligations on the day of the merger. They may also be carried forward to offset future taxable income.

However there are no provisions for tax-free demergers.

10. Is there any particular issue to consider in the case of companies whose main assets are real estate?

The sale or transfer of a target company's real estate assets is subject to real estate transfer taxes of 1% of the value of the property, payable by the seller or transferring company.

11. Thinking about payment of dividends out of your country and a potential exit, is there any particular country that provides a tax efficient exit route to invest in your country?

A holding company in a country with which Venezuela has a Double Taxation Treaty (DTT) can be used to reduce the withholding tax on dividends. Venezuela has signed treaties to avoid double taxation with a number of countries, including Canada, France, Germany, Italy, the Netherlands, Portugal, Spain, Switzerland, Trinidad and Tobago, Barbados and the UK and US.

12. How is foreign debt usually structured to finance acquisitions in your country?

Interest paid to non-residents is subject to withholding tax at a rate of 34% for companies in countries that do not have a double taxation treaty with Venezuela. If a tax treaty is in effect, the rate ranges from 4.95% to 15% depending on the country.

The interest on loans to acquire subsidiaries is deductible against the holding company's profits. Thin capitalisation and transfer pricing rules also apply to on inter-company loans.

From a Seller's Perspective

13. What are the main differences between share and asset deals?

From a seller's perspective a share deal in Venezuela is usually more attractive than an asset deal. In a share deal in Venezuela the seller is taxed on the capital gain of the purchase price over the tax basis of the shares. The capital gain generated in transfer of such shares is taxed at a rate of between 15% and 34% if the seller is a corporation. But depending on relevant taxation treaty provisions, capital gains on the sale of shares may be exempt.

The sale of shares is subject to income withholding tax at a rate of 5% of the gross sales price. Withholding tax is withheld by the buyer and paid to the national treasury.

Losses on the sale of shares are deductible as long as the selling price is in line with the market price or the book value, the shares were held for at least 2 consecutive years and the target company carried out economic activities during the 2 years before the sale.

14. How are capital gains taxed in your country? Is there any participation exemption regime available?

Capital gains in Venezuela are taxed as part of net taxable income, at a rate of 34% for corporations. But capital gains generated through the sale of sales on the Venezuelan stock market are taxed at a rate of 1% of the sale proceeds. Venezuela has no provisions for participation exemptions on capital gains.

15. Is there any fiscal advantage if the proceeds from the sale are reinvested?

If the seller reinvests the proceeds from a sale, the dividend tax does not apply as long as the retained earnings are not distributed.

Your Taxand contact for further queries is:

Venezuela

Manuel Candal

T. +58 212 750 00 95 ext 101

E. mcandal@taxand.com.ve

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ARGENTINA

Matias Olivero Vila

T. +54 11 5 288 2308

E. matias.olivero.vila@bfmyl.com

AUSTRALIA

Jonathon Leek

T. +61 8 9460 1616

E. jonathon.leek@corrs.com.au

AUSTRIA

Bernhard Vanas

T. +431 533 863 3900

E. bernhard.vanas@taxand.at

BELGIUM

Geert de Neef

T. +32 2 787 91 11

E. geert.deneef@abtaxand.com

BRAZIL

Jose Octavio Faloppa

T. +55 11 2179 5234

E. jof@bmatax.com.br

CANADA

Daniel Lacelle

T. +1 514 392 9532

E. daniel.lacelle@gowlings.com

CHILE

Fernando Barros

T. +56 2 2378 8907

E. fbarros@bye.cl

CHINA

Dennis Xu

T. +86 21 6447 7878 ext 506

E. dennis.xu@hendersen.com

COLOMBIA

Mauricio Pineros

T. +571 31 92 9 00 ext 921

E. mpineros@gpzlegal.com

CYPRUS

Chris Damianou

T. +357 22 699 222

E. chris.damianou@eurofast.eu

DENMARK

Anders Oreby Hansen

T. +45 72273602

E. aoh@bechbruun.com

FINLAND

Sami Tuominen

T. +358 9 6153 3585

E. sami.tuominen@borenius.com

FRANCE

Denis Andres

T. +33 17 03 88 804

E. denis.andres@arsene-taxand.com

GERMANY

Nicole Froehlich

T. +49 69 27229 24830

E. nicole.froehlich@luther-lawfirm.com

GREECE

Maria Zoupa

T. +30 210 696 7000

E. m.zoupa@zeya.com

INDIA

Vivek Gupta

T. +91 124 339 5052

E. vivek.gupta@bmradvisors.com

INDONESIA

Hariansyah

T. +62 21 835 6363

E. hariansyah@pbtaxand.com

IRELAND

Sonya Manzor

T. +353 16 39 5212

E. sonya.manzor@williamfry.ie

ITALY

Alfredo Fossati

T. +39 02 726 0591

E. afossati@fantozzieassociati.it

JAPAN

Eiki Kawakami

T. +81 3 3222 1401

E. e-kawakami@kojimalaw.jp

KOREA

Stephan Kim

T. +82 2 2112 1144

E. sekim@sojong.com

LUXEMBOURG

Olivier Remacle

T. +352 26 940 239

E. olivier.remacle@atoz.lu

MALAYSIA

Leow Mui Le

T. +603 2032 2799

E. lml@taxand.com.my

MALTA

Walter Cutajar

T. +356 2730 0045

E. walter.cutajar@avanzia.com.mt

MAURITIUS

Gyaneshwarnath (Gary) Gowrea

T. +230 405 2002

E. gary.gowrea@cim.mu

MEXICO

Manuel Tamez

T. +52 55 5201 7403

E. mtamez@macf.com.mx

NETHERLANDS

Marc Sanders

T. +31 20 757 0905

E. marc.sanders@vmwtaxand.nl

NORWAY

Einar Bakko

T. +47 905 30 589

E. e.bakko@selmer.no

PAKISTAN

Huzaima Bukhari

T. +92 42 3530 0721

E. huzaima@huzaimaikram.com

PERU

Rocio Liu

T. +511 610 4747

E. rliu@mafirma.com.pe

PHILIPPINES

Serafin Salvador Jr.

T. +632 811 25 00

E. susalvador@salvadorlaw.com

POLAND

Andrzej Puncewicz

T. +48 22 324 5949

E. andrzej.puncewicz@taxand.pl

PORTUGAL

Miguel C. Reis

T. +351 226 158 861

E. miguel.c.reis@garrigues.com

PUERTO RICO

Edgardo Sanabria

T. +1 787 999 3015

E. esanabria@zatax.com

ROMANIA

Angela Rosca

T. +40 21 316 0645

E. angela.rosca@taxhouse.ro

RUSSIA

Andrey Tereschenko

T. +7 495 967 00 07

E. a.tereschenko@pgplaw.ru

SINGAPORE

Leon Kwong Wing

T. +65 6238 3018

E. leonkwongwing@khattarwong.com

SOUTH AFRICA

Peter Dachs

T. +27 21 410 6620

E. pdachs@ens.co.za

SPAIN

Albert Collado

T. +34 93 253 37 00

E. albert.collado@garrigues.com

SWEDEN

Hakan Nylen

T. +46 40 10 71 93

E. hakan.nylen@skeppsbronskatt.se

SWITZERLAND

David Ryser

T. +41 44 215 77 04

E. david.ryser@taxpartner.ch

THAILAND

Chinapat Visuttipat

T. +66 2632 1800 ext 181

E. chinapat.vs@hnpcounsel.com

TURKEY

Uluc Ozcan

T. +90 212 337 00 00

E. uluc.ozcan@erdikler.com

UK

Ian Fleming

T. +44 207 663 0425

E. ifleming@alvarezandmarsal.com

UKRAINE

Olga Khoroshyllova

T. +380 44 492 8282

E. o.khoroshylova@epap.ua

USA

Martin Williams

T. +1 212 328 8503

E. mawilliams@alvarezandmarsal.com

VENEZUELA

Manuel Candal

T. +58 212 750 00 95 ext 101

E. mcandal@taxand.com.ve

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