Colombia

Colombia

General

1. What are recent tax developments in your country which are relevant for M&A deals?

Recent tax reforms have recognised several corporate reorganisations as tax neutral transactions. In particular, current tax rules recognise mergers, spin-offs and capital/in-kind contributions as tax neutral transactions. These new rules (introduced and developed since 2012) submit the tax neutral status to different requirements that must be accomplished with; among others, tax neutral status depends on different business purpose criteria and corporate documentary.

2. What is the general approach of your jurisdiction regarding the implementation of OECD BEPS actions (action Plan 6 specifically) and, if applicable, the amendments to the EU Parent-Subsidiary Directive?

Colombia is in the process of being accepted within the OECD. The country it is also part of the development of BEPS as a guest jurisdiction. Colombia has not introduced any tax rule aimed at introducing BEPS actions. The Government has announced a new tax reform that will be presented to the congress on late 2016; although the text of an eventual tax bill is not known yet, this reform may introduce new anti-avoidance rules that may contain BEPS aspects. Note that current DTTs (that in general do not contain Action 6 recommendations) are not in a renegotiation process.

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

a. Share deals

As a general rule the transfer of shares of Colombian companies generates Colombian source income for the seller. The capital gain generated in the transfer of shares is subject to capital gains tax in Colombia at a rate of 10%; provided, that the sold shares have been held for more than two years.

The transfer 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 crédito 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.

b. Asset deals

Under Colombian tax law in an asset deal the pre-closing tax liabilities of the seller 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 turnover tax (or industry and commerce tax) applicable in this city. 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 pre-closing industry and commerce tax liabilities of the seller (associated to industry and commerce tax associated to the activities of the commercial establishment).

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 (according to Section 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 2.5% withholding tax on the amount paid or accrued for the acquisition of the assets.

Buy-side

4. 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.

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

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

The amortisation of the goodwill cannot be deducted by the same company whose shares, quotas, or outstanding interest have been acquired, 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 tax basis of the corresponding investment. This prohibition does not apply to entities subject to the supervision of the financial superintendence, 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: the goodwill generated in acquisitions performed after 1 January 2013. The goodwill generated in acquisitions agreed before 1 January 2013, which perfection is subject to the approval by any competent governmental agency under applications filed before 31 December 2012.

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

As a general rule, interest paid on loans obtained for the acquisition of assets different from shares are deductible for income tax purposes.

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, the dividends that correspond to profit subject to income tax at the corporate level are considered for Colombian income tax purposes as non-taxed income. According to this provision, the Colombian tax office has stated that interest paid on loans obtained for the acquisition of shares is not deductible if in the corresponding taxable year the borrower has obtained non-taxed dividends. If during the corresponding taxable year the borrower has obtained dividends subject to income tax (i.e., dividends that correspond to profits not taxed at the 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, the interests that exceed this limit must be treated as non-deductible expenses. This rule is applicable to foreign and local loan, and also to loans granted by related and by non-related parties.

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 the supervision of the Financial Superintendence and corporations, entities or special purpose vehicles that obtain financing to carry out public services infrastructure projects.

7. 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 purposes of obtain the loan to carry out the acquisition of a Colombia target company. After the 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. This is relevant for purposes of amortising debt but it may not be applicable in order to amortise goodwill derived from the purchase of shares (it may not be deductible according to current rules as already mentioned in this document).

8. 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 taxable income obtained by the target company for future years, without any limitation in time. Colombian tax law does not provide for a carry-back rule.

9. 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.

Section 530 of the tax code establishes that the transfer of shares is exempted from the stamp tax. In any case, stamp tax is currently set-forth by law at a 0% rate.

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

10. Are there any restrictions on the deductibility of acquisition costs?

In general, costs and expenses can be deducted for income tax purposes as long as they are (i) directly related to the engaged activity, (ii) necessary, and (iii) proportional to the performed activities.

As from 2014, the deduction of expenses and costs has been restricted in some cases. This rule has been introduced in order to promote the use of the banking system.

Cost related to the acquisition of shares is not deductible for income tax purposes (i.e., cost is the value of the asset for tax purposes and it is relevant at the time of an eventual sale).

11. Can VAT (if applicable) be recovered on acquisition costs?

Being a tax over added value, it allows taxpayers to credit input VAT against output VAT, provided that the former was levied on goods and services used in the production or manufacture of taxable goods and services. Additional restrictions may apply.

Please note that there is no VAT on the sale of shares.

12. Are there any particular issues to consider in the acquisition by foreign companies? *(for example non-resident taxation rules/substance rules and tax efficient exit routes)*

Foreign companies are allowed to freely acquire participation in Colombian companies. Foreign exchange regime must be observed (i.e., registration of the investment in Colombia before the Central Bank) in order to repatriation of dividends for instance. Foreign head companies are subject to tax in Colombia only on their Colombian source income.

Dividends are considered Colombian source income. The parent foreign company will be subject to tax on dividends perceived from its Colombian subsidiary, if this local company distributes dividends out of profits not subject to tax in Colombia. If on the contrary, the Colombian company distributes dividends out of profits subject to tax in Colombia, such dividends will not be subject to any further taxation.

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%.

In general, DTTs in force with Colombia do not change the above mentioned general rule. Instead, the 33% withholding tax may be reduced if special requirements are met.

Note that notwithstanding the mentioned rule, the government has announced a tax reform under which dividends may be subject to a 14%/15% dividends withholding tax (this is not in place yet).

13. Can the group reorganise after the acquisition in a tax neutral environment through mergers or a tax group?

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.

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 two or more companies dissolve and, without liquidating, are absorbed by an existing company, or create a new company.

A spin-off occurs in the following two events: (i) when a company, without dissolving transfer one or more portions of its equity to one or more existing companies, or use them to create a new company, or (ii) 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.

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

Notwithstanding rules under DTTs in force, under Colombian rules, there are no particular issues to consider in case of acquisition of the shares of companies whose main assets are real estate.

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

It is necessary however to take into account the specific dispositions of DTTs in connection with the capital gains obtained in a sale of shares of companies whose main assets are real estate.

Sell-side

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

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

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%. This rule is applicable if the shares being transferred were held by the seller for two years or more, otherwise, the profit will be subject to income tax at a rate that could be increased up to 40% (applicable rate to foreign companies as for FY2016).

On the other hand the profits obtained from the sale of shares listed in the Colombian stock exchange will neither be subject to income tax nor to capital gains tax, provided that the sale do not exceed 10% of the outstanding shares of the respective company in a taxable year (Colombian Tax Code, Section 36-1).

Under the DTTs in force, in general, capital gains derived from the transfer of Colombian shares, are subject to tax in Colombia only if the value of the shares is derived in more than 50% from real estate located in Colombia, directly or indirectly. Some DTTs provide that the capital gain obtained from the transfer of Colombian shares is also subject to tax in Colombia 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.

Asset deals

Gains derived from the transfer of fixed assets owned for more than two 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 transfer of fixed assets owned for less than two years are ordinary income subject to income tax at a rate of 40% for foreign companies, and at a combined rate of 40% (income tax at 25%, CREE tax at 9% and surcharge on CREE tax at 6%) for Colombian-resident taxpayers.

Losses derived from the transfer of fixed assets owned for more than two 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 transfer of fixed assets owned for more than two 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 assets being transferred.

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

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

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

17. Are there any local substance requirements for holding/finance companies?

Currently, under Colombian legislation there are no substance requirements for holding/finance companies. Note that as from 2013, foreign companies may be deemed Colombian based companies for tax purposes if their effective place of management is located in Colombia. Substance criteria must be observed in these kinds of cases.

Please also note that DTTs currently in force with Colombia requires that in order for an item of income be benefit from these DTTs, the entity/individual domiciled/resident in the other contracting state must be the beneficial owner of such income.

Your Taxand contact for further queries is:

Colombia

Mauricio Piñeros
T. +571 3192900
E. mpineros@gpzlegal.com

Andres Hoyos
T. +571 3192900
E. ahoyos@gpzlegal.com