



# ROMANIA



# ROMANIA

## INTERNATIONAL DEVELOPMENTS

### 1. WHAT ARE RECENT TAX DEVELOPMENTS IN YOUR COUNTRY WHICH ARE RELEVANT FOR M&A DEALS AND PRIVATE EQUITY?

The new Romanian Fiscal Code, in force starting 1 January 2016, brought several amendments to existing tax rules, some of them being relevant also for mergers and acquisitions (M&A). Specifically, stricter conditions apply in order for a partial spin-off to qualify as neutral for direct tax purposes, while from a VAT point of view it is provided that mergers and spin-offs are by default outside the VAT scope (with no additional condition to be met, as it was the case up to 31 December 2015).

The new Code also changed some of the rules relevant for private equity investments, of which we mention the decrease of the dividend tax rate from 16% (in force up to 31 December 2015) to 5% and the introduction of more detailed rules applicable for investment income derived by individuals (e.g. detailed computation methods of gains obtained from transfers of equities and of various types of securities). Moreover, starting 2018, the standard personal income tax rate decreased from 16% to 10%. This applies inter-alia for instance to capital gains derived by resident and non-resident individuals from sale of securities.

### 2. WHAT IS THE GENERAL APPROACH OF YOUR JURISDICTION REGARDING THE IMPLEMENTATION OF OECD BEPS ACTIONS (ACTION PLANS 6 AND 15 SPECIFICALLY) AND, IF APPLICABLE, THE AMENDMENTS TO THE EU PARENT-SUBSIDIARY DIRECTIVE AND ANTI-TAX AVOIDANCE DIRECTIVES?

In June 2017, the Romanian Parliament issued a law which approved Romania's joining the BEPS Project as associate, which allows Romania's participation in the implementation of measures against tax base erosion and profit shifting, as well as their domestic implementation.

It is expected that Romania would implement the four minimum BEPS standards (which include Action 6). Also, on the 7 June 2017 Romania signed in Paris the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting – Multilateral Instrument (Action 15).

Additionally, Romania transposed four rules of Council Directive (EU) 2016/1164 laying down rules against tax avoidance practices that directly affect the functioning of the internal market (ATAD) into its domestic legislation starting the 1 January 2018. Those rules are: Interest limitation rule, Exit taxation, General anti-abuse rule and Controlled foreign company rule.

Moreover, Romania transposed in its domestic tax law the amendments brought by EU Directives 2014/86 and 2015/121 to EU Parent-Subsidiary Directive on (i) refraining from taxing the profits received by the Romanian parent company only to the extent they are not deductible for the subsidiary and (ii) regarding the fact that the exemption shall not be granted in case of an arrangement or series of arrangements which are not genuine and have the main purpose or one of the main purposes that of obtaining tax advantage.

## GENERAL

### 3. WHAT ARE THE MAIN DIFFERENCES BETWEEN AN ACQUISITION OF SHARES AND AN ASSET DEAL IN YOUR COUNTRY?

#### A) Share deal

#### Tax advantages:

Under a share deal, the target company is entitled to continue with the same tax depreciation plan applicable for its non-current assets as before the transaction.



Sale of shares is a VAT exempt without credit operation.

No real estate tax implications arise in the case of a share deal, as far as the assets of the target are concerned. However, potential notary fees may be due if the parties opt to have the share purchase agreement authenticated by a notary public. In this case, the notary fees are due by either the seller or by the buyer, as contractually agreed between the parties.

The target is entitled to carry forward and recover its fiscal losses in the next 7 consecutive years based on FIFO method provided it is a corporate income tax (CIT) payer. A different taxation system should however be applied by the target for activities carried out in certain fields (e.g. hotel/ accommodation facilities, restaurants/ catering and bars) – if this is the case, the tax due is not determined with reference to profits or income derived, but with reference to certain indicators like the serving area, rank of the city, accommodation capacity etc. – hence, tax losses are not relevant for determining the tax due for these activities. Regardless of the above tax regimes, special tax rules apply in case the target qualifies as payer of tax on micro-enterprises income. The target should apply the tax on micro-enterprises income (3% tax on qualifying income, or 1% tax if it has at least one full time employee) if certain criteria are cumulatively met at 31 December prior to the reporting year. One of the criteria is that the target obtains yearly qualifying revenues not exceeding € 1,000,000. However, starting the 1 April 2018 taxpayers which are obliged to apply the micro-enterprises income taxation may nevertheless opt to apply the CIT system on the condition that their share capital is of at least RON 45,000 (some EUR 10,000) and they have at least two full time employees. The comments in this material take into account a standard CIT payer and hence, they may not be necessarily applicable in case the Romanian company applies other tax regime than CIT (e.g. tax on micro-enterprises income). A case-by-case analysis is therefore required.

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.

#### **Tax disadvantages:**

Under a share deal in Romania the buyer takes over all liabilities, including tax liabilities, of the seller with respect to the target. Therefore, buyers should perform in-depth due diligence to quantify the potential risks and seek protection through the sale-purchase agreement (by asking the seller for guarantees and indemnities in respect of pre-closing events).

The tax value of the shares is the acquisition price due by the buyer. The tax value of the shares is used to determine the capital gains tax owed by the buyer in the case of a future taxable share deal, if the specific exemption does not apply.

#### **B) Asset deal**

##### **Tax advantages:**

In an asset deal the buyer does not take over the seller's pre-closing financial and tax liabilities as it is the case under a share deal.

For Romanian tax purposes, the useful life of depreciable non-current assets is established within specific ranges, depending on the category of assets concerned. 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 via tax depreciation charges. The applicable VAT rate depends on the nature of assets transferred (however, VAT is not due if the operation qualifies as a transfer of a going concern). In 2018, the standard VAT rate is maintained at 19%.

No stamp duties, real estate tax or notary fees are due at the moment of the asset deal. Notary fees are due in case the parties opt to authenticate the contract for the transfer of ownership right. Transfer of the ownership right



over land and buildings is generally mandatory to be authenticated by a notary public. The notary fees are owed either by the seller or by the buyer, as mutually agreed.

**Tax disadvantages:**

In case of a business transfer, the purchase price allocation should be made based on a valuation report. No tax depreciation is allowed for any resulting goodwill.

Generally, the input VAT incurred upon acquisition of assets may be asked for reimbursement by the buyer. However such a procedure may prove to be administrative burdensome and lengthy (3 to 6 months or may be even longer depending on the complexity of operations, as it generally entails a tax audit). In case of specific operations, VAT simplification measures apply if the seller and buyer are both registered for VAT purposes in Romania. Examples of operations are sales of constructions and land. The simplification measures provide that the buyer accounts for VAT via reverse charge mechanism without any VAT cash-flow effect to the extent it has full VAT deduction right. If the asset deal qualifies as a transfer of a going concern, it falls outside of the Romanian VAT scope and no VAT should apply.

In an asset deal the target's fiscal loss cannot be used by the buyer, but may be off-set by the target against potential gains arising at the date of the asset deal.

If buildings are transferred, the related real estate tax (building tax) which will be owed by the buyer (as new owner) could differ from the real estate tax that was owed by the seller prior disposal. The buildings are charged with different local tax rates depending on their destination (residential vs. non-residential). If the buyer is a legal entity, the taxable base for the first 3 years will be represented by the acquisition cost. Building's value should be updated based on a valuation report prepared by an authorised valuator at least once in every three years, as otherwise the building tax rate will increase.

The seller of a building owes the building tax for the remaining period of the calendar year in which the asset is sold. The buyer owes build tax starting next year (following the acquisition).

## 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?

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 the 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 which generates a surplus, provided that the target's accounting policy is to reevaluate its depreciable non-current assets. Nevertheless, the CIT impact of increased tax depreciation corresponding to the revaluation surplus is netted-off by an equal taxable item. Recognition of a step-up in value of intangible assets for accounting and tax purposes is not allowed.

### 5. WHAT ARE THE PARTICULAR RULES OF AMORTISATION OF GOODWILL AND SIMILAR INTANGIBLE ASSETS IN YOUR COUNTRY?

Goodwill cannot be depreciated for tax purposes.

For accounting purposes, according to the Romanian accounting regulations approved by Order no. 1802/2014, 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 transaction date. Recognition of goodwill in the standalone financial statements is allowed only if the goodwill arises further to a total or partial transfer of assets and liabilities (under a sale or a merger). Goodwill can be thus recognized if the transfer is related to the transfer of a business represented by an integrated system of assets and operations managed with the view of obtaining profits.



Goodwill recognized as an asset can be depreciated for accounting purposes, during a maximum 5-year period. However entities may depreciate goodwill systematically over a period not exceeding 10 years, with appropriate disclosure in the notes to the financial statements.

Separately from goodwill, expenses related to the acquisition of patents, copyrights, licenses, trademarks or production marks, rights to explore natural resources and other similar intangibles recognized for accounting purposes, as well as capitalized development expenses, may be amortised for tax purposes based on the straight-line method over the contractual period or over their useful life, as the case. However, intangibles with undetermined useful lives may not be amortized for tax purposes. Expenses related to the acquisition or production of software are to be recovered through straight-line or reducing-balance deductions over a period of 3 years. The amortization for patents may be determined also by using the reducing-balance method or the accelerated method. Expenses related to acquisition of customer contracts recognized as intangibles for accounting purposes are to be amortised over the period of these contracts. Set-up expenses recognized as intangibles for accounting purposes are to be amortised over a maximum 5-year period.

## **6. WHAT ARE THE LIMITATIONS ON THE DEDUCTIBILITY OF INTEREST EXPENSE? ARE THERE SPECIAL INTEREST LIMITATIONS IN THE CASES OF ACQUISITION OF SHARES AND ASSETS?**

According to general the rule, expenses (including interest expenses) are deductible if they are incurred for business purposes.

Interest expenses are non-deductible if they relate to non-taxable income. This may be the case if the debt finances the acquisition of shares which may generate exempt dividend income or exempt capital gains upon disposals of the shares acquired (if the holding conditions are met).

In addition, the deductibility of interest expenses should be analysed also under the new Interest limitation rule transposed on the 1 January 2018 from ATAD. This interest limitation should be applied by taxpayers having associated entities. The relationship with an associated entity is generally characterized by a direct or indirect participation of 25% or more of the share capital/vote rights or the right to receive 25% or more of the entity's profits. The limitation rules do not apply to independent companies (i.e. entities which are not part of a consolidated group for financial accounting purposes, having no associated enterprise and no permanent establishment). Also, the limitation rule does not apply in respect of loans used to finance long term public infrastructure projects.

The limitation rule applies to all borrowing costs (e.g. interest corresponding to all types of debts, including bank loans, other expenses incurred in relation to financing like leasing, capitalized interest, foreign exchange losses etc.). The limitation should apply to the exceeding borrowing costs, defined as borrowing costs less interest income and other equivalent income ("Exceeding borrowing cost"). The Exceeding borrowing cost is deductible up to a fixed threshold of EUR 200,000 (this may be increased in the future), while any remaining Exceeding borrowing cost may be deducted up to 10% (this may be increased in the future) of the tax EBITDA (accounting result - non-taxable income + corporate income tax + Exceeding borrowing costs + fiscal depreciation). The part of Exceeding borrowing cost which remains non-deductible in the reference year based on the above limitation rules, may be carried-forward indefinitely and deducted in the future periods subject to the same deductibility limitations.

Separately, if the interest bearing debt is received from a related party, transfer pricing provisions should also be observed.

## **7. WHAT ARE COMMON STRATEGIES TO PUSH-DOWN DEBT ON ACQUISITIONS?**

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 a Romanian special purpose vehicle (SPV) is used to buy the target's shares. Subsequently the SPV and the target are merged and, hence, 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.

As a general rule, expenses are deductible if they are incurred for business purposes. Nevertheless, expenses related to non-taxable income should be treated as non-deductible. If the sole purpose of the debt is to finance the acquisition of shares in a Romanian company, the income obtained therefrom may 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) CIT payer. Also, capital gains derived by a Romanian SPV CIT payer upon disposing of target's shares is also non-taxable for CIT if at the date of disposal, the selling SPV has maintained a minimum holding percentage of 10% for an uninterrupted period of 1 year. Therefore, interest expenses incurred on the loan obtained to acquire the shares in the target would not be deductible for CIT purposes if the SPV earns non-taxable income. CIT deductibility of interest accrued post-merger may be however achieved in certain circumstances, but subject to the Interest limitation rule transposed from ATAD.

## **8. ARE THERE ANY TAX INCENTIVES FOR EQUITY FINANCING?**

A law for stimulating the individual investors was enforced in 2015. This law regulates the conditions under which individual investors (so-called Business Angels) can benefit from certain tax incentives if they contribute cash of at least EUR 3,000 and maximum EUR 200,000 to the capital of a Romanian small sized limited liability company. According to the law, Business Angels are exempt under certain specific conditions from the following taxes:

- ❖ Income tax on dividends for a period of three years since the capital increase, for the dividends related to the shares received; and
- ❖ Income tax on capital gains derived from the transfer of the respective shares, if the transfer takes place after a period of at least three years since the capital increase.

## **9. ARE LOSSES OF A TARGET COMPANY AVAILABLE AFTER AN ACQUISITION IS MADE? ARE THERE ANY RESTRICTIONS ON THE USE OF SUCH LOSSES?**

The target company's fiscal losses are available to be off-set against its own future taxable profits.

In case of a share deal, if after the transaction the target is absorbed by the buyer, any fiscal losses of the target entity can be off-set against the buyer's taxable profits within the same limits (e.g. 7 years since they arose at the level of absorbed entity etc.).

As for an asset deal, the target's fiscal losses may be off-set only against its future profits and therefore cannot be available directly for the buyer.

## **10. ARE THERE ANY ITEMS THAT SHOULD BE INCLUDED IN THE SCOPE OF A TAX DUE DILIGENCE THAT ARE VERY SPECIFIC TO YOUR COUNTRY?**

Examples of tax areas which are heavily scrutinized by the tax authorities at present, regardless of the industry of the taxpayer, are:

- ❖ Deductibility of service expenses – to claim CIT deductibility, the target should be able to demonstrate with written evidence that the services acquired have been actually rendered, that they were acquired and used for business purposes as well as the benefits derived by the taxpayer therefrom
- ❖ Transfer pricing issues may arise for transactions carried out by the target with related parties – these should be carried out at fair market value (in line with the “arm's length principle”). Lack of a complete transfer pricing file may trigger fines and adjustment of taxable basis for CIT purposes and also for VAT in certain circumstances
- ❖ Services acquired by the target from individuals organized as freelancers / limited liability companies etc. may



be re-qualified in certain cases as dependent relationships from a tax point of view and hence trigger personal income tax and mandatory social security contributions, similar to salaries. These, as well as late payment charges are imposed to the target

#### **11. IS THERE ANY INDIRECT TAX ON TRANSFER OF SHARES (STAMP DUTY, TRANSFER TAX, ETC.)?**

There is no indirect tax on transfer of shares (certain commissions/taxes may be due if the shares are traded on the regulated market). Sale of shares is an 'exempt without credit operation' for VAT purposes, and therefore no Romanian VAT should be charged.

#### **12. ARE THERE ANY RESTRICTIONS ON THE CORPORATE TAX DEDUCTIBILITY OF ACQUISITION COSTS?**

There are no specific restrictions regarding the deductibility of the acquisition costs of the assets under an asset deal. For instance, acquisition cost of fixed assets may be recovered via tax depreciation charges as long as the buyer uses the assets for business purposes and they generate taxable income.

Acquisition costs incurred in view of a share deal should be entirely non-deductible if the investment generates only non-taxable income (e.g. exempt dividends received or non-taxable capital gains obtained in case of a potential exit based on a participation of more than 10% maintained for at least one year). Else, if the investment generates both taxable (e.g. management fees) and non-taxable income, the part of allocable expense which should be non-deductible is to be determined based on a rationale allocation method or based on the weight of non-taxable income in the total income.

#### **13. CAN VAT (IF APPLICABLE) BE RECOVERED ON ACQUISITION COSTS?**

Any input VAT incurred by the buyer in case of an asset deal may be deducted in certain conditions if the buyer is a VAT taxable person and provided that the said acquisition is made with the view of carrying out VAT taxable operations or operations exempt from VAT with credit. The intention should be properly documented.

Under a share deal, based on the ECJ jurisprudence, the recoverability of VAT incurred by the buyer on acquisitions of consulting services (e.g. services provided by finance advisory and/or legal firms) depends on the status of the buyer from a VAT perspective. For instance, if the buyer is a mere holding company whose sole purpose is to acquire holdings in the subsidiaries and would not directly or indirectly involve in the management of those subsidiaries, it does not have the status of a taxable person and has no right to deduct the input VAT.

If the services are used by the holding company in order to perform both economic transactions giving rise to a right to deduct VAT and also economic transactions that do not, the deduction is allowed only in respect of the part of VAT which is proportional to the amount relating to the former transactions.

#### **14. ARE THERE ANY PARTICULAR TAX ISSUES TO CONSIDER IN THE ACQUISITION OF A DOMESTIC COMPANY BY A FOREIGN COMPANY?**

If a non-resident company acquires the shares of a Romanian target company, the Romanian tax rules applicable to dividends and capital gains are in principle similar with those applicable to acquisitions made by Romanian companies. For instance, a qualifying EU tax resident investor may benefit from withholding tax (WHT) exemption for dividend income received from the Romanian target (under the specific conditions of the transposed EU Parent-Subsidiary Directive). Also, an investor which is resident in a DTT country could also enjoy CIT exemption in respect of capital gains derived upon disposal of the shares provided that the seller has maintained a minimum holding of at least 10% in the Romanian investee for an uninterrupted period of at least one year. Other formal requirements should be met for availing of such exemptions.



If the holding conditions are not met upon exit (e.g. the 10% and the 1 year period), the capital gains tax due in Romania may be eliminated under the provisions of the applicable DTT. However, certain DTTs award taxation rights to Romania in case the shares sold by the non-resident derive their value directly or indirectly, mainly from real estate located in Romania. This is to be analysed on a case-by-case basis.

If a non-resident company acquires the assets of a Romanian target and continues to operate the business, it will likely give rise to a permanent establishment in Romania, case in which 16% CIT would be due on the allocable taxable profits.

Income derived by the non-resident investor from Romania (like e.g. dividends, interest, royalties, service fees etc.) may be subject to WHT – standard domestic rate is 16%, save for dividends which are taxed at 5%. The domestic rate may be reduced or eliminated under the provisions of the applicable DTT or the EU Directives provisions, as transposed in the domestic law – documentation requirements apply.

Lack of substance of the foreign investor may lead to non-application of the above-mentioned exemptions / reduced rates under DTTs etc. If the foreign investor has the actual place of effective management in Romania, it becomes a Romanian tax resident and is liable to 16% Romanian CIT on its worldwide income. No detailed guidance is provided on substance rules at present under Romanian law. However, general anti-abuse rules are available (covering also artificial cross-border transactions) and may be used to requalify a transaction as to reflect its economic substance.

## **15. CAN THE GROUP REORGANISE AFTER THE ACQUISITION IN A TAX NEUTRAL MANNER THROUGH MERGERS OR A TAX GROUPING?**

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 for the difference between the market value of the assets/liabilities transferred and their tax value (i.e. no VAT and no corporate income tax is due), provided that certain criteria are cumulatively met. In case of local partial spin-offs, the transfer should consist of one or more independent business lines towards one or more existing/new entities, while the company undergoing the spin-off operations should maintain at least one independent business line. Mergers and spin-offs must have business substance to be considered tax neutral. Domestic and EU cross-border merger and spin-off operations may not enjoy tax neutrality if they result in fraud and tax evasion detected according to the law.

The transfer of assets and liabilities is not a taxable transfer if the receiving entity maintains the tax value, tax depreciation method and useful lives of the assets transferred upon the merger or spin-off at the same level as they were prior to the reorganisation process.

No CIT grouping is available in Romania at present. This is applicable only for the Romanian permanent establishments of the same foreign legal entity.

## **16. ARE THERE ANY PARTICULAR ISSUES TO CONSIDER IN THE CASE OF A TARGET COMPANY THAT HAS SIGNIFICANT REAL ESTATE ASSETS?**

Attention should be paid to the DTT concluded between Romania and the country of tax residence of the buyer of the Romanian target whose assets are mainly represented by Romanian real estate.

Specifically, it should be checked whether, according to the above-mentioned DTT, Romania has the right to tax the capital gains derived by a non-resident investor from the sale of the shares in 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, save for the case where the seller is tax resident in a treaty country and has maintained a participation of minimum 10% in the target's capital for at least 1 year prior the sale.





**17. IS FISCAL UNITY/TAX GROUPING ALLOWED IN YOUR JURISDICTION AND IF SO, WHAT BENEFITS DOES IT GRANT?**

The Romanian Fiscal Code provides for VAT grouping which may be implemented in certain specific conditions.

However, fiscal unity is not available in Romania for CIT purposes. Nevertheless, foreign companies carrying out activities in Romania via more than one permanent establishment (PE) would be able to consolidate all Romanian income and expenses attributable to the PEs at the level of one single PE which is assigned to handle the CIT liabilities.

**18. DOES YOUR COUNTRY HAVE ANY SPECIAL TAX STATUS SUCH AS A PATENT BOX FOR COMPANIES THAT HOLD INTANGIBLE ASSETS?**

There is no special tax regime such as a patent box for companies holding intangible assets in Romania.

However, there are certain tax incentives applied for qualifying research and development (R&D) activities. For instance, the CIT payers benefit from an additional 50% deduction of the eligible expenses incurred for the qualifying R&D activity. Also, they benefit from the accelerated tax depreciation which can be applied in respect of the equipment used for qualifying R&D activities. Also, the salary and deemed salary income derived by individuals who perform activities related to R&D and software creation, as defined by law, may be exempt from personal income tax under specific conditions.

**19. DOES YOUR COUNTRY IMPOSE ADVERSE TAX CONSEQUENCES IF OWNERSHIP OF INTANGIBLES IS TRANSFERRED OUT OF THE COUNTRY?**

Romanian tax legislation does not include specific provisions addressing the transfer of ownership over intangibles outside the country. However, the tax law contains general substance over form and anti-abuse / anti-treaty shopping rules which may be applied by the tax authorities, should the context require it.

**SELL-SIDE**

**20. HOW ARE CAPITAL GAINS TAXED IN YOUR COUNTRY? WHAT, IF ANY, GAINS ARISING IN AN M&A CONTEXT ARE ELIGIBLE FOR SPECIAL TREATMENT?**

Capital gains obtained (from the sale of shares and/or of assets) by Romanian resident companies registered as CIT payers are included in their ordinary profit and taxed at the corporate income tax rate of 16%. If the seller owns for an uninterrupted period of minimum one year, minimum 10% of the share capital of the target company, the capital gains from selling the shares are not taxable. Capital losses related to a sale of shares are in general tax-deductible, save for the case where the participation meets the above holding conditions (10%, for one year).

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%. Sellers resident in treaty-countries are exempt from CIT if at the date of disposal the above holding conditions (10%, for one year) are met. If the holding conditions are not met, the capital gain may still be CIT exempt in Romania if the double tax treaty concluded between Romania and the seller's country of tax residence awards the right to tax such gains only to the other state (investor's country).

In addition, the corporate seller is required to register for Romanian corporate income tax purposes either directly (in case of EU/EEA tax residents) or by appointing a Romanian tax agent. The tax registration is used for declaring and paying any Romanian capital gains tax owed. Obtaining a tax number and filing nil tax returns is required even if no tax is due in Romania (e.g. by virtue of the applicable double tax treaty). The non-resident should make available a tax residence certificate issued by competent authorities in its residence jurisdiction in order to be able to invoke treaty benefits.



## 21. IS THERE ANY FISCAL ADVANTAGE IF THE PROCEEDS FROM THE SALE OF SHARES OR ASSETS ARE REINVESTED?

The profit reinvested by Romanian corporate income tax payers may be exempt from CIT. Qualifying investments are technological equipment, computers and peripheral equipment, cash registers and machineries for control or billing activities, software programs and the right to use software programs, produced and/or purchased by the company, including under financial leasing contracts, put into service and used for business purposes. Specific conditions should be observed.

## 22. ARE THERE ANY LOCAL SUBSTANCE REQUIREMENTS FOR HOLDING COMPANIES?

There is no specific substance requirement concerning foreign holding/finance companies included in the Romanian tax legislation at this stage.

However, the domestic tax legislation contains certain requirements regarding economic substance related to transactions/ activities (“substance over form” principle). For example, in determining the amount of a tax, a levy or mandatory social contributions, tax authorities may disregard a transaction that does not have an economic purpose, adjusting tax effects thereof, or they may reclassify the form of transactions / activities to reflect their economic substance. Specific rules are provided also for artificial cross-border transactions.

In 2016, the Romanian tax administration issued the form which should be filed by foreign legal entities having the actual place of effective management in Romania. After filing this form, the non-resident entity is assigned with a Romanian tax ID number based on which it can discharge its CIT (and other) liabilities in Romania in respect of its worldwide income.

Starting the 1st of January 2018, Romania transposed in its domestic legislation the Controlled foreign companies (CFC) rules provided by ATAD. Generally, an entity should be deemed a CFC if:

- ❖ the Romanian taxpayer, alone or together with its associated enterprises, holds a direct or indirect participation greater than 50% of the voting rights/ capital or has the right to receive more than 50% of the respective entity's profits; and
- ❖ the profits tax actually paid by the foreign entity or permanent establishment is lower than the difference between the profits tax which would have been paid by the latter in Romania and the profits tax actually paid by that foreign entity or permanent establishment.

If the above conditions are met, the Romanian CIT payer should include in its taxable base the retained earnings of the CFC, such as: interest, royalties, dividends, income from financial leases, income from goods acquired and resold without any economic value being added or with a low value added etc. Certain exceptions apply.

## 23. ARE THERE ANY SPECIAL TAX CONSIDERATIONS REGARDING MERGERS/SPIN-OFFS?

The transfer of assets and liabilities is not a taxable transfer if the receiving entity maintains the tax value, tax depreciation method and useful lives of the assets transferred upon the merger or spin-off at the same level 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 (i.e. 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’.

No taxation arises for provisions and reserves that were previously deducted by the absorbed entity and which are not coming from its permanent establishments from abroad, or of the reserves representing tax incentives, if such elements are transferred and maintained as such in the receiving entity's books upon merger. The reduction or usage of reserves that were previously deducted (e.g. by distribution to shareholders, usage for writing-off own



shares) triggers corporate income tax liabilities. Also the usage (i.e. for share capital increase or to off-set losses) of legal reserves and reserves representing tax incentives triggers corporate income tax liabilities for the fiscal period when they are used.

No VAT is charged if the transaction qualifies as a transfer of a going concern (in line with the EU VAT provisions). Mergers and spin-offs are by default considered outside the scope of VAT if the assets are transferred to a taxable person.

Fiscal losses brought forward at the level of the surviving entity can be recovered. Fiscal losses brought forward at the level of the target (absorbed company) may also be off-set against the surviving entity's taxable profits.

## MANAGEMENT INCENTIVES

### 24. WHAT ARE THE TAX CONSIDERATIONS IN YOUR JURISDICTION FOR MANAGEMENT INCENTIVES IN CONNECTION WITH SELLING OR BUYING A COMPANY?

Income received by individuals in cash or in-kind by virtue of a dependent relationship (e.g. employment, directors' fees) for dependent activities rendered in Romania is subjected to personal income tax and mandatory social security contributions (due by both the employer and employee). The same applies in respect of taxable benefits obtained by these individuals.

However, advantages representing the rights in a qualifying stock options plan received by employees / managers / directors are exempt from personal income tax and social security contributions at grant date and exercise date. Romanian Fiscal Code defines the stock option plan as being a program initiated by a legal entity through which the employees / managers / directors of this entity or of a related party entity are granted the right to buy at a preferential price or to receive for free a specific number of shares issued by that legal entity. The program should provide for a minimum 1 year period between the moment when the right is granted and the exercise date.

In the case of disposal of shares obtained through a stock option plan, the capital gains due by the individuals are determined as difference between the sale price and the fiscal value represented by the preferential acquisition price which includes the transaction costs. In case of shares granted for free, the fiscal value is zero.

## FOR MORE INFORMATION CONTACT:

**Angela Rosca**

**Tel: +40 21 316 0645**

**E-mail: [angela.rosca@taxhouse.ro](mailto:angela.rosca@taxhouse.ro)**

**Adrian Deaconu**

**Tel: +40 21 316 0645**

**E-mail: [adrian.deaconu@taxhouse.ro](mailto:adrian.deaconu@taxhouse.ro)**