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Foreword

2015 saw a record year for global merger and acquisition (M&A) activity marked by many mega-sized transactions. With the possibility of renewed and diversified activity from private equity players, activist investors and corporations alike, 2016 appears supportive for the continuance of robust M&A activity.

While some parts of the global economy remain sluggish and commodity prices are depressed, low interest rates, high equity prices and capital availability have been catalysts for deal-making from small scale transactions to mega-market deals. Five years of consistent growth and recovery in the U.S. is supplying buyers with confidence to seek out potential acquisitions in order to stimulate growth. Further, Europe may attract more inbound activity with better visibility around the return to growth in the region, which may yet be reflected in market prices. Additionally, Asian outbound M&A is expected to remain a significant factor in global transactions going forward as regions businesses look West for new sources of growth and products and services for a growing middle class.

As corporations and investors seek opportunities for growth and investment, businesses are increasingly turning to cross-border transactions. However, governments worldwide continue to reform their tax codes at a rate not seen historically. As evidenced by the final Base Erosion and Profit Shifting (BEPS) reports published in October 2015, there has been a continual recent focus on putting an end to international tax avoidance and protecting tax basis, while offering increased certainty and predictability to taxpayers.

Accordingly, while operating in an uncertain and ever-changing 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 29 countries. In the same format as previous editions, it provides an ‘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, intellectual property 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.

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Private equity investments in the post-BEPS world
Private equity investments in the post-BEPS world

On 5 October 2015, the OECD published the 13 final Base Erosion and Profit Shifting (BEPS) reports covering the 15 actions of the very ambitious and challenging BEPS action plan. The aim of the BEPS action plan is to put an end to international tax avoidance, realign taxation with economic activities and value creation and to create a single set of international tax rules to address BEPS issues. Furthermore, the action plan is about protecting tax bases, while offering increased certainty and predictability to taxpayers. One of the key aspects is to eliminate double non-taxation, but “without resulting in double taxation, unwarranted compliance burdens or restrictions to legitimate cross-border activity”. Now that the BEPS package has been approved by the G20 Finance Ministers in Lima on 8 October 2015 and by the G20 leaders during their summit on 15-16 November in Antalya, how will these measures be implemented, which of these measures are of particular relevance for the private equity sector and which actions should be undertaken?

The BEPS package: have the OECD and the G20 achieved their objectives?

2 years ago, the clearly expressed objective was to put an end to international tax avoidance and protect tax bases while at the same time offering increased certainty and predictability to taxpayers and take measures which do not result in double taxation, unwarranted compliance burdens or restrictions to legitimate cross-border activity. While this was the intention of the OECD and G20 at the time the BEPS project was launched, the reactions of industry players and their representatives to the BEPS discussion drafts released for comments over the past 2 years as well as to the final BEPS package released last month reflect the concern that several of the BEPS proposals may have effects which are not consistent with the objectives defined by the OECD and which may ultimately affect cross-border investment flows. The new rules could potentially recreate situations of double taxation which the OECD has been trying to fight since the release of its first OECD Model Tax Convention. The new rules could negatively impact cross border investments, even in situations where sound business reasons are given for setting up a structure abroad. Why? Because the requirements imposed under the BEPS package cannot always be achieved in practice, and this, even for structures where there is neither a double non-taxation situation, nor an abuse. Some of the new requirements, especially the ones aiming at preventing treaty shopping, are simply not adapted to each and every situation and the situation of investment funds is probably one of the best illustrations. This is why for some of the actions of the BEPS action plan, work remains to be done before participating countries will have all necessary means and elements at their disposal to be ready for implementation.

The BEPS actions under review

In order to be able to analyse the potential impact of the BEPS measures, it is important to distinguish between the ones which countries have formally committed to implement within a set time frame and those measures which are only standards or guidelines in case countries wish to implement them. However, one should bear in mind that countries may also implement BEPS measures unilaterally, even though no commitment to do so has been made. The measures of the BEPS package can be divided into 3 different implementation categories:

<table>
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<td>Countries committed to adopt minimum standards</td>
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Action 5: Harmful tax measures
Action 2: Hybrid mismatches
Action 3: CFC rules
Action 6: TrPartly best practicesty Abuse
Action 4: Interest deduction
Action 12: Disclosure
Action 13: CbC Reporting
Action 14: Dispute resolution

Partly minimum standards
Partly best practices
Action 7: PE definition
Action 7: PE definition
Actions 8, 9 & 10: TP
Actions 8, 9 & 10: TP
In addition, there are some horizontal measures: Action 1 on digital economy, Action 11 on measuring the economic impact of BEPS and Action 15 on the multilateral instrument which aims to accelerate the implementation by participating countries on some of the BEPS measures.

Some of the most relevant actions of the BEPS action plan for the private equity industry include Action 6 (“Preventing the granting of treaty benefits in inappropriate Circumstances”), Action 4 (Limit base erosion via interest deductions and other financial payments) and Action 2 (Neutralise the effects of hybrid mismatch arrangements).

One major area of concern for private equity investors and asset managers is Action 6 “Treaty abuse”, which targets companies which use conduit companies to artificially shift income. While the primary targets are multinational corporations, PE firms raising money across multiple jurisdictions and investing across multiple jurisdictions (a large part of the PE universe) will come under scrutiny. The OECD has recognised that, as drafted, the Action 6 proposals don’t work for the alternative fund industry, including Private Equity, so further work should take place in 2016. It will be important for the PE industry to make its voice heard to avoid collateral damage to the industry through Action 6. Under Action 6, countries should agree to include in their double tax treaties an express statement that their common intention is to eliminate double taxation without creating opportunities for treaty shopping. In addition, they should include either (i) the general treaty anti-abuse rule, or (ii) the Limitation on benefits (LOB) rule supplemented by a mechanism that would deal with conduit arrangements not already dealt with in tax treaties, or (iii) both the general treaty anti-abuse rule and the LOB rule. While US tax treaties generally include a LOB provision, this type of provision is very rarely seen in tax treaties concluded by other countries, especially EU countries, and constitutes thus a major change.

At this stage, it remains to be seen which of these measures countries will implement. This may be clarified either by the signing of the multilateral agreement to be released in the course of next year or by a renegotiation of existing treaties. While the aim of Action 6 is quite clear, the proposals it includes, especially the so-called (LOB) clause may have unexpected negative effects on structures and investment vehicles which are not used for treaty shopping purposes but are indeed in place for sound economic reasons. In its simplest form, the LOB clause can be seen as treating any corporate structure other than the most basic case of a company owned by residents of its own jurisdiction as “suspicious”. Any structure with investors from multiple countries investing in multiple jurisdictions can be challenged in its access to double tax treaties, and then needs to qualify, if at all, under one or more exceptions. Identifying ultimate investors in an investment structure in order to demonstrate that investing directly (instead of indirectly via several investment/holding vehicles) would have given rise to treaty benefits becomes very complex, if not impossible. This is especially true for the case of Collective Investment Vehicles (CIVs) which have hundreds of thousands of investors, which change very rapidly and which are resident in numerous different jurisdictions. While initial discussion drafts on Action 6 did not expressly cover CIVs, the OECD quickly woke up to the conflict between its earlier work on CIVs and initial discussion drafts of the Action Plan. Action 6 now encompasses CIVs and “non-CIV funds”. However, even after the release of the final package, OECD and G20 countries will keep working to complete the areas which require further work in 2016 and 2017, including finalising the model provisions and detailed commentary on the LOB rule with a continued examination of the issues relating to the broader question of treaty entitlement of investment funds (other than collective investment funds i.e. non-CIV funds).

Action 2 “neutralise the effects of hybrid mismatch arrangements” will also affect some investment structures rendering it important for understanding whether structures create situations of so-called double non taxation, i.e. no taxation in both the jurisdiction of source and the jurisdiction of residence of the parent company, or whether the effect is merely a timing effect, often the case in cross-border structures.

Action 4, “limit base erosion via interest deductions and other financial payments,” may change the economics of leverage, widely used to enhance returns. The primary aim of Action 4 is to reduce the amount of taxable profits shifted through intra-group interest-bearing loans. However, it also features more broad-based interest limitations which could impact third-party interest charges too. Even though Action 4 does not define a minimum standard that countries have committed to but only a common approach that countries have agreed to gradually adopt, many jurisdictions have already introduced these types of rules on a unilateral basis and the implementation of BEPS may cause these rules to become the new norm. This will have clear effects on the long-term effective tax rates in typical investment structures that use multiple layers of debt from both third parties and related parties.

Action 7 “Preventing the artificial avoidance of Permanent Establishment status,” may create taxable presences in some countries in which none existed before. While the primary focus was multinational enterprises “avoiding” permanent establishments, the wording of the paper and commentaries are broad enough to create concerns for asset managers or investment managers operating cross border.
Recommendations for the Private Equity industry

The current BEPS work will have many practical implications for traditional Private Equity investment structures. The new tax environment will impact both the investors and the investment managers on their net of tax returns. Both will have to adapt their structures in order to become BEPS-compliant. The thing is that even after the release of the final BEPS package, work remains to be done. Some flexibility has been left to countries on a few of the minimum standards to implement and some countries may even go beyond BEPS recommendations. In addition, to achieve a coordinated and harmonised implementation of BEPS recommendations at EU level, action has been taken by the European Commission on 28 January 2016 with the release of a EU Tax Avoidance package, which includes a draft directive against tax avoidance. The draft directive introduces among others anti-BEPS measures which are presented as minimum standards, while certain of these are only recommendations or best practices in the BEPS framework. This means that the measures proposed at EU level go beyond the BEPS recommendations. Furthermore, since the European Commission proposes principle-based rules in order to leave it to the Member States to define their implementation details, it is questionable whether the objective of having a coherent implementation of BEPS measures at EU level will be met. Therefore, investors will need a tailor-made and detailed action plan as their individual strategy will depend on many different criteria and on the jurisdictions in which they operate.

In the meantime, Private Equity firms should make an inventory of structures that may be impacted and then plan along the following lines:

- Investment structures should be strengthened with more substance.
- Financing structures should be reviewed in light of challenges to both the deduction of interest and tax treaty benefits.
- Financial instruments used should be reviewed in order to distinguish “real” hybrid instruments impacted by Action 2 and non-hybrid instruments which are not.
- Accounting systems should be adapted to be able to handle additional reporting and transfer pricing requirements.
- Management structures should be reviewed in light of the increased risk of having a permanent establishment.
- Underwriting and valuation models should be reviewed in light of potential volatility in effective tax rates.

BEPS will have profound effects on the Private Equity industry and not many of them will be positive. However, with appropriate management, the negative effects can be limited, and the specificities of an industry that has been delivering quality returns to investors over the years will be recognised.

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Country overviews
Argentina
Argentina

General

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

   On September 23, 2013, the income tax law was amended. According to the amended law, the distribution of dividends is subject to income tax at a rate of 10%, unless the dividends are distributed to Argentine corporate entities. In addition, the amended law establishes that the sale, exchange or other form of disposition of shares and other securities is subject to a capital gain tax of 15% for Argentine resident individuals and foreign beneficiaries.

   However, as of now many aspects of such tax regulations remain unclear and, pursuant to certain announcements made by Argentine tax authorities, they are subject to further rulemaking and interpretation. In this regard, as of today no regulations have been issued regarding the mechanism to pay the Argentine capital gains tax when the sale of shares of an Argentine company exclusively involves non-Argentine parties.

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?**

   Argentina has signed the OECD declaration on BEPS, the OECD multilateral convention on mutual administrative matters, OECD declaration on automatic exchange of information (early adopter), and the multilateral competent authority agreement.

   No significant legislative changes have been adopted to date in direct response to the OECD’s work. However, Argentina has taken steps to address perceived international tax avoidance through domestic measures.

   BEPS measures are not new in Argentina. During the last years the Argentine tax authorities challenged tax-motivated transactions and structures on the basis of ‘substance over form’ principle as construed in case law. In addition an Argentine government commission was created to review the country’s tax treaty network to determine whether there was potential for abuse and new tax information reporting requirements were created, among other measures.

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

   a. Share deal
   
   b. Asset deal

**From a buyer’s perspective**

**Share deals**

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 Argentine company’s shares are purchased by an Argentine company, 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 deals
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.

From a seller’s perspective

Share deals
The sale of SA shares or SRL quotas by Argentine companies, Argentine Individuals and/or foreign individuals or companies is subject to income tax (see section 14).

Although the tax debts are transferred to the buyer, the directors of the Argentinean company who were in charge during the period of such tax debt would remain jointly and severally liable if the Argentinean company does not pay the tax debt claimed by the AFIP. The procedure is simple

Asset deals
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.

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?

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.

5. 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.
6. **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 two 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 the consideration 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 the transfer pricing study 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 the 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 null-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.

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**

Over the 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 existence of the loan were 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.

7. 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 proceeds of the loan 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 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.
• Upon latest amendments of the income tax law, the distribution of dividends to Argentine individuals or foreign individuals or companies is subject to income tax at a rate of 10%.
• 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, Argentine individuals and foreign companies or individuals is subject to income tax

In case the Argentinean entity finances the acquisition by issuing private bonds with public offering, this provides a strong case to sustain the interest deduction. Private bond law states that the 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 the 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. Two of the main requirements hold that both entities should have maintained for at least 12 months before the date of reorganisation the same or related activities and that the continuing entity must maintain the same or related activities as the previous entities for at least 2 years as from the date of the reorganisation. Due to certain precedents of the Federal Supreme Court, the AFIP has recently admitted, in rulings, the tax free merger conducted between a holding entity and an operative entity of the same economic group even when the aforementioned requirements were not complied. Also, if certain conditions are met, the tax-free reorganisation could be possible in this alternative scenario.

8. 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 one company to another, provided that certain requirements are met (see section 13). Argentina’s income tax law provides for three types of tax-free reorganisation: mergers, spin-offs and transfers within the same economic group.
9. Is there any indirect tax on transfer of shares (stamp duty, transfer tax, etc.)?

Federal Taxes
Tax on debits and credits is levied on debits and credits on Argentine bank accounts and other transactions that are used for substituting the use of checking bank accounts. The general rate is 0.6%, however there are increased rates of 1.2% and reduced rates of 0.075%. Thus, if Argentine bank accounts are used for the payment of the transfer of the shares, this transaction would be subject to tax at a rate of 0.6% applicable on each credit or debit on Argentine bank accounts. 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.

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

Provincial taxes
Gross turnover tax.
Gross turnover tax could be applicable to Argentine residents on the transfer of shares to the extent such activity is conducted on a regular basis within an Argentine province or within the City of Buenos Aires. However, please note that in certain jurisdictions (e.g. City of Buenos Aires) exemptions may apply.

Stamp tax
The stamp tax could be applicable in the jurisdiction in which the transaction documents are executed but, in addition, it may also apply in the jurisdiction in which the transaction has effects. Please note that documents executed abroad may also be subject to stamp tax to the extent its effects take place in an Argentine province or in the City of Buenos Aires.

However, exemptions could apply in certain jurisdictions for the transfer of shares of Argentine companies. Also, there are some alternatives, depending on the transaction, to enter into agreements that are not subject to the stamp tax.

Free transmission of goods tax
The provinces of Buenos Aires and Entre Ríos establish a tax on free transmission of assets, including inheritance, legacies, donations, etc. Hence, free transmission of shares could be subject to this tax on said jurisdictions.

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

According to AFIP’s position costs incurred on the acquisition of an Argentinean company’s shares (e.g. interests from loans, legal fees, advisory fees, etc.) are not deductible for income tax purposes (see section 7) on the grounds that such expenses are not necessary for the obtainment, maintenance and conservation of taxable income.

However as we mentioned in section 7 it could be argued the deductibility of such expenses.

Also, although is not free from doubt, it could be argued that legal or advisory fees should be included as part of the acquisition cost of the shares. Under said scenario, such expenses would not be deductible for income tax purposes. Nevertheless in case of a future sale of the shares the sale price would be compensated against a higher acquisition cost.

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

In general, Argentine VAT is levied on three different classes of transactions, namely: the sale of tangible personal property within Argentina; the definitive import of tangible personal property and services into Argentina; and the provision of services within Argentina.

In this regard, the provision of advisory or legal services for the acquisition of an Argentine company would be subject to VAT as they will be “economically used” in Argentina. Hence, VAT paid for the aforementioned transactions will constitute a VAT credit to be compensated only against its VAT debits (i.e. against its output VAT).

If VAT credits for the rendering of the services cannot be compensated they should be included as part of the acquisition cost of the 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)**

There are no particular issues in the acquisition of Argentine shares by foreign companies. However please note the following:

- The sale of shares of an Argentine company is subject to income tax in Argentina.
- Due to inflation and devaluation scenario in Argentina any capital gain from the sale of shares of an Argentine company could be high since the acquisition cost of the shares is historical and should be determined in local currency at the moment of the purchase.
- Indirect sale of Argentine shares is not subject to Income Tax.
- Argentine entities should pay personal asset tax at a rate of 0.5% on the net worth on behalf of the shareholders (in case the shareholders are foreigners).
- Transactions performed between related parties must comply with transfer pricing regulations.
- If Argentinean bank accounts are used, tax on debits and credits would apply.
- As of today, no regulations have been issued stipulating the withholding and payment mechanism that the non-resident buyer should follow when the transaction is performed between foreign companies.
- Previously, Argentina applied strong foreign exchange regulations on the inflow and outflow of funds. However, recent changes have been introduced on this matter by the new government administration.

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

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 three 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 (i.e. income tax and VAT) nor, in certain cases, to provincial taxes (i.e. turnover tax and stamp tax).

Failure to comply with these requirements triggers the collapse of the tax-free reorganisation regime and it, 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 two 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 two 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.
14. Is there any particular issue to consider in case of companies of which 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 the end of the fiscal year from applying the 35% corporate income tax rate to the result of such particular fiscal year. The real estate transaction affects the result of the fiscal year 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, the 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 the real estate cost is historical. However, rollover transactions are applicable in Argentina: whenever a depreciable asset is sold and replaced income derived from the sale transaction may be assigned to the new asset’s cost, resulting therefore in a deferral in the recognition of built-in gains. General depreciation rules provided in the income tax law are then applied on the cost of the new asset reduced by the assigned income amount. This option is available to the extent that both operations are performed within a one-year term.

In general, real estate transfers are not subject to VAT. However, if the seller uses the premises as a fixed asset, the seller must pay VAT in some specific cases, 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. In general terms, real estate investments in Argentina are usually structured under two possible scenarios:

- Direct acquisition of the real property made by a local vehicle (e.g. 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.

Sell-Side

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

No participation exemption regime is available in Argentina. The results derived from the transfer of S.A shares, SRL quotas and other securities are subject to Argentine income tax, regardless of the type of beneficiary who obtains the income.

Capital gains obtained by Argentine corporate entities (in general, entities organised or incorporated under Argentine law, certain traders and intermediaries, local branches of non-Argentine entities, sole proprietorships and individuals carrying on certain commercial activities in Argentina) derived from the sale, exchange or other disposition of shares are subject to income tax at the rate of 35% on net income. Any loss derived from the transfer of shares may only be offset against profits of the same source from the same type of transactions. If such offset cannot be made in the same fiscal year in which the loss occurred or such loss cannot be offset in full, then such amount may be offset against income of the same source generated by the same type of transactions in the immediately subsequent 5 fiscal years.
Income obtained by Argentine resident individuals from the sale of shares is subject to income tax at a 15% rate on net income, unless such securities were traded in stock markets and/or have public offering authorization, in which case an exemption applies. The implementing Decree 2334/2013 introduced a provision stating that the exemption includes income derived from the sale of shares and other securities made through a stock exchange market duly authorized by the CNV. Any loss derived from the transfer of shares may only be offset against profits of the same source from the same type of transactions. If such offset cannot be made in the same fiscal year in which the loss occurred or such loss cannot be offset in full, then such amount may be offset against income of the same source generated by the same type of transactions in the immediately subsequent 5 fiscal years.

Capital gains obtained by non-Argentine resident individuals or non-Argentine entities from the sale, exchange or other disposition of shares would be subject to income tax (please note that the abovementioned exemption for shares is not applicable to non-Argentine beneficiaries). Therefore, the gain derived from the disposition of shares is subject to Argentine income tax at either (1) a 15% rate on the amount resulting from the deduction of the gross profit paid or credited, the expenses incurred in Argentina necessary for its obtainment, maintenance and conservation, as the deductions admitted by the income tax law or (2) at a 13.5% rate on the sales price. There is currently no guidance under Argentine law with respect to how this election is made. When both the seller and the buyer are non-residents, the person liable to pay the tax shall be the buyer of the shares, quotas, equity interests and other securities transferred. However, as of today, no regulations have been issued stipulating the withholding and payment mechanism that the non-resident buyer should follow.

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

In general, 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 (i.e., 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 cost of the new asset reduced by the assigned income amount. The sale and replacement of depreciable assets must take place within a one-year term for the taxpayer to apply this regime.

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

Foreign holding companies are liable to comply with substance requirements. No specific regulations were issued in Argentina. Analysis is made on the basis of ‘substance over form’ principle.

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General

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

   From 1st of January 2016 onwards, whenever assets (including participations) are transferred from Austria to a foreign country in course of a M&A transaction and Austria consequently loses its taxation right regarding the intrinsic hidden reserves, these hidden reserves are subject to taxation, regardless of a realisation act (i.e. sale).

   Nevertheless, it is possible to pay, on application, the tax by installments, if the assets are transferred into an EU-Member state or an EEA-Member state which has signed a comprehensive administrative assistance agreement with Austria.

   In respect to fixed assets, the installments are paid over a period of seven years. In respect to current assets, the installments are paid over a period of two years.

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?**

   Austria has already proactively implemented some changes to the Austrian tax law as a response to the BEPS discussion i.e. predominately provisions to (i) fight hybrid mismatches (action 2), (ii) to limit base erosion via interest deductions and other financial payments (action 4) and (iii) to implement a country-by-country reporting standard (action 5). In addition, actions against the artificial avoidance of a permanent establishment (action 7) were taken in respect to commissioner agreements before the BEPS discussion started.

   To prevent the abuse of tax treaties (action 6), the Austrian tax authorities apply a substance over form approach requiring that the entity claiming benefits must be set up based on economic reasons, fulfill certain commercial functions and have a minimum substance in respect to people and office space.

   With a view to the EU Parent-Subsidiary Directive, please note that the Austrian tax law provides, in respect to incoming dividends, for a switch over (from the exemption method to the credit method) in certain cases where abuse of law is assumed. This is the case, if the foreign distributing company derives mainly passive income (i.e. interest, royalties, rental and lease income from movable assets) and is subject to low taxation (effective tax rate does not exceed 15%).

   As of 1 January 2011 a provision was implemented that dividends which would be exempt under the general provisions are nevertheless subject to taxation if they are tax deductible at the level of the distributing entity. This provision was implemented to combat the abusive use of hybrid debt capital instruments which are deemed as debt in the foreign state and as equity in Austria.

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

   **a. Share deal**

   Within a share deal generally all tax attributes including tax loss carry forwards are maintained while they are generally disappear in course of an asset deal.

   **b. Asset deal**

   The main difference from a financial and tax perspective is that an asset deal my lead to a step up in book values and thus to higher depreciation. Although a higher depreciation might be seen favorable from a tax perspective it would reduce the potential for dividend payments and thus might lead to a derogation of the ability to service the acquisition debt (thus reducing the possible leverage).
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?

Generally the book values of the assets in the transferred company are not affected by the transfer. However, it might be that following the transfer the company gets a new commercial perspective either by a change of strategy, additional group support or synergy effects within the group of its new shareholder(s). In such a case, the depreciation policy might be revised and as a consequence past impairments might be recaptured. However, please note that such revisions would be taxable. If only the terms of useful life of the assets are extended this would not lead to an immediate step up of book values but would have, due to the extended remaining useful life, a similar effect.

Also, in course of a subsequent reorganisation it might be possible to step up the book values for accounting purposes, tax book values would however remain at the same level.

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

Goodwill can only be booked if acquired in an asset deal. The useful life is invariably 15 years (with exceptions for professional service firms). A write-down or write-off due to an impairment test would however result into an immediate tax deduction. In case of shares acquisition, cost can only be utilised by way of a write-down under certain conditions or in course of liquidation.

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

Austrian tax law neither provides for strict debt equity ratios nor an earning stripping regime. However, if borrowings are from related parties the loan might be re-characterised to equity which leads to non-tax deductible interest expenses, if the interest is not at arm’s length. Additionally, the following restrictions apply:

a. Restriction on interest deduction if interest income is subject to low taxation

Interest is not tax deductible, if it is low taxed in the hands of the beneficial recipient. This is the case under the following circumstances:

- The recipient of such payments is a direct or indirect affiliated corporation or is under a controlling influence of the same shareholder; and
- The interest is in the hands of the receiving corporation
- not taxable due to a personal or objective tax exemption
- subject to a nominal tax rate of under 10 %
- subject to an effective tax rate of under 10 % due to a specific tax allowance or refund

The deductibility is however not affected if the effective tax rate is reduced to below 10 % due to tax loss carry forwards or the application of tax grouping.

b. Restriction on interest deduction for inter-company share-deals

If shares are acquired from an affiliate, any related interest expense is not tax deductible.

From a substance over form perspective application of the non-deductibility rule is extended also to cases where the acquisition is equity financed with funds originating from debt financed capital increases.
7. **What are usual strategies to push-down the debt on acquisitions?**

If the buying corporation acquires a majority interest in an Austrian target company, a tax group may be set up. Group taxation offers the advantage of offsetting profits and losses within the tax group and thus resulting economically in a debt push down.

A (limited) debt push down can be achieved by debt financed dividend distributions made by the target. The merger route generally is not a viable alternative due to various restrictions in corporate law securing the interest of debtors.

8. **Are losses of the target company(ies) available after an acquisition is made?**

Tax loss carry forwards cannot be transferred in the course of an asset deal.

In the course of a share deal, tax loss carry forwards generally remain available at the level of the target and can be offset against future profits.

However such tax loss carry forwards perish, if the target company incurs a substantial change (ie of more than 75%) in the economic and organisational structure within a short period of time before or after the change in ownership. Exempted are only changes in the course of restructurings with the aim to retain employment.

Careful tax planning is required also in subsequent reorganisations (ie merger, spin-off, etc) as these can also lead to tax loss carry forwards being forfeited.

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

   a. **Share deal**
   
   For the time being there is no (share) transfer tax or stamp duty on a share deal in Austria. The EU, however, intends to introduce a financial transaction tax, in which case Austria would levy such tax.

   From 2016 onwards real estate transfer tax is triggered, if at least 95 % of the shares in a company owning real estate located in Austria are acquired by a single shareholder or by two or more companies of the same tax group.

   Share deals are exempt from VAT.

   b. **Asset deal**
   
   The renewal of certain agreements (e.g. rental agreements with landlords) and the assignment of receivables or other rights which are affected in course of an asset-deal may be subject to stamp duty. Precondition is that a document within the meaning of the Austrian Stamp Duty Act is executed.

   The transfer of Austrian located real estate or similar rights generally attracts real estate transfer tax and registration fees.

   In the course of an asset deal each single asset has to be evaluated separately for VAT purposes. Therefore the VAT is based on the purchase price plus transferred liabilities, less tax-exempt (e.g. accounts receivables, transfer of a partnership interest and of shares in a corporation) or non-taxable items (e.g. passenger cars).

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

   Acquisition costs should generally be capitalised to the purchased asset, in a share deal scenario as well as in an asset deal scenario. Only costs which were incurred prior to the purchase decision, relating rather to the decision process than to the actual acquisition process are tax deductible. Typical expenses in this respect are due diligence costs.

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

   VAT incurred in course of an asset deal should generally be recoverable.

   In context of a share deal it has to be observed that generally only entrepreneurs are eligible for input VAT. Thus, if a mere holding company is doing a share deal VAT recovery would generally be not possible.
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)

As the most efficient structure for a debt push down is the creation of a tax group between the acquirer and the target company, an Austrian tax resident acquisition vehicle might be advantageous. On the other hand it has to be noted that under the condition that treaty protection is available the sale of an Austrian entity by a foreign holding company does not trigger Austrian capital gains taxation which would be the case in a domestic scenario.

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

Tax neutral reorganisations can only be carried out under certain conditions. The predominant ones are that the transferred assets constitute a commercial business in the sense that the assets are not just held for investment purposes and that the transferred assets have a positive fair market value. It has to be observed that tax losses might be jeopardised by such subsequent reorganisation.

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

There are no special provisions for real estate companies. From 2016 onwards RETT is triggered if at least 95% of the shares in any company owning Austrian real estate are acquired by a single shareholder or by two or more companies being part of the same tax group.

Sell-side

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

a. Share deal

For qualified international participations (> 10%, holding period > 1 year, comparable to a corporation) there is an election model allowing a corporate taxpayer to choose between a tax neutral and a tax effective status of the participation.

Tax effective status: Any capital losses or write downs reduce the company's taxable income. However, it should be spread over seven years. On the other hand capital gains or appreciations increase the company's taxable income immediately.

Tax neutral status: In that case any expenses resulting from capital losses or write downs are not tax deductible. Correspondingly any income resulting from capital gains or appreciations are not taxable. An exceptional rule is available for actual and final liquidation losses, which can be utilised for tax purposes over seven years under certain conditions.

The election concerning the tax neutral or tax effective treatment of an international participation must be exercised in the year participation is acquired and can be excised differently for all international participation. These are one-time options and bind the holding company with regards to this specific investment.

If the seller is an Austrian resident individual the capital gain from the sale of shares is invariably subject to a flat tax rate of 27.5%.

b. Asset deal

If the seller is an Austrian corporation any capital gain is subject to 25% corporate income tax. If the seller is an Austrian individual resident, the capital gain is subject to the progressive standard income tax rate. Please note that a reduced rate might be available if the seller had run the business for more than seven years and retires at the time the business is sold. If the person does not retire it would be eligible to spread the taxation of the capital gain over three years.
16. **Is there any fiscal advantage if the proceeds from the sale are reinvested?**

Rollover relief is not available for corporations. Special provisions apply for private foundations where rollover relief in available.

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

The Austrian tax law generally applies a substance over form approach. Consequently any transaction is attributed rather to the beneficial than to the legal owner. Thus generally a look through approach is applied to transactions involving strawmen or back-to-back constructions. To be considered as beneficial owner the entity generally needs to have the resources and the capacity to control the investment and the related risks.

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General

1. **What are recent tax developments in your country which are relevant for M&A deals?**
   
   The Belgian Government has introduced a new ‘speculation tax’ for individual investors, who invest in listed shares. When the individual realises a capital gain on such shares within six months following their purchase, they will be taxable at a special rate of 33%. In addition, the standard withholding tax rate for dividends, interest and royalty income is increased from 25% to 27%. Dividend distributions between group companies are not affected by the increase due to the Belgian and European exemptions applying to related companies.

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?**
   
   The Belgian Government is not proactively implementing the BEPS recommendations and seems to adopt a more ‘wait and see’ attitude. However, with regards to the specific transfer pricing recommendations, the Government has announced that it is looking into the matter to decide on how to convert these guidelines into Belgian tax law.

3. **What are the main differences among acquisitions made through a share deal versus an asset deal in your country?**
   
   **a. Share deal**
   
   In 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, which might lead him to prefer an asset deal instead. In most cases, however, the seller 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, the Belgian legislation on capital gains on shares realised by corporate taxpayers has 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 also question n° 15).

   Individual sellers benefit in principle still 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 listed shares or a substantial shareholding sold to a buyer established outside the European Economic Area).

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

   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 may, however, benefit from a deferred taxation regime (see also question 16).
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?**

   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 the acquisition.

5. **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 the assets to which these additional costs relate. To determine the 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 five years for intangible fixed assets (such as goodwill and clientele). Often the Belgian Tax Authority attempts 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 that their clientele is of a more ‘dynamic’ nature and that the depreciation period should therefore be shorter than 10 or 12 years.

6. **Are there any limitations to the deductibility of interest on 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 the 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 the 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, or 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 five times the total sum of the taxed reserves at the beginning of the taxable period plus the amount of paid-in capital at the end of this period (this is the so-called 5:1 debt-equity ratio). Furthermore, the same debt-equity ratio of 5:1 also applies to loans granted by related parties.

7. **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 to perform 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 the profits and costs of both companies remaining taxable and deductible within the one single taxable entity, i.e. 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.

8. **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 the events or circumstances that represent 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 existence of the company (even in cases where new activities are carried out by the company 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.

9. **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 the normal market value of the property. The 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 levying. 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 relating to the period in which 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 ‘stock exchange tax’ (various rates apply, depending on the nature of the security concerned; the standard rate amounts to 0.27%). However various exemptions apply.

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

Acquisition costs are, as any other cost, deductible provided the taxpayer can establish that said expenses or costs were incurred during the taxable period in order to acquire or at least preserve taxable income. Also, the reality and the amount of the expense needs to be justified as being “reasonable” (the taxpayer may deliver this proof by all means of law). An expense will however not qualify as tax deductible if the sole purpose of the expense is transferring taxable profits from one company to another.

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

For asset deals, the normal VAT deductions apply. When the acquiring company is entitled to deduct input VAT and uses the acquired assets and services for activities subject to VAT, the paid input VAT can be recovered by reclaiming it in the VAT return relating to the period in which the transfer took place.
For share deals, the answer is less affirmative. In general however, if the acquisition costs are part of the company’s general business costs and are as such incorporated in the general turnover rendered by that company to third parties or other group companies, the input VAT on these costs will be deductible (depending on the company’s overall right to deduct input VAT). If these costs however relate to an isolated purchase and sale of shares or participation, the concerned input VAT on these costs may not be deductible since it will be considered as a financial transaction for which no input VAT recovery is granted.

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)**

When a foreign company acquires a Belgian company, the main tax consequences thereof will of course need to be verified in its own country of residence. However, from a Belgian perspective there are a few elements to take into account, such as the aforementioned debt-equity ratios and loss limitation rule. In addition, it will in any event be important to make sure that the Belgian company disposes of sufficient substance following the takeover so that it cannot be contested that the company remains a Belgian resident company. In that respect, we usually recommend that all shareholder’s and board meetings are physically held in Belgium and that all important decisions are taken from the Belgian offices. The acquiring company itself should in principle not be afraid of becoming subject to Belgian taxation, unless of course a Belgian permanent establishment would be created upon or following the acquisition.

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

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

A tax neutral merger between two companies is possible if certain conditions are fulfilled:

- The acquiring company must be a Belgian or a European resident company;
- The merger is carried out in accordance with the Belgian Code of Companies or similar corporate rules applying to the acquiring company; and
- 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 the group structure or rationalisation of activities have motivated the merger operation.

The burden of proof in principle lies with the tax authorities: the tax authorities 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 tax authorities can prove the 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 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.
14. **Is there any particular issue to consider in case of companies of which 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 location of the real estate in Belgium) or VAT where a new building is concerned (21%). A transfer of shares in general can be effectuated without any transfer tax being due (also see question 9).

**Sell-side**

15. **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.

Capital gains on shares are (as a general rule) fully exempt if the following two conditions are met:

- The shares must have been issued by companies subject to a normal tax regime (the taxation condition); and
- The shares must have been held in full ownership during an uninterrupted period of one year (the holding condition).

The exemption is fully applicable for SMEs, but other ‘large’ companies fulfilling the two exemption conditions mentioned above are subject to a special tax of 0.412%.

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

- annual average number of 50 employees;
- annual turnover, excluding VAT of EUR 9 million;
- balance sheet total of EUR 4.5 million.

For companies affiliated with another company, the employees are added up and the annual turnover and the 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 condition and the holding condition are met;
- Taxation at 0.412% of capital gains on shares realised by companies other than SMEs if both the taxation condition and the holding condition are met;
- Taxation at 25.75% of capital gains on shares when the taxation condition is met, but not the holding condition; and
- 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%. However a new ‘speculation tax’ has been introduced: capital gains realized on listed shares within 6 months after their purchase are now also taxed at the 33% rate.

16. 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 five years, the capital gain will be taxed on a deferred basis following the depreciation of the reinvestment assets. However this is provided that the purchase price of the assets is fully reinvested in depreciable fixed assets used within a Member State of the European Economic Area for the carrying out of the vendor’s business activity within a certain period of time (in principle within three years, but extended to five years for reinvestments in buildings, vessels or airplanes).

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

In order to qualify as a Belgian tax resident company, a company will need to comply with the substance requirements of Belgian tax law, i.e. the company must have its registered seat, principal establishment or seat of management or administration in Belgium. As a result, when you wish to set up a Belgian tax resident company, it will be important not only to incorporate the company in accordance with Belgian company law provisions and have the seat of the company registered in Belgium, but also to make sure that the company is effectively managed in Belgium (e.g. board of directors’ meeting is held in Belgium physically, all management decisions are effectively decided upon out of the Belgian office). In an international context, also the tax residency rules included in the Double Tax Treaties to which Belgium is a party will come into play. These Double Tax Treaties mainly provide the ‘place of effective management’ as the main criterion to determine a company’s tax residency.

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

   Legislative amendments in the past few years now strongly discourage a foreign acquirer of a Canadian corporation (Target) that itself has foreign subsidiaries from keeping those foreign subsidiaries “under” Canada. These rules effectively force the Canadian Target to sell or distribute its foreign subsidiaries “up” to the foreign acquirer. Canadian tax authorities perceive there as being generally no good reason to have a foreign-controlled Canadian corporation own foreign subsidiaries, largely because in some cases foreign multinationals have caused their Canadian subsidiaries to acquire the shares of foreign group members (so-called “foreign affiliate dumping”) either in exchange for cash as a means of earnings stripping or in exchange for debt in order to use the result interest expense to erode the Canadian tax base.

   Over the past few years Canada has tightened its “thin capitalisation” rules limiting the extent to which interest expense owing to related non-residents may be deducted against Canadian-source income. See Answer 6, below.

   Canada has also introduced various measures to protect its withholding tax regime on interest, royalties and similar payments. In particular, new “back-to-back” rules apply where a Canadian pays such amounts to a recipient that itself has a connection to a non-resident who would, if it were the direct recipient of the payment, incur a greater Canadian withholding tax than the tax exigible on the payment to the actual recipient. These rules support the withholding tax applicable on interest payments to non-arm’s length non-resident creditors, and also effectively act as an anti-treaty shopping rule for such payments. See “Canada Releases Revised Back-to-Back Loan Rules,” Tax Notes International, October, 2014. These rules constrain the creation of tax-deductible interest on acquisition financing and repatriation out of Canada by intra-group charges.

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?**

   In 2014 Canada released a draft proposal to create a sweeping domestic law anti-treaty shopping rule that would over-ride Canada’s tax treaties: see “Canada To Unilaterally Override Tax Treaties with Proposed New Anti-Treaty-Shopping Rule,” Tax Notes International, March 2014. Subsequently, Canada announced its intention to hold off implementing such proposal pending the outcome of the OECD BEPS work on treaty shopping, although Canada continued to negotiate specific anti-treaty shopping provisions in tax treaties concluded during this period, as well as enacting the “back-to-back” rules referred to in Answer 1, above. In the federal budget of March 22, 2016, the Canadian government announced its intention to proceed with anti-treaty shopping initiatives, which may involve signing the pending OECD multi-lateral instrument, amendments to bilateral treaties, or both.
3. What are the main differences among acquisitions made through a share deal versus an asset deal in your country?

a. Share deal

Sellers of shares will generally realise a capital gain in the amount by which their proceeds of disposition exceed the cost basis of their shares for tax purposes. This is generally advantageous as (1) only 50% of capital gains are included in taxable income, (2) capital gains may be offset by capital losses, and (3) some Canadian shareholders can claim an exemption up to a specified dollar amount on “qualified small business corporation shares.”

Non-resident sellers of shares will generally be subject to Canadian tax on a share sale only where (1) the shares have derived their value (directly or indirectly) primarily from Canadian real/natural resource property at any time in the previous 5 years, and (2) no tax treaty relief is available. Where such shares are traded on a public stock exchange, a non-resident seller who (together with non-arm’s-length persons) has not owned 25% or more of any class of the corporation’s shares at any time in the 5 years preceding the sale will be exempt from Canadian capital gains tax. See “Canada’s Section 116 System for Nonresident Vendors of Taxable Canadian Property”, Tax Notes International, April 2012.

The buyer’s cost basis in the shares of a Canadian corporation it acquires may in some cases be pushed down into the cost basis of land and shares owned by that corporation (see Answer 4 below). See “Tax Issues on Acquiring a Canadian Business,” Tax Notes International, August 2015. Foreign buyers typically create a Canadian company to act as the direct purchaser of the acquired shares in order to access this step-up, as well as to maximise their ability to repatriate their Canadian investment as a return of “paid-up capital” that is not subject to Canadian dividend withholding tax.

b. Asset deal

Buyers often prefer to acquire assets rather than shares, as the cost basis of many assets can be deducted from income over time as a tax version of depreciation, whereas the cost basis in shares is generally of benefit only when those shares are sold. Asset transactions may generate sales tax, which is typically borne by the buyer. Canada has a federal multi-stage VAT in which buyers pay the tax (GST) and (if they operate a business) claim a full refund (input tax credit), which a number of provinces have harmonised their sales taxes with, to produce a harmonised sales tax (HST). Other provinces have non-harmonised sales taxes (PST) that can produce actual non-refundable sales taxes (see Answer 11 below). Most provinces have land transfer taxes.

Sellers generally prefer not to sell assets, because (1) sales of depreciable assets that have generated previous deductions from taxable income may produce a reversal of such previously-claimed deductions (“recapture”), and (2) the accrued gain/recapture that a corporation has on its assets is often much greater than the gain that its shareholders have on its shares.

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?

Where one Canadian corporation (Buyer) acquires all of the shares of another Canadian corporation (Target), a cost basis step-up (or “bump”) may be available when Target is merged up into Buyer and Buyer acquires all of Target’s property (which occurs on a tax-deferred basis). Effectively this step-up (the “88(1)(d) bump”) is limited to Target’s non-depreciable capital property: land, shares and (in some cases) interests in partnerships. Foreign buyers often create a new Canadian corporation to act as Buyer for the purpose of availing itself of an 88(1)(d) bump where Target owns non-depreciable capital property with significant accrued gains (especially shares of foreign subsidiaries that need to be extracted out from under Canada post-closing, as per Answer 1). See “Canada’s 88(1) (d) Tax Cost Bump: A Guide for Foreign Purchasers,” Tax Notes International, December, 2013.
5. **What are the particular rules of depreciation of goodwill in your country?**

In the 2016 federal budget, the Canadian government announced its intention to proceed with replacing the existing “eligible capital property” regime for amortising goodwill and other business intangibles. Effective 2017, such property will be moved into the existing depreciable property regime that amortises the cost of tangible capital property for tax purposes, with a 5% annual depreciation rate. See “Federal Budget 2016 — A Focus on the Middle Class and Continued Scrutiny of Corporate Tax Avoidance”, March 2016

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

Interest on borrowed money is generally deductible to the extent used for the purpose of gaining or producing income, and to the extent that the amount paid is “reasonable” (i.e., not in excess of an arm’s-length rate). Debt incurred for certain non-income-earning purposes (e.g., paying dividends, repurchasing shares of the debtor) is deductible by administrative practice within limits. “Thin capitalisation” rules limit the extent to which interest owing to non-arm’s-length non-residents may be deducted in computing income, in order to limit cross-border intra-group interest stripping. For example, a Canadian corporation is effectively limited to $1.50 of debt owing to such creditors for every $1 of equity: interest on debt in excess of such amount will be non-deductible.

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

Since Canada does not levy interest withholding tax on debt owing to arm’s-length creditors and such debt is not subject to “thin capitalisation” interest expense limitations, it is common to see a Canadian company that is created to effect the acquisition of a Canadian target borrow directly from arm’s-length creditors. Alternatively, to the extent that such borrowing is done at the foreign parent level, the foreign parent can capitalise the Canadian acquisition company with a mix of equity and debt owing to the foreign parent within the 1.5:1 debt/equity limitations imposed by the “thin capitalisation” rules described in Answer 6. 25% Canadian withholding tax applies on interest paid to a non-arm’s-length foreign creditor, reduced to 10% for non-arm’s-length creditors resident in most countries with which Canada has a tax treaty, and zero for non-arm’s-length creditors who are U.S. residents entitled to benefits under the Canada-U.S. tax treaty.

8. **Are losses of the target company(ies) available after an acquisition is made?**

Target’s capital losses (both realised and accrued but unrealised) do not survive the acquisition of control, making it important to undertake pre-closing planning in order to make the best possible use of these tax attributes. Accumulated operating losses from prior years (and the year ending on the acquisition of control) may be carried forward and used in post-closing taxation years only if (1) throughout the later year in which Target seeks to use the losses it continues to carry on the same business as gave rise to the loss (the loss business) with a reasonable expectation of profit; and (2) the post-acquisition income that the losses are used against arises from carrying on either the loss business or a business of selling similar property or providing similar services as were sold or rendered in the loss business. These rules prevent a buyer in, for example, the mining business from purchasing a company with losses generated in a completely different business (e.g., software development) and using those losses. Similar rules apply to various tax credits and resource-sector tax pools.

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

No.

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

Such costs are governed by the usual rules differentiating between (1) costs that are currently deductible and (2) those that are capital in nature and hence deductible only over time or capitalised in the cost basis of the property acquired.
11. Can VAT (if applicable) be recovered on acquisition costs?

Where assets are acquired by purchaser that is registered for purposes of goods and services tax/harmonised sales tax/Quebec sales tax ("GST/HST/QST"), and the purchaser is acquiring the assets for consumption, use or supply in taxable activities, any GST/HST/QST paid in respect of the assets or acquisition cost should be wholly or partially recoverable.

Provincial sales tax ("PST") is a single stage tax and is payable on taxable acquisitions and is not recoverable.

The purchase of shares is exempt from GST/HST/QST; however acquisition costs may apply and the acquirer may be entitled to a full or partial refund if certain conditions are met. The purchase of shares would not attract PST however legal services and other acquisition costs may be subject to PST which would not be recoverable.

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 buyers will typically make Canadian acquisitions through a Canadian acquisition company in order to (1) create paid-up capital equal to the full amount of their equity investment (see Answer 3(a)), (2) merge that Canadian company with the Canadian Target to consolidate the interest expense on any Canadian acquisition debt incurred with the Target’s operating income, and (3) obtain the cost-basis step-up described in Answer 4 (which is often especially important for foreign buyers). Where Target has foreign subsidiaries, planning will be needed to prevent adverse consequences from the “foreign affiliate dumping” rules described in Answer 1. Foreign buyers must also consider potential planning for repatriating assets from their Canadian acquisition (e.g., dividends, royalties, interest, management fees, etc.), as well as dealing with potential Canadian capital gains tax on an eventual sale of their investment. Transfer pricing rules will apply to transactions between the Canadian subsidiary and non-Canadian members of the foreign buyer group.

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

No group relief or consolidation system exists in the Canadian tax regime: each taxable entity pays tax separately. Canadian corporations can merge on a tax-deferred basis, and in fact Canadian buyers of Canadian Targets typically merge post-closing in order to (1) consolidate their income and deductions and (2) claim the 88(1)(d) bump described in Answer 4. By using such tools and making the best use of available Target tax attributes (often in cooperative pre-closing transactions undertaken by Target prior to closing), opportunities for post-closing reorganisations without adverse tax results are maximised.

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

As described in Answer 3 above, non-residents may be subject to Canadian capital gains tax upon a sale where the shares of a company derive their value primarily from Canadian real/natural resource property, in particular where no tax treaty relief is available to the non-resident. A withholding regime applies to buyers of such “taxable Canadian property” from non-residents, which effectively requires buyers to withhold and remit to the Canada Revenue Agency (CRA) a portion of the sale price on account of the non-resident’s potential Canadian capital gains tax liability, unless the non-resident obtains pre-clearance from the CRA that no such withholding is required. See “Canada’s Section 116 System for Nonresident Vendors of Taxable Canadian Property”, Tax Notes International, April 2012.
Sell-side

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

The taxation of capital gains for both residents and non-residents is described in Answer 3, above. No participation exemption per se exists, although the tools described in Answer 13 can often be used to reduce or eliminate accrued gains on Target property acquired (directly or indirectly) through an acquisition. Where Target has foreign subsidiaries, Canada generally will not tax dividends received from such foreign entities to the extent attributable to active business income earned in a country with which Canada has a tax treaty, and an election can be made to reduce capital gains on the shares of such foreign subsidiaries by the amount of such exempt dividends. This acts as a limited form of participation exemption on investments in foreign subsidiaries.

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

There are no specific rules governing the reinvestment of proceeds from a sale of assets or shares, other than in very limited situations that are rarely encountered as a practical matter. It generally is possible to transfer property to a Canadian corporation in exchange for shares of that corporation on a tax-deferred basis.

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

No specific rules apply to holding companies. In all cases, Canadian tax authorities will wish to be satisfied that a holding/finance company (1) is in fact acting as a principal and not as an agent for another entity, and that it has the requisite capacity to do what it claims to be doing, (2) is in fact the beneficial owner of the property it purports to own (i.e., it has the indicia of ownership that the jurisprudence establishes as the hallmarks of beneficial ownership of property), and (3) is indeed fiscally resident where it claims to be (the location of the company’s central management and control is often relevant in this regard). The back-to-back rules and pending anti-treaty shopping rules described in Answer 1 will make the use of holding companies in inbound planning more challenging going forward. Canada has a general anti-avoidance rule that allows transactions to be recharacterised in situations of abuse or misuse, and some Canadian tax treaties contain specific anti-avoidance rules.

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General

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

   A couple of tax circulars have been released by the State Administration of Taxation (SAT) aiming to tackle various conceptual and practical issues arising with the implementation of the notice on several issues relating to treatment of corporate income tax pertaining to enterprise restructurings (Circular 59) and the notice on strengthening the administration of enterprise income tax on share transfer gains derived by non-resident enterprises (Circular 698) in 2009.

   Circular 698 is known for its significant impact on the deal structure involving the so-called “indirect transfer” of a Chinese entity(ies). Circular 698 in principle adopts the “reasonable commercial purposes” criteria in the assessment of share transfer transactions. The SAT released a supplemental tax circular, announcement on several issues relating to enterprise income tax on transfer of assets between non-resident enterprises (Circular 7), which provides a much more extensive scope of ‘taxable properties’ which are potentially subject to the indirect transfer assessment to also include certain assets and real properties, as well as further elaboration on the assessment criteria of “reasonable commercial purposes”. Circular 7 also provides “safe harbor rules” and a new reporting and tax withholding mechanism.

   Also issued in 2009, Circular 59 has been acting as the pillar of the enterprise reorganisation tax system. The SAT issued several tax circulars which provide more specific guidance on certain topics addressed in Circular 59, primarily:

   - Circular on corporate income tax treatments to encourage corporate restructuring (Circular 109), which lowers the threshold to enjoy the special restructuring treatment in a share or asset acquisition with respect to the ratio limit, and provides additional circumstances which can enjoy the special restructuring treatment
   - Announcement of several issues relating to administration of levying and collection of enterprise income tax on restructuring of enterprises (SAT announcement 2015 No. 48), which provides more detailed guidance from implementation perspectives.

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?**

   China has been actively participating in the BEPS project as a G20 member and a cooperative partner of OECD. Shortly after the OECD released the final package, on October 10, 2015 the SAT published via its official website the Chinese translation of the BEPS 2015 Final Reports, showing a strong urge of the Chinese government to keep up with the development of international tax system. The SAT also addressed a general plan of actions including but not limited to refining the prevailing tax legislative framework to incorporate the BEPS actions with consideration of practical situation, building up risk management mechanism, etc. It is foreseeable that the BEPS project will have profound influence on the Chinese international tax system in the next few years.
3. **What are the main differences among acquisitions made through a share deal versus an asset deal in your country?**

   a. **Share deal**
      - Historical tax risks will be inherited by the buyer under share deal
      - The seller to the transaction would be the holding company of the Chinese target entity.
      - A share deal might trigger income tax implications for the seller.

   b. **Asset deal**
      - Historical tax risks are not inherited by the buyer under an asset deal.
      - The seller to the transaction would be the Chinese target entity.
      - Various turnover taxes and the enterprise income tax would be potentially triggered in an asset deal, as it is treated as the sale of assets of the Chinese target entity.

**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?**

   In a share deal the fair value of the net assets of the target entity shall be adopted. Expected that as the asset appreciation is recognised at the target entity level and reasonably allocated to each asset item, the step-up of the value of the tangible and intangible assets of the target cannot be achieved.

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

   China tax regulations do not allow goodwill to be depreciated.

6. **Are there any limitations to the deductibility of interest on 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:
     1. the borrowing and lending are genuine; and
     2. the enterprise and individual have concluded a loan contract.

   - Interest deductibility is limited to the market rate on similar loans

   - Interest paid to a related company is deductible if the debt/equity ratios are observed:
     1. 5:1 for financial service enterprises; and
     2. 2:1 for non-financial enterprises.

   Those 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 (i) cannot be carried forward and (ii) will be re-characterised as dividends subject to corporate income tax.
7. What are usual strategies to push-down the debt on acquisitions?
Due to the foreign exchange control and in accordance with relevant tax regulations, onshore and/or offshore related and 3rd party loans can be considered but with certain limitations, i.e., offshore loans would be subject to the foreign loan quota, while related party financing is subject to thin-capitalisation rules.
Other traditional debt push down techniques might also be considered, such as setting up a new China entity, funded with debt, to acquire the trade and assets of an existing China entity; acquiring another Chinese entity from the non-Chinese holding entity, or through transfer pricing arrangement, etc., while relevant tax costs under each scenarios shall be considered.

8. Are losses of the target company(ies) available after an acquisition is made?
Yes, the losses remain valid at the target entity level after the share deal. The target’s tax losses cannot be utilised by the holding entity.

9. Is there any indirect tax on transfer of shares (stamp duty, transfer tax, etc.)?
Yes, both parties to the agreement would be subject to the stamp duty at 0.05%.

10. Are there any restrictions on the deductibility of acquisition costs?
Acquisition costs shall be capitalised and are thus not deductible until the investment is disposed. Costs and expenditures incurred associated with the transaction that do not qualify for capitalisation can be recognised in the respective tax period for the income tax purposes.

11. Can VAT (if applicable) be recovered on acquisition costs?
VAT would only be triggered in an asset deal as it is treated as a sale of assets to the buyer. If the buyer has obtained the general VAT taxpayer status, the VAT incurred on the purchase of assets and substantiated with a special VAT invoice can be credited against the output VAT incurred on taxable income of the buyer. The tax regulations also provide certain circumstances where the input VAT credit cannot be claim, which shall be assessed based on the asset list and prior to the transaction.

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)
No specific tax concern for buyer, while, from legal side, certain application with China authorities is required before a China legal entity is invested into overseas.

13. Can the group reorganise after the acquisition in a tax neutral environment through mergers or a tax group?
The tax neutral will normally require a lock-up period for the investor’s shareholding. The period could be 1 year or 3 years depending on different kind of restructuring case.
China in principle does not have a group tax reporting mechanism.
14. **Is there any particular issue to consider in case of companies of which main assets are real estate?**

In a share deal, no specific tax issue solely applying to real estate. However, if the tax authorities assess the share transfer to be solely for the purpose of transfer of real properties, relevant land appreciation tax implication might be triggered.

In an asset deal, the transfer of real properties would be subject to the land appreciation tax, business tax (which might be converted to the VAT shortly), deed tax, as well as other collections associated with the real estate transactions.

**Sell-side**

15. **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 Circular 59:

**Article 5** Where enterprise restructuring complies with the following conditions simultaneously, special tax process provisions shall apply:

1. It has reasonable commercial purpose, and reduction, exemption or delay in tax payment is not its primary purposes.
2. The proportion of acquired, merged or separated assets or equities conforms to that stipulated herein.
3. The original real operating activities of the restructured assets are not changed in the consecutive 12 months after the enterprise restructuring.
4. The equity payment amount involved in the transaction consideration of the restructuring conforms to the proportion stipulated herein.
5. The original major shareholders to whom the equities are paid in enterprise restructuring may not transfer its equities obtained in the consecutive 12 months after the restructuring.

**Article 7** 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 may not be applied unless the following conditions are met, in addition to the conditions stipulated in Article 5 hereof:

1. 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 thereby, and the transferring non-resident enterprise 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 3 years);
2. A non-resident enterprise transfers to a resident enterprise with 100% of its direct holdings equities it possesses of another resident enterprise;
3. A resident enterprise invests in a non-resident enterprise with 100% of its direct holdings with the assets and equities in its possession; and
4. Other cases approved by the Ministry of Finance and the State Administration of Taxation.
16. **Is there any fiscal advantage if the proceeds from the sale are reinvested?**

Before 2007, there was some preferential treatment on reinvestment of the dividends. However, no current effective tax policy is to date available.

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

Business substance is not required to set up a holding structure. However, the business substance would be essential in the beneficial owner test in the application for tax treaty treatment.

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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.

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Cyprus
General

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

   Originally the Cyprus income tax law from 2002 had introduced major reforms and rearrangements to the Cyprus tax system at the time of Cyprus's accession to the EU in May 2004. The law had then been redesigned to modernise and harmonise the local tax regime with that of other European nations and to ascertain full range compliance with the European Community law, the EU code of conduct for business taxation and the Organisation for Economic Co-operation and Development (OECD) guidelines to eliminate preferential treatment for international businesses, and all EU Directives.

   Consequently, the corporate reorganisation provisions were thus incorporated into the legislation of the Cyprus Income Tax. Thereupon, various other laws, such as the stamp duty and capital gains, were also amended to facilitate and allow the tax-free implementation of these provisions. Currently, the provisions for reorganisation concern: corporate mergers, corporate divisions, asset transfers, and shares exchange.

   Further, the tax treatment of cross-border mergers and acquisitions, is remaining as is, although in more recent years the Cyprus Income Tax law has been amended to encompass amongst others the removal of restrictions on interest deductibility on equity acquisitions (trading), and the introduction of a time-limit to the carry forward of losses. Additionally, up to year 2014, Companies needed to be Cyprus tax residents, for the group loss relief to apply, and thus a Cyprus tax-resident entity could only surrender its losses to a fellow Cyprus tax-resident entity. As this condition could be regarded as irreconcilable to the EU freedom of establishment, the relevant law has been amended in December 2015, and is effective retroactively from 1 January 2015. Through this amendment, new parameters have been introduced which are aligned with the jurisprudence of recent decisions of the European Court of Justice (ECJ), and the law now provides that the group loss relief provisions are extended to scenarios where the surrendering entity is registered in and is a tax-resident of another EU Member State.

   Furthermore, in an aim and effort by Cyprus to always treat transactions between related parties in a fair way, another December 2015 tax law amendment, which is effective retroactively as from 1 January 2015 again, was introduced in reference to the arm’s length principle as codified in the tax law. As per this, a negative transfer pricing adjustment is now included within the provisions, while prior to that, the law only provided for upward adjustments in cases when transactions between related parties were not performed at arm’s length.

   Finally, reference to reorganisations, the relevant law has been further amended in December 2015, and effective as from 1 January 2016, introducing new anti-abuse and anti-avoidance provisions, while maintaining and safeguarding the tax neutrality for bona fide transactions. Specifically, should the Tax authorities evaluate that a re-organisation has been put in place for no valid commercial reason and reflects no economic reality. They are statutorily granted the right to refuse any tax exemptions which would have otherwise been allowed by the law in relation to re-organisations. In practice, the Commissioner can deny exemption from tax of any profits arising from a re-organisation, if he judges that the main purpose or one of the main purposes of the re-organisation was i) the avoidance, decrease, or postponement of the payment of tax, or ii) the direct or indirect allocation of an entity’s assets to a person without settling the corresponding tax, or as a means of decreasing/postponing that corresponding tax.

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?**

   Cyprus holds a positive stand towards harmonising to the OECD BEPS actions. To date, there's one recent development in the era, through the 30 December 2015 press release by the Cyprus Ministry of Finance announcing plans to amend the existing Intellectual Property regime, so that this will correspond to the
recommendations of the final report of the OECD on Action 5 ‘Countering Harmful Tax Practices More Effectively Taking into Account Transparency and Substance’ [the Report] under its Action Plan against Base Erosion and Profit Shifting. In line to this, the prospective changes are expected to adopt the ‘modified nexus approach’, while the amendments will also be inclusive of transitional arrangements like the grandfathering provisions for existing IP as these are provided in the Report and the applicable European Union (EU) framework. The exact parameters of Action 5 to be adopted by the Cyprus authorities will soon be announced, although it is already clear that the upcoming legislative changes are to have a considerable effect on the tax methodology of IP relevant activities.

Moreover, as an additional step for the Cyprus income tax law to be harmonised with the EU Parent - subsidiary directive including the two amending directives subsequently issued, a change has been voted into law in December 2015, and is applicable as from 1 January 2016 altering the pre-existing situation where dividend income was altogether and unconditionally exempt from corporate income tax. As the directive is referencing to the common tax regime applicable to parent and subsidiary companies of different EU member states, and since the amendment is obligatory for all EU member states as it involves the introduction of anti-hybrid and general anti-avoidance measures in regard to the distribution of profits from a subsidiary to a parent company within the EU, in the situation when a Cyprus tax-resident entity or a Cyprus located P.E. of a foreign tax-resident entity, receives dividend income from another company, the corporate income tax exemption will not apply to the extent that the relevant dividend is allowed as a tax deduction in the jurisdiction of the foreign paying company.

Subsequently, when the dividend corporate income tax exemption is no longer available due to the above, it should be subject to the rate of Corporate Income Tax of 12.5%. In this situation though, the dividend will not be liable to the Cyprus Special Defence Contribution (SDC) taxation scheme, and will not be considered dividend for SDC purposes.

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

a. Share deals
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. Of course a contract is exempt from stamp duty when the acquisition is effected as a result of company re-organisation.

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

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

- 3% on amounts up to €85,000 of the sale price or market value
- 5% on amounts between €85,001 and €170,000
- 8% on any amount exceeding €170,000

There is a 50% exemption to the above fees applicable to immovable property transfers taking place between 16 July 2015 and 31 December 2016, irrespective of the date of the signing of the relevant contract or its submission to the Land Registry or to contracts signed and submitted to the Land Registry between 2 December 2011 to 31 December 2016 irrespective of the transfer date.

The law is applicable in the situations where VAT is not applicable. In these cases the bill provides that transfer duties shall be reduced by 50%, and in particular this applies in transactions where:

- transfer fees either apply or are due; and
- the transfer is in regard to land, buildings or interests in land or indivisible interests that are sold for the first time from the issue date of the building permit; and
- the contract is submitted for the first time to the local District Land Registry during the period of application of the law i.e. between 2 December 2011 to 31 December 2016.
On the other hand, for the period 2 December 2011 to 31 December 2016, there is a 100% exemption to the above transfer fees if the transfer relates to a transaction that is subject to VAT.

Immovable property situated in Cyprus is taxed on an annual basis on the market value of the property as at 1 January 1980, and applies to such property owned by the taxpayers [physical and legal persons] as at 1 January of each year. As of 1 January 2013 the bands and rates are as follows, and apply per owner and not per property.

- 0.6% on property up to value of €40,000, yet for owners of property with value up to €12,500, a 100% exemption applies. For owners with property above €12,500 tax is payable on the entire value including the first €12,500.
- 0.8% on property of value of €40,001 to €120,000
- 0.9% on property of value of €120,001 to €170,000
- 1.1% on property of value of €170,001 to €300,000
- 1.3% on property of value of €300,001 to €500,000
- 1.5% on property of value of €500,001 to €800,000
- 1.7% on property of value of €800,001 to €3,000,000
- 1.9% on property of value above €3,000,000

Again the agreement for the acquisition of immovable property or any other asset may also be subject to stamp duty in Cyprus. Stamp duty is imposed on contracts relating to things located or to be done in Cyprus. If the 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 nature of the assets 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 19%.

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

In the case of a taxable sale of immovable property, any losses realised may be set off 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.

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?

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.

5. 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 the 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, it only appears in consolidated financial statements. The goodwill is treated as a fixed asset and, as such, gains are excluded from tax.

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

Also, following an amendment to the Cyprus Law in 2012, any interest expense relating to the acquisitions of shares after 1 January 2012, may be deducted from taxable income on the provision that the acquired company is directly or indirectly wholly acquired, i.e. 100% shareholding, and the acquired company holds assets which are all used for business purposes. While other interest expense relating to non-business assets is not deductible. Thus, interest paid on borrowings used by a holding company to acquire a fully owned subsidiary is treated as interest used for the acquisition of trading fixed assets.

On the other hand, 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

Overall, under the Cyprus tax law, it is not permitted to deduct any interest expenses relating to the acquisition of a non-business asset.

Additionally, after the lapse of seven years from the date of purchase of an asset, the Cyprus Tax Office stops disallowing any interest as it considers the debt on the acquisition of the asset as paid.

It is worth noting that since the rules above provide only a general overview, proper advice should be sought on a case-by-case basis.

Also, non-trading assets are considered those that are not readily convertible into cash.

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

7. **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 shares of the holding company 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 to be 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 (i.e. debt to be carried forward by postponing the payment of liability for the future) is also possible, allowing allocation of obligations according to annual profits.

From a Cypriot perspective, any losses that would have been subject to tax if they were to be gains may be off-set against other sources of income in the same tax year. When the income is not sufficient, the losses may be carried
forward and off-set 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:

- Two companies are considered to belong to the same group for group relief purposes if one 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 members of the same group for the entire year of assessment
- It is only possible to off-set the loss of one company against the profit of another where the loss and profit are attributable to the same year of assessment
- Any payment for off-setting 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
- Also, up to year 2014, both Companies needed to be Cyprus tax residents, for the group loss relief to apply, and thus a Cyprus tax-resident entity could only surrender its losses to a fellow Cyprus tax-resident entity. As this condition though might have been regarded as irreconcilable to the EU freedom of establishment though, the relevant law has been amended in December 2015, and is effective retroactively from 1 January 2015. Through this amendment new parameters have been introduced which are aligned with the jurisprudence of recent decisions of the European Court of Justice [ECJ], and the amended law now provides that the group loss relief provisions are extended to scenarios where the surrendering entity is registered-in and is a tax-resident of another EU Member State. Yet, this will be on the condition that this surrendering entity has exhausted all other possibilities available to it in carrying forward or surrendering its losses in its resident state or in another EU Member State where its intermediary holding company maybe be based and has legal seat. Additionally, in such circumstances, the tax losses need be calculated based on the Cyprus tax law provisions. Another clause of this amending law, also provides that in deciding if two Cyprus tax resident entities are eligible to group relief, given a situation that also involves interpositioning of a non-Cyprus tax resident entity as well, the interposed entity will not affect the Cyprus tax resident companies’ group relief eligibility as long as the interposed is: i) a tax resident in an EU member state, or ii) a tax resident in any other country with which Cyprus has a signed DTT [ either bilateral or a multilaterall], or an exchange of information (EoI) agreement.

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 off-set and the carry forward of losses apply.

8. Are losses of the target company(ies) available after an acquisition is made?

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

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

- Within any three-year period, there is a change in the ownership of the shares of a company and a substantial change in the nature of the business of the company (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 reactivation of the business there is a change in the ownership of the company’s shares

Losses can be carried forward provided that the process of reorganisation complies with all legal requirements.
9. **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. Specifically, stamp duty is governed by the Stamp duty Law (19/1963), within which article 4 (1) provides that the documents specifically presented in its first schedule are subject to stamp duty if these documents concern property situated in the Republic of Cyprus, as well as matters or things to be performed or done in Cyprus, irrespective of the place of execution of such documents. As of 1 March 2013, the applicable rates that are payable on contracts are nil 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 €1000 or part of the amount of €1000, with a maximum amount of €20,000. In practice, it is advisable the agreement to be sent to the stamp duty authority of Cyprus 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 or it relates to transfer of securities quoted on a recognised stock exchange.

Also, agreements for the purchase of shares in a Cypriot company, which are executed in Cyprus, are not required to be stamped in Cyprus, and it is also the actual practice of the Stamp Duty Commissioner to exclude and exempt such documents from stamp duty. Further, not required to be stamped in Cyprus are: i) instruments of transfer of shares in a Cypriot company which are executed in Cyprus ii) agreements for the purchase of the shares in a foreign company which are executed in Cyprus, and iii) instrument for the transfer of shares in a foreign company which are executed in Cyprus.

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

A purchaser making use of a Cyprus acquisition vehicle in order to execute an acquisition for cash can fund the vehicle with debt, equity, or hybrid instruments that combine the characteristics of debt and equity together. Further after, as a general rule, in order to ascertain a physical or legal person's chargeable income, only the outgoings and expenses which are wholly and exclusively incurred by such a person in the production of taxable income can be allowed to be deducted.

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

As of 1 February 2002, the Cyprus value added tax law is fully harmonised with the EU Sixth Directive, and VAT is levied at the rate of 19% as from 13 January 2014 onwards on a wide range of goods and services. Further, goods exported from Cyprus to non-EU destinations are subject to a zero VAT rate.

In particular, the transfer of a business as a going concern is outside the scope of VAT, provided certain conditions are met. The actual end-result of such transfer needs to be that a new owner is established who will be operating the business as such. Therefore, the mere sale of assets does not constitute in itself a transfer of a business as a going concern. While in the case that land and buildings are sold, it is advised that professional consultancy is requested.

As for the sale of shares, it is specifically listed as an exempt transaction in the Cyprus VAT law via Schedule Seven, Table B of the relevant legislation.

On this note, as sales of shares is categorised as ‘exempt’, no [input] VAT tax incurred on related costs, such as professional fees, is eligible to be recovered.

Yet, following the European Court of Justice [ECJ] decision to Kretztechnik AG v Finanzamt Linz (Case C-465/03), input VAT tax incurred in relation to the issue of shares instead, can be generally recoverable. Specifically, if a buyer issues shares in consideration of an acquisition, some or even all of the VAT attributable to the corresponding share issue can be considered recoverable.
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)

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 the distribution of dividends to the 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. Further, in an aim and effort by Cyprus to always treat transactions between related parties in a fair way, a December 2015 tax law amendment, which is effective retroactively from 1 January 2015, was introduced in reference to the arm’s length principle as codified in the tax law. As per this, a negative transfer pricing adjustment is now included within the provisions, while prior to that, the law only provided for upward adjustments in cases when transactions between related parties were not performed at arm’s length.

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

Any additional specific issues to be considered in the case of acquisitions of Cyprus companies by foreign investors, will need to be also examined on a case by case basis, depending on industry sector involved and investor’s jurisdictional origin.

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

Cyprus has implemented the provisions of the EU Merger Directive 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 level of the transferring company. Accumulated losses of the transferring company moved to the receiving company may be off-set and the relevant provisions for the consolidation of losses are applied.

Equally profits derived at the level of the receiving company 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 shareholder of the transferring company does not give rise to any taxation on the gains or losses at the level of the shareholder.

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, the corporate reorganisation should not involve a cash payment exceeding 10% of the nominal value of the shares.

Stamp duty exemption on relevant contracts is also allowed.

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

Moreover, reference to reorganisations, the relevant law has been further amended in December 2015, and effective 1 January 2016, there is an introduction of new anti-abuse and anti-avoidance provisions, while maintaining and safeguarding the tax neutrality for bona fide transactions.

As per these amendments, if the Tax authorities evaluate that a re-organisation has been put in place for no valid commercial reason and reflects no economic reality, they are statutorily granted the right to refuse any tax exemptions which would have otherwise been allowed by the law in relation to re-organisations. In practice, the
Commissioner can deny exemption from tax of any profits arising from a re-organisation, if he judges that the main purpose or one of the main purposes of the re-organisation was i) the avoidance, decrease, or postponement of the payment of tax, or ii) the direct or indirect allocation of an entity's assets to a person without settling the corresponding tax, or as a means of decreasing/postponing that corresponding tax.

Yet, such decision by the tax office of not allowing re-organisation exemptions must be adequately supported and fully substantiated, and thus the Commissioner will have to proceed to requesting evidential documentation if that is considered necessary, in order for the purpose of the re-organisation to be properly determined. Thereafter in every case the decisions by the tax office need to be completely justified, while at the same time the affected taxpayers maintain the right to proceed to objection and appeal against such a decision in line with the relevant provisions of the Assessment and Collection of Taxes Law.

In a different scenario, the Tax Authorities may approve the relevant tax exemptions available due to a re-organisation, yet at the same time they might need to request the enforcement of some conditions in order to safeguard the bona fide nature of the re-organisation.

The conditions relate to: i) the number of shares to be issued as a result of the re-organisation by the receiving company and, ii) the period of time that the shares issued in the course of re-organisation are to be kept by the receiving company which may not exceed three years, unless these shares are quoted in a recognised and approved stock exchange or they are shares which were transferred due to hereditary succession and are thus exempt from the holding time period restriction.

In the case that the above two conditions as set by the Tax authorities, are not met by the affected Companies, then the re-organisation will be considered non-qualifying for the tax-free re-organisation provisions of the Cyprus Income Tax Law and any tax that was initially deemed not to be due will become payable either by the transferring or the receiving or the acquiring company.

14. Is there any particular issue to consider in case of companies of which 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, unless these are first acquired between 16 July 2015 to 31st December 2016.

In the case though that capital gains tax is imposable, 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 though, DTT allows for the taxation of such gains at the level of the subsidiary.

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 which takes between one and four 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 0.6% to 1.9%. For persons with properties of aggregate value €12,500 or less, 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%.
15. **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.

Further, when Capital Gains Tax in Cyprus is triggered, it is imposed at the rate of 20% and this is in the cases of capital gains derived from the disposal of immovable property located in Cyprus or from the disposal of shares of companies which own immovable property in Cyprus, with the exception of any such shares being listed at a recognised stock exchange or when the sale is made in the event of a qualifying company reorganisation.

Further, as per recent amendment to the relevant law, as from 17 December 2015 the definition of ‘property’ is extended so that Capital Gains Tax is also levied on sale of shares which directly or indirectly participate in other companies that in turn hold immovable property in Cyprus, on the provision that at least 50% of the market value of the shares that are sold is derived from that Cyprus immovable property. In the process of calculations towards determining whether this 50% threshold is applicable, any liabilities are not taken into account.

Generally, gains from the sale of securities and gains deriving from the disposal of shareholding, are exempt from both capital gains and corporate income tax, other than in the cases as identified above hereto.

Further, a favourable exemption is also in place as from July 2015, as per which gains from sale of immovable property [ with this being land, or land with building(s), or buildings ] are 100% exempted from Capital Gains Tax when i) they were/will be acquired between the day the new law came into effect being 16 July 2015, up to 31 December 2016 inclusively, and ii) they were/will be acquired from an independent non-related party at market value, via an ordinary purchase / purchase agreement, and not through: a donation, or gift, neither by way of exchange, trade nor in a way of settlement of debt, and the sale must not be related to any foreclosure agreement either.

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

There is no fiscal advantage in Cyprus in re-investing 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.

While gains deriving from the sale of assets would be taxed accordingly.
17. **Are there any local substance requirements for holding/finance companies?**

Overall, the tax residency of a Cyprus company is determined by the underlying principles of the notion of ‘Management and Control’. Additionally, in the absence of a formal definition regarding the establishment of the management and control, it is advisable that the following parameters be taken into account:

- The majority of the Directors of the Company are tax residents in Cyprus;
- The headquarters of the company are maintained in Cyprus;
- Important company decisions are taken in Cyprus by the local directors, and also it is recommended that the Memorandum and Articles of Association of the Company, allow only for Special Powers of Attorney [SPoA] to be issued by the Directors as opposed to General ones. These SPoA further need be clearly specifying the exact activity to be undertaken by the attorney, [e.g. only some particular transaction in a certain area of activities]. This measure acts as a safeguard towards the monitoring of the business solely by the Directors, since they are the ones originally entrusted with the managerial function and thus appointed by the shareholders of the Company;
- Moreover, the company needs to have economic substance in Cyprus. As economic substance has become a very important issue, a deeper look into the ‘substance over form’ doctrine is encouraged.

While some common characteristics of substance for Cyprus companies are:

- Having a real physical presence in Cyprus, whether through an owned distinct office or via leasing space at a serviced business centre;
- Having people working part-time or full-time at the company’s offices;
- Having dedicated telephone, facsimile, and internet lines, as well as a website and electronic mail addresses;
- Owning at least one bank account maintained with a Cyprus bank, and operated by a Cypriot member of the Board of Directors;
- Maintaining proper accounting books and records in Cyprus, and preparing timely annual Audited Financial Statements, submitting promptly all annual tax returns, and settling promptly all relevant tax amounts due.

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General

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

   During the past year, the Danish Parliament adopted new legislation in a number of different areas relevant for M&A deals.

   In February 2015, a bill amending the rules limiting the deductibility of interest under the Danish thin cap regime was adopted. Furthermore, the EU Council introduced an amendment to the EU Parent-Subsidiary Directive not allowing companies to benefit from tax exemption on dividends having already been deducted by the distributing company.

   On 21 April 2015, the Danish Parliament adopted a bill purportedly proposed to prevent unwanted utilisation of Danish double taxation treaties as well as a number of EU Directives. The amendments constitute a Danish attempt at implementing general anti-abuse initiatives currently considered and contemplated at EU and OECD levels.

   This Act introduces a General Anti-Abuse Rule (GAAR) hitherto not known in Danish legislation, cf. more below.

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

   As mentioned above, Denmark has adopted a bill implementing the OECD BEPS Action Point 6. The bill also contains amendments to the EU Parent-Subsidiary Directive. The new provision marks a change in the traditional Danish anti-abuse tax legislation doctrine which, in the past, targeted specific practices deemed to be abusive and, therefore, countered by Specific Anti-Abuse Rules (SAAR). The new rule contains two provisions: An EU tax directive anti-abuse provision and a tax treaty anti-abuse provision. Despite differences in the wording, no specific difference in the contents is pursued between the directive anti-abuse provision and the tax treaty anti-abuse provision. The EU tax directive anti-abuse provision mainly attempts to implement the anti-abuse or misuse amendment to the Parent-Subsidiary Directive and thus the Danish anti-abuse provision more or less mirrors the wording of the amended Directive.

   Unlike the anti-abuse provision in the Parent-Subsidiary Directive, the Danish domestic provision is also intended to apply as an anti-abuse rule to all EU Direct Tax Directives, specifically the EU Merger Directive (2009/133) and the Interest-Royalty Directive (2003/49).

   The tax treaty anti-abuse provision aims at implementing the expected outcome of the BEPS project, specifically Action Point 6. As the final report on Action 6 was not yet released at the time of the adoption of the bill, it was arguably somewhat premature to introduce a provision incorporating the outcome of the project. Nevertheless, the bill aims at applying the new provision on both existing and future Danish tax treaties based on the alleged general agreement among the OECD countries implying that states are not obliged to grant treaty benefits from participation in arrangements that entail abuse of treaty provisions. The new provision states that treaty benefits will not be granted if: “it is reasonable to establish, taking into account all relevant facts and circumstances, that obtaining the benefit is one of the most significant purposes of any arrangement or transaction which directly or indirectly leads to the benefit, unless it is established that granting the benefit under such circumstances would be in accordance with the content and purpose of the tax treaty provision in question.”

   Since Denmark has not previously operated with a general anti-abuse provision and due to the very general nature of its wording, a level of uncertainty as to the obtaining of tax directive or tax treaty benefits will be introduced with the entering into force of the proposed provisions. Uncertainty will at least exist pending specific administrative or
court practice regarding the use of both provisions. Accordingly, caution should be shown as to the application of such provisions, and specific tax advice thereon should be obtained.

On 18 December 2015, a new bill was adopted. The purpose was to implement Action Point 13 of the BEPS Initiative (Guidance on the Implementation of Transfer Pricing Documentation and Country-by-Country Reporting) into Danish law. The bill is a direct implementation of the OECD recommendation of BEPS Action Point 13, and although the country-by-country reporting requirement is new, the OECD standard to be used is very similar to the EU standard already being used by many Danish companies. The country-by-country report must, for example, contain information relating to the global allocation of the multinational enterprise’s income and taxes paid together with certain indicators of the location of financial activity within the multinational enterprise group and information on the multinational enterprise’s total employment, capital, retained earnings and tangible assets in each tax jurisdiction.

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

a. **Share deal**

The main difference between acquisitions made through share deals and acquisitions made through asset deals in Denmark is that no deduction is possible on share deals. When acquiring assets, however, it is possible to depreciate the purchase price according to specific rules. Apart from the carry-forward of losses described below, the tax position of the acquired Danish company remains unchanged. Consequently, it is not possible to create a tax-free step-up in the tax basis of the assets of the acquired company. However, the capital gain realised by the seller on the sale of shares is often tax-exempt.

b. **Asset deal**

In an asset deal, the purchaser will generally only inherit those liabilities that it assumes specifically pursuant to the terms of the asset purchase agreement.

The purchase price must be allocated to the different assets included in the deal as the allocation serves as the basis for capital gains taxation of the seller and as the basis for the tax depreciation of for the purchaser.

The Danish tax authorities may challenge either the total cash value or the allocation between depreciable assets. Where no allocation is made, the tax authorities may assess an appropriate allocation and both the seller and the purchaser are obliged to apply the assessed values.

**Depreciation**

A general prerequisite for depreciation is that the relevant asset is in fact subject to deterioration when in use. Land is not depreciable, for example. The method of declining balance depreciation is allowed for commercial operating equipment, i.e., 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 plus acquisitions made during the year and less the proceeds from assets sold during the year. The maximum permitted rate of depreciation is 15% to 25% (depending on the specific type of assets included in the depreciation balance), and taxpayers are free to apply a lower rate and a different rate each year.

**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?**

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

Normally, a purchaser would investigate whether the target company has tax capacity in the form of a loss carry-forward which may be used 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.
5. **What are the particular rules of depreciation of goodwill in your country?**

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

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

The deduction of interest expenses is limited by the following three rules which apply simultaneously (in chronological order):

1) A limitation based on the debt-to-equity ratio: Thin capitalisation limitations with a debt-to-equity ratio of 4:1 are in force.

2) A limitation based on the 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.

3) A limitation based on annual profits: Net financing expenses may not exceed 80% of earnings before interest and tax (the EBIT limitation).

7. **What are usual strategies to push down the debt on acquisitions?**

Given the Danish interest limitation rules, push-downs are something to avoid.

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 by a group entity. There are five specific provisions listed in the rules for which this would be the case:

- If an entity has a voting majority through equity,
- If an entity may appoint a majority of directors,
- If, through provisions in the articles of association or similar agreement with the subsidiary, an entity exercises a decisive influence,
- If an entity has decisive influence through a shareholders’ agreement or similar, and
- If an entity has shares and exercises a decisive influence over its operations.

These provisions are quite specific, but the basic rules may be summarised as a company being in a 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 which are already forced to consolidate for accounting purposes should know for which companies the consolidation is relevant. Groups are obliged to provide the tax authorities with an overview of the group structure with sufficient information to ascertain whether the correct companies have been included.

If an individual owns two Danish companies, these companies are not treated as jointly taxed.

8. **Are losses of the target company(ies) available after an acquisition is made?**

In Denmark, companies are granted an unlimited carry-forward of tax losses. No carry-back exists. However, the annual amount of losses from previous tax years to be set off against profits cannot exceed DKK 7,852,500 (approximately EUR 1,052,000). It should be noted that this base amount applies to group level, i.e., companies that are jointly taxed have a mutual base amount of DKK 7,852,500 for the group as a whole.

If the loss carried forward exceeds DKK 7,852,500, the remainder of the loss may be set off against 60% or less of the year’s profit. There is no time limit for how many years the losses may be carried forward.

Loss carry-forward 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 one tax year. If this is the case, the Net Operating Losses (NOLs) are limited to be offset against future operating income. Consequently, 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 and leasing income.

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

Consequently, when more than 50% of the shares (or voting rights) in companies without any active trade or business are transferred, 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 trade or business.

9. 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.

10. Are there any restrictions on the deductibility of acquisition costs?
According to Danish law, expenses related to acquisition costs are, in general, not deductible if the acquisition is for the purpose of participation in the management.

Furthermore, it should be noted that the Danish Tax Authorities in the past years have been challenging the deductibility of internal labour cost accrued in connection with M&A activity carried out by a company. As a result, uncertainty will exist pending specific administrative or court practice regarding the deductibility of internal labour cost accrued in connection with M&A activity. Accordingly, caution should be shown and specific tax advice thereon should be obtained.

11. May VAT (if applicable) be recovered on acquisition costs?
Following decisions from the European Court of Justice, the Danish Tax Authorities will allow a company to deduct VAT in relation to the acquisition of shares in a subsidiary company if the acquiring company intends to supply services subject to VAT.

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)
If a Danish company is acquired by a foreign company it is relevant to consider if there is a double taxation treaty in place, as dividends from a Danish company to a foreign recipient - as a starting point - are subject to Danish withholding tax at a rate of 27%. However, no withholding tax would be applicable on outbound dividends if both of the following two conditions are met (participation exemption). The recipient of the dividend holds directly, at least 10% of the share capital and the recipient qualifies for an exemption from or reduction of the Danish withholding tax by virtue of a relevant tax treaty or the Parent-Subsidiary Directive. Please note, that the Danish Tax Authority has taken the view that protection under the Parent-Subsidiary Directive and/or tax treaties is only available to the beneficial owner of dividends distributed. Thus, if a Danish company is used as a conduit entity in a structure effectively facilitating the reduction of foreign dividend withholding tax, Denmark will impose dividend withholding tax on the dividend distributions from the Danish company to the foreign parent. Further, it is relevant to consider the Danish interest deduction limitations regarding thin capitalisation rules as well as the asset and EBIT limitation tests. Finally, it is relevant to consider the newly adopted an anti-abuse clause. The anti-abuse clause prevent companies from benefiting from the Parent-Subsidiary Directive and/or tax treaties in respect of reorganisation of companies, payment of dividends, interests and royalties if the main purpose or one of the main purposes of the arrangement is to achieve a tax advantage contrary to the purpose of the double tax treaty.
13. **May the group reorganise after the acquisition in a tax-neutral environment through mergers or a tax group?**

After an acquisition, a group may reorganise in a tax-neutral environment. The decisive factor is whether 10% or more of the shares are owned or not. If so, there are a number of possible tax regimes. If this threshold is not met, the matter is more complicated. 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.

14. **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 complex 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).

**Sell-side**

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

As a general rule, the disposal of receivables will trigger Danish capital gains taxation. Taxable capital gains are taxed at the regular corporate income tax rate of 22% for 2016.

**Sale of shares – distribution of dividends**

Shareholdings are divided into two 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, if the shareholding constitutes less than 10% of the share capital (portfolio investments) and the shares are “listed shares” (shares that are listed on the stock exchange or similarly regulated markets), dividends received by and capital gains realised on the transfer of shares are subject to tax at the ordinary corporate tax rate of 22% for 2016.

**Losses on financial instruments**

The ring-fencing restrictions applicable to losses incurred on financial instruments, which contain a certain right or obligation to sell shares, now apply 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.

16. **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 when reinvesting the proceeds from a sale.

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

The Danish Tax Authority has taken the view that protection under the Parent-Subsidiary Directive and/or tax treaties is only available to the beneficial owner of dividends distributed. Accordingly, the distribution of dividend for Danish tax purposes will be tax exempt if the foreign recipient owns at least 10% of the company distributing the dividend and the foreign recipient qualifies as the beneficial owner. However, if a foreign company does not qualify as the beneficial owner, the dividend distributed will be subject to a Danish requirement for withholding tax. Generally, the issue of beneficial ownership is determined on the basis of substance requirements. In general, a conduit company only acting as an intermediary receiving income on behalf of another company that de facto constitutes the recipient of the income in question will, from a Danish tax point of view, be disregarded in relation to
protection under the relevant EU Directives and tax treaties. Such flow-through entity is not likely to be considered beneficial owner of dividends received and will, according to the Danish Tax Authorities, not be eligible for protection under the relevant EU Directives, meaning that the Danish standard rules prescribing the withholding of certain taxes will apply.

As described above under question 2, Denmark has adopted GAAR and will consequently disallow protection under the EU Parent-Subsidiary Directive if an arrangement or a series of arrangements have been put into place with the main purpose or one of the main purposes being to obtain tax advantages.

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General

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

   The most relevant recent developments in Finland relate closely to the BEPS project. Interest deduction limitations that entered into force in 2014 have impacted the structuring of the deals. Additionally, the Finnish Tax Administration has become more aggressive in challenging existing structures and arrangements which place taxpayers in a position to evaluate and document their actions more prudently.

   Especially the developments in taxation have caused changes to means of financing. Recent case law has reduced attractiveness of PIK loans provided by private individuals. In private equity deals, partnership loans have been replaced by preference shares. Moreover, different kinds of bond instruments have become more frequent means of external financing.

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?**

   Finland has been active in putting the BEPS actions into practice. Finland already has restrictions on deductibility of interest and CFC legislation in place. Additionally, Finland has committed to implement country-by-country reporting.

   New provisions of the Parent-Subsidiary Directive have been implemented in Finnish tax law with effect from the beginning of 2016. The amendments included a Limitation-On-Benefits (LOB) rule and a General Anti-Abuse Rule (GAAR).

   The LOB rule tackles the situation in which payments are treated as deductible expenses in the source Member State and as a tax exempt dividend in the recipient Member State. As an exception to the general rule of tax exemption of dividends provided by the Parent-Subsidiary Directive, the dividend is taxable if either one of the following two conditions are met:

   - The payment is deductible for the distributing company; or
   - The arrangement in question has as a main purpose or as one of the main purposes to obtain tax benefits and the arrangement is not genuine having regard to all relevant facts and circumstances.

   The general anti-abuse rule introduces a principal purpose test, providing that the arrangement is considered not to be genuine to the extent that they are not put into place for valid commercial reasons which reflect economic reality.

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

   a. **Share deal**

   A share deal may be less preferable from the buyer’s perspective for two 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 aspects 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 8 below for further details regarding this aspect.

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

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. With regard to real estates, transfer in the form of shares is therefore more advantageous than transferring the real estate directly.

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

An asset deal is out of scope of VAT when it fulfills the requirements set out in the VAT legislation. A case-by-case analysis is usually required.

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?

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 15 below for further details).

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

For tax purposes, goodwill (i.e. 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 ten 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 for tax purposes – the entire shares acquisition cost usually becomes deductible only in a subsequent transfer.

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

There is a limitation on the deductibility of intra-group interest expenses. Limitations concerning the tax deductibility of interest payments have been applicable to corporations, partnerships, corresponding foreign entities and their permanent establishments as of the fiscal year 2014. The limitations are applied only if the interest expenses exceed the interest income received by the company. A general safe haven of €500,000 is 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 25% of the company's tax EBITDA (taxable business profits added with the aggregate amount of interest costs, depreciations and group contributions received, and 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.

The regulation allows an indefinite carry forward of interest expenses that cannot be deducted based on the above-mentioned restrictions.
In addition, transfer pricing provisions, general anti-avoidance provision and the provision on hidden profit distributions in Finnish domestic law may be applied to deny tax deductibility of interest expenses. In most cases, no withholding tax is levied in Finland on interest payments to non-resident companies based on domestic law.

7. 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 low corporate income tax rate. As the deductibility of related party interest expenses has been restricted, feasibility of the debt structure has to be evaluated in detail. Financing from third parties may also be a tax efficient alternative.

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. The 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.

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

8. Are losses of the target company(ies) available after an acquisition is made?

Tax losses incurred may be carried forward for the subsequent 10 tax years. Losses are deductible in the order in which they are incurred.

If more than 50% of the shares in a company have changed hands during the loss year or thereafter, the right to carry forward losses is forfeited. Also, if a corresponding change of ownership has taken place in a company owning at least 20% of the shares in the loss-making company, the losses are forfeited.

The Finnish Tax Administration may upon application by the taxpayer and under certain conditions grant a special permission to utilise losses despite of the change in the ownership. If a special permission to utilise tax losses is obtained, the losses may be utilised only against taxable income earned by the company itself, since group contributions cannot be utilised to offset losses after a change in the ownership.

For a listed company, the right to carry forward losses is not forfeited unless more than half of the non-listed shares change hands (i.e. changes in the ownership of listed shares do not result in the forfeiture of losses). Changes in ownership of listed shares do not affect 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 7 above).

Under Finnish tax legislation, the carry back of losses is not allowed.

9. Is there any indirect tax on the 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 real estate and housing companies, the transfer tax is 2%. As a main rule, transfer tax is not applicable to the trade of shares in publically listed companies. Additionally, the transfer of shares between parties not tax resident in Finland are exempt from Finnish transfer tax unless the target is directly or indirectly a Finnish real estate or housing company. The purchaser is liable to pay the transfer tax.
10. Are there any restrictions on the deductibility of acquisition costs?

The costs accruing directly from facilitating the acquisition, such as fees from legal and other professional services and transfer tax are included in the acquisition costs of shares. The buyer cannot depreciate the acquisition cost of the shares, but when determining taxable capital gain in potential future share sales, the acquisition costs are deducted from the sale price.

Financing costs related to the acquisition of shares are deducted as yearly expenses i.e. they are not included in the shares’ acquisition costs. This means that costs relating to financing or refinancing of the target company should be deductible, although acquisition cost of the acquired shares are not subject to depreciations. Due to this divergent treatment, drawing the line between the financing costs and other cost relating to the acquisition may be of essence from a tax point of view. Especially with regard to shares to which participation exemption is applicable, the classification of costs as acquisition cost of shares may cause non-deductibility of costs (please see section 15 below for further details).

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

Yes, VAT on acquisition costs can be recovered in the proportion that the company acquiring the shares or assets has VAT taxable activities.

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)?

A company subject to only limited tax liability in Finland is taxed in Finland only for the Finnish source income unless the person has a permanent establishment in Finland. Capital gains derived from the sale of shares are not regarded as Finnish source income under Finnish legislation, as long as the company’s assets do not essentially consist of real estate property.

Dividend distributions made by a Finnish company to a foreign corporate recipient are generally subject to withholding tax at 20%. However, this rate may be reduced in situations such as the following:

- Situations covered by 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.

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

As an EU Member State, Finland has harmonised its tax provisions for tax neutral corporate transactions in accordance with the Merger Directive. 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. Tax neutrality of reorganisations in effect means that arrangements do not cause income tax implications either for companies participating in the arrangements or their shareholders. Tax neutrality is often subject to fulfillment of certain conditions, for example in mergers, divisions and exchanges of shares, there are restrictions on the amount of cash contributions. Even though the threshold for the amount of cash contribution would not be exceeded, the transaction is deemed to be a taxable event to the extent that cash compensation has been used.
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 the 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 permanent establishment, the difference between fair value and book value of assets will be realised for tax purposes.

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 five years of the end of the tax year in which the exchange took place or is resident within the EEA, or 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 that 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.

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

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

Many of Finland's Double Taxation Agreements (DTAs) include a paragraph entitling Finland to tax income arising from a shareholding in a Finnish company which owns real estate in Finland and shareholders of which are entitled to use the real estate based on their shareholding. Typically, Finland's taxing right also covers capital gains derived from the disposal of shares in real estate companies the assets of which mainly comprise of directly or indirectly owned real estate located in Finland. However, there are also DTAs not allowing Finland to tax income or capital gains relating to such shares.

A real estate company is not a specifically defined legal term in Finnish law even though it is commonly used in practice; real estate companies can be organised, e.g. as ordinary limited liability companies, residential housing companies or Mutual Real Estate Companies (MRECs).

Residential housing companies and MRECs are taxed under the Income Tax Act. In practice, residential housing companies do not pay tax. The purpose of the company is only to provide residence to the shareholders who pay all costs of the company through a monthly maintenance charge. MRECs are limited liability companies with purpose to own and manage at least one building or a part of a building. Its shares are attributable to certain parts of the real property and based on their shareholding, shareholders are entitled to hold and control the respective parts of the real estate. Therefore, for example, rental income arising from the leasing of the real estate accrues directly to the shareholders. Typically, income received by MRECs comprises of monthly charges that the shareholders pay to the mutual real estate company.

Regular Real Estate Companies (RECs) operate just as any limited liability companies – i.e. if 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 RECs are subject to the general corporate income tax (currently 20%). Specific transfer tax provisions apply to sales of real estate companies (please see section 9 above).
Sell-side

15. **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 from the transfer of shares are not considered taxable income, and consequently 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 one year during a period that has ended no more than one 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;
  - A company resident in a country with which Finland has a tax treaty, which is applied to dividends distributed by that company.

Capital losses accruing from the transfer of shares that are fixed assets but that cannot be transferred are tax exempt and are only deductible from taxable capital gains derived from transfers of fixed asset shares in the same tax year and the subsequent five tax years. 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 one 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.

Even if under participation exemption rules acquisition costs of shares would not be tax-deductible, based on case law, the seller may be entitled to deduct for example expert and auditing fees relating to the sale of shares for the part acquisition cost including those costs that exceed the tax exempt sales price.

In the current Finnish tax practice, recovery of VAT on transaction costs relating to the sales of shares is generally denied by the tax authorities. In the absence of recent case law, the correctness of such interpretation is not clear.
16. Is there any fiscal advantage if the proceeds from the sale are reinvested?

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

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

There are no substance requirements for holding/finance companies tax resident in Finland.

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

- **Horizontal tax consolidation**

Following the decisions by the Court of Justice of the European Union (CJEU) (regarding the Dutch tax consolidation regime, which is similar to the French one) and by a French court (regarding the French regime), which ruled that the French tax provisions which prohibit the tax consolidation of French subsidiaries controlled by the same EU parent company violate the freedom of establishment, the second Amended Finance Bill for 2014 extended the situation in which companies can set up a tax consolidated group in France. Indeed, it is now possible, subject to conditions, to set up “horizontal” tax groups in France, i.e. to consolidate, for tax purposes, French subsidiaries controlled by a foreign EU parent company if the following conditions are met:

- all companies are subject to corporate income tax (or similar income tax) under the standard regime;
- the French companies are directly or indirectly held at more than 95% by the same EU parent company;
- the EU parent company is not held at more than 95% by another EU company subject to corporate income tax (or similar income tax);
- all companies members of the so-called “horizontal” tax group have the same opening and closing date.

These new provisions came into force for financial years closed on or after 31 December 2014.

From a practical standpoint, the enlargement of cases where a tax group may be created between French companies may also help avoiding some post-acquisition relocation of shares, especially in cases of build-up.

- **About French tax consolidation rules**

On 2 September 2015, the CJEU ruled that the French tax consolidation rules as regards the tax treatment of dividends distributed between companies that are member of the same tax group violate the freedom of establishment and the rules make it less attractive for companies with EU subsidiaries to exercise that freedom because they would be deterred from setting up subsidiaries in other Member States (CJEU, 02/09/2015, aff. C-386/14, Steria).

The French tax consolidation regime has been amended to bring French law into compliance with European law (amending the finance law for 2015). The new regime applies from fiscal years beginning from 1 January 2016.

As a reminder, according to the former regime, the taxation of dividends is limited to a 5% lump sum (parent subsidiary regime). The 5% lump sum was neutralised in case of a dividend distribution carried out between companies members of the same tax consolidated group. Based on these provisions, dividends received by French companies from its EU subsidiaries that would have fulfilled all conditions to become members of a tax consolidated group if they had been incorporated in France, were subject to CIT up to the 5% lump sum without any neutralisation. This difference based on the state of incorporation of the distributing company has been considered as non-compliant with the freedom of establishment.

According to the new regime, the lump sum is reduced from 5% to 1% in the following cases:

- Dividends distributions within a tax consolidated group or/and;
- Dividends distributions received by a company member of a tax consolidation group and paid by another company in the group or by a company located in the EU which is subject to a similar corporate income tax, provided that these companies meet the conditions which would enable it to be a member of the tax consolidated group if the company was located in France.
It should be noted that the 1% lump sum is not neutralised even in the cases where both the distributing and the receiving companies are members of the same tax consolidated group.

However, it should be noted that for dividends received from French companies owned at 95% or more but which is not a member of the tax consolidation group, the lump sum is 5%.

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?**

The 2014 Finance Bill introduced a new anti-hybrid financing measure limiting the deductibility of interests accrued to related party lenders. The right to deduct interest on loans paid between related parties is subject to the following new demonstration: the borrower must be able to prove, upon the tax authorities’ request, that, for the current fiscal year, the lender is subject to a corporate income tax on the interest income received which is equal to at least 25% of the corporate income tax that would be due if computed under the French general rules (i.e., 8.33%) without consideration of the effective tax payment by the lender. The new rule is applicable to the fiscal year ending on or after 25 September 2013.

The anti-hybrid rule represents France’s first concrete step to give effect to the OECD base erosion and profit shifting (BEPS) project.

On 27 January 2015, the Council adopted an anti-abuse rule about the parent subsidiary regime.

This clause has been transposed in identical format into French law by the amended Finance Act for 2015. Under this amended, the parent subsidiary regime is not applicable “to an arrangement or a series of arrangements which, having been put into place for the main purpose or one of the main purposes of obtaining a tax advantage that defeats the object or purpose of this Directive, are not genuine having regard to all relevant facts and circumstances. An arrangement may comprise more than one step or part. (…) An arrangement or a series of arrangements shall be regarded as not genuine to the extent that they are not put into place for valid commercial reasons which reflect economic reality”.

The new clause is applicable for fiscal years as from 1 January 2016.

3. **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 three-year statute of limitation, which can in some circumstances be extended to ten years). Asset deals (i.e. straight sales of assets or going concerns) do not result in the transfer of pre-closing liabilities relating to the assets or going concern being transferred (except for the going concern’s taxes on assets or activities transferred in the year the transaction occurs, for which the buyer may become jointly liable for a limited period of time).

Asset 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 (i.e. for Société Anonyme (SÀ) or Société par Actions Simplifiées (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 the number of shares purchased divided by the 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 all together form a going concern. It should be noted that 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 carry forward 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 further challenge the 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 is not the owner of the assets or going concern transferred on 1 January of the year the transaction occurs.

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?**

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

Tax-free restructurings (i.e. merger favourable or merger neutrality regimes allow benefitting from deferred taxation on capital gains on assets transferred by the merged or the contributing company) may also be 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 two 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 related taxation is postponed until the end of the tax-consolidated group, the exit of the tax-consolidated group of one of the two companies, or the assets sold to a company that is not a member of the tax-consolidated group (correlatively, amortisation on the re-evaluated value is not possible).

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

In principle, the amortisation of goodwill is not allowed in France, either in share deals or asset deals. However, in some specific cases, pursuant to the regulation of the ANC dated 23 November 2015, depreciation can be recorded in the case there is any time limit on the use of the business asset (for example: concession).

Moreover, the regulation of the ANC also amended the accounting treatment of a “technical loss” resulting from a merger carried out at the net accounting value (difference, up to the latent capital gain on assets received in the frame of the merger, between (i) the net accounting of the shares held by the absorbing company in the absorbed one; and (ii) the net asset value of the absorbed company). This “technical loss” was in principle recorded in the balance sheet of the absorbing company as a “goodwill” that could not be depreciated either from an accounting or tax standpoint.

Now, from an accounting purpose, if possible, such “technical loss” must be allocated to the underlying assets it relates to and be depreciated following the depreciation rules applicable to said underlying asset.

From a tax perspective, the depreciation of a business asset is not allowed. Therefore, extra-accounting adjustments will be necessary.

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

There are several rules that relate to the deductibility of interest on borrowings.

**Interest rate limitation**

Under the interest rate limitation when interest expenses are paid to a direct shareholder, the annual deductible interest rate is capped at a rate determined by the Tax Administration (e.g. 2.15% for the full year closed on 31 December 2015). 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 at arm’s length (i.e. a rate the company could have obtained from third party financial institutions in similar circumstances).

**Anti-hybrid legislation**

The deduction of loan interest paid by a company subject to corporate income tax to a related company is allowed provided that the lender is subject to tax on profits on the interest received amounting to at least 25% of the tax as determined under French tax rules (i.e. 8.33%) This mechanism was enacted to limit the use of hybrid instruments which take advantage of different legal qualifications of the same flow between two countries and allowing the deduction of the financial interest accrued in France and the exemption of the corresponding interest income received by the lender abroad. This rule is applicable to interest incurred since 25 September 2013, irrespective of the date the loan was granted.

**Thin capitalisation rules**

The amount of interest paid to related entities which exceeds the highest of the three following thresholds will not be tax deductible on a standalone basis:

- First threshold: amount of interest computed on one and a half times the net equity, i.e., the interest deductibility is limited by the following ratio: “net equity: debt from related parties = 1:1.5”;
- Second threshold: 25% of the ordinary income before taxes, amortisation and interest paid to related entities;
- Third threshold: interest received from related parties.
In addition, third-party loans (including bank debt) which are guaranteed by a “related party” to the borrower are deemed to be related party debt for thin capitalisation purposes (or loans granted by a non-related company, guaranteed by a non-related company itself guaranteed by a related company to the borrower).

Moreover, it should be noted that specific rules apply within a tax-consolidated group. Indeed, subject to limitations, the parent company could be allowed to deduct from the group taxable income all or part of the non-deductible interest as determined on a standalone basis.

Finally, if the accounting consolidated group’s debt/equity ratio is higher than the borrowing entity’s own debt/equity ratio, the limitation on the deduction of interest paid to related entities will not apply.

The consolidated group is defined as all the French and foreign entities under the control of the same ultimate parent company.

For the purposes of this comparison, only debts owed to third parties are taken into account for computing group’s debt/equity ratio, though both debts owed to third parties and related entities are taken into account for the computation of the debt/equity ratio of the borrowing entity.

In any case, if the fraction of non-deductible interest is lower than € 150K, there will be no limitation.

The non-deductible fraction of interest due on the application of the thin capitalisation provision may be carried forward to the following tax year (Y+1) and offset against 25% of the ordinary income before taxes and depreciation of fixed assets. The remaining amount may then be carried forward to the following tax years but with an annual deduction of 5%.

**Acquisition of shares not controlled from France (Carrez amendment)**

The deductibility of financial expenses linked to acquisition of shares qualifying 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 eight 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.

**Proportional interest deduction restriction “French rabot”**

Deduction of financial expenses of companies is now subject to a general limitation. For the accounting period ended as of 31 December 2012 companies have to add-back to their taxable result 25% of their “net financial expenses”.

“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 carry-forward 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.

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

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 (e.g. 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 (i.e. with an effective tax rate of 3.44%).

Another solution could be a relocation of assets (e.g. 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 companies 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 two holding companies, namely in the case of a secondary leveraged buy-out.

In any case, these schemes have to be analysed in light of French commercial law, which prohibits a company from financing its own acquisition.

8. **Are losses of the target company(ies) available after an acquisition is made?**

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 unless 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 three 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 carry forward its own standalone tax losses further to the merger (i.e. impact on its own activity).

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

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

Acquisition costs of shares mainly include registration duties, commissions, fees (auditor fees, external appraiser fees, advisor fees) and deed expenses related to the acquisition.

- From an accounting standpoint, these costs may be taken into consideration in the acquisition cost of the shares or deducted for the FY where they have been incurred.
- From a tax standpoint, the costs incurred to acquire shares qualifying as a controlling interest must be incorporated into the acquisition cost of said controlling interest. However, the deduction of acquisition costs may be spread over a 5-year period. In case of acquisition in the course of a fiscal year, the first annuity is computed pro-rata temporarily.

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

As a matter of principle, based on ECJ case law and guidelines issued by the French tax administration, input VAT on acquisition costs may only be recoverable if the acquiring company provides services subject to VAT to its subsidiaries.

Note, however, that in the case where the acquiring companies would receive non-ancillary financial income, its right to recover input VAT could be reduced.

In principle, the fact that the acquiring company would also receive dividends from its subsidiaries should have no impact on its right to recover input VAT on acquisition costs.

However, it should be noted that, despite the provision of the guideline issued by the French tax authorities (that have not been amended to date) and the ECJ case law, recent case law from French Supreme Court may give some arguments to the FTA to try to limit the possibility to deduct 100% of the input VAT in the case where the acquiring company receives dividends from its subsidiaries.

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)

We refer to question 17.

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

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

For capital gains 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.

For transfer tax purposes a real estate company is a company with assets made up of more than 50% of French real estate at any time of the year preceding the sale.

a. Share deal
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 (i.e. maximum effective rate of 34.43%). The favourable regime of participation exemption (i.e. 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.

b. Asset deal
Capital gains on the transfer of assets in real estate company subject to corporate income tax are taxed at the normal corporate income tax rate.

The acquisition of real estate asset is subject to transfer duties at the rate of 5.09% of the fair market value of the estate asset.

Sell-side

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

a. Share deal
For non-French tax resident companies subject to the provisions of relevant tax treaties having a substantial shareholding provision (e.g. 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 five 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 two-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.

b. Asset deal
If a French company sells assets, the capital gain is taxable at the normal corporate income tax rate (i.e., maximum effective rate of 34.43%).

16. 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.
17. **Are there any local substance requirements for holding/finance companies?**

The local substance requirements for holding companies are: minimum staff, offices, location of board meetings, decision power, etc.

However, the substance must be in relation to the activity of the company, i.e. the substance-level requirement is different between an operational company, a financial company and a non-operating holding which purpose is only management of its shareholding. Consequently, the substance level requirements for non-operating holdings are necessarily limited.

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General

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

   Germany has recently seen some legislative developments with relevance for M&A deals. The tax legislation amended the Reorganisation Tax Act (RTA) by tightening the conditions for the tax neutrality of hive-downs and share-for-share exchanges. Their tax neutrality in general requires that the transferring person receives as consideration new shares in the receiving entity. Other considerations by the receiving entity in addition to new shares (e.g. cash, shareholder loans) are permitted. However, the legislation requires that the fair value of such other considerations must not amount to more than (a) 25% of the book value of the contributed business assets or (b) EUR 500k (the amount must not exceed the book value of the contributed assets).

   Moreover, regarding the loss forfeit rules, the tax legislation extended the beneficial group relief to further intra-group transactions (see no. 8 below).

   M&A deals are also affected by amendments of the Real Estate Transfer Tax (RETT) Act. With respect to the transfer of interests in German real estate holding partnerships, RETT will in principle be triggered if at least 95% of the interests are directly or indirectly transferred within 5 years. With respect to indirect transfers, the German Federal Fiscal Court ruled that 100% of the shares of a corporation that is a partner of the real estate holding partnership have to be transferred in order to assume a tax-relevant transaction of the partnership interest. The legislature tightened this taxpayer-friendly jurisprudence by introducing a provision under which a transfer of at least 95% of the shares in such a corporation would be sufficient to trigger RETT. Furthermore, the legislature increased for many cases the tax base for RETT purposes by introducing new rules for determining the fair value of real estate, thereby following a judgment of the German Federal Constitutional Court.

   Finally, it is important to note that the envisaged tightening of the rules dealing with the tax-exemption of capital gains deriving from the disposal of shares in corporations by corporations (i.e. a 10% minimum shareholding criteria) has not been introduced yet and is currently not included in any tax bill. However, it cannot be ruled out that the restriction will be enacted at a later stage.

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?**

   **BEPS**

   Germany generally supports the BEPS actions. Many proposals have already been implemented in German tax law (e.g. an interest barrier rule, action 4). At the moment (February 2016), no general legislative proposal in regard to BEPS actions is available. It seems likely that in particular BEPS actions 2 (hybrid mismatch arrangements) and 13 (country-by-country reporting) will be implemented in German law. In regard to hybrid mismatches, a previous law proposal contained provisions aimed at preventing a no-taxation or double-dip situation. It is to be assumed that a regulation will be implemented on the basis of this proposal.

   As far as action 6 is concerned, German national law and many double tax treaties (DTT) already include anti-treaty-shopping, subject-to-tax and switch-over clauses. Certain DTTs also contain limitation-on-benefits clauses. It is to be assumed that further adjustments of German DTTs with regard to a limitation-on-benefit clause and a principle purpose test could be made as part of the implementation of a multilateral instrument (action 15). The negotiations concerning this multilateral instrument should be concluded by the end of 2016.

   The EU has published a draft directive aimed at implementing the core BEPS measures across the EU. This is expected to influence further legislative measures in Germany.
Parent-Subsidiary Directive
The recent amendments of the Parent-Subsidiary Directive in July 2014 (introducing subject-to-tax clause and correspondence principle) and January 2015 (introducing a general anti-abuse clause) were in principle enacted in German tax law.

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

a. Share deal
Buyer perspective
In a share deal, no step-up of assets in the target company is possible. Further, the buyer acquires all tax risks from prior years associated with the company’s shares and therefore requests tax guarantees/indemnity from the seller. Share acquisitions are generally not subject to VAT (see below). If the target company owns German real estate with considerable value, a share deal might enable the buyer to mitigate or even avoid RETT (see no. 14 below). There are various options available for the buyer to achieve a debt-push down (see no. 7 below). Whether interest expense is deductible depends on the general requirements (see no. 6 below).

Seller perspective
From a corporate seller’s perspective, the main advantage of a share deal is that the capital gain deriving from the disposal of shares is in principle 95% tax-exempt. However, capital losses from share deals are not tax-deductible at all. Losses carried forward and current losses up to the transfer date might be forfeited under the loss forfeiture rules (unless certain requirements are fulfilled). Share transfers are generally 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.

b. Asset deal
Buyer perspective
An asset deal gives the buyer the possibility to step up the acquired assets, including goodwill, up to the acquisition price. The subsequent depreciation results in lower tax burdens for the buyer in the future. 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 regulation that the acquirer has to take on some secondary liability for certain taxes resulting from the pre-acquisition period.

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 no. 6 below). Furthermore, the acquisition of assets is generally not exempt from VAT (unless the assets qualify as a going concern). This has to be carefully considered if the input VAT is not fully deductible.

Please note that the acquisition of a partnership interest is treated like an asset deal for German tax purposes. Therefore there is a step-up of the value of the assets for the buyer when acquiring partnership interests. Depreciations of the stepped-up assets (shown in a supplementary balance sheet) are allocated directly to the acquiring partner.

Seller perspective
The asset deal is in principle a taxable event. Capital gains could be offset against existing losses and loss carry-forwards of the seller. In this context the seller has to take into account Germany’s minimum taxation rules. These rules allow the deduction only of loss carry-forwards in a fiscal year in the amount of EUR 1 million plus 60% of the income exceeding EUR 1 million. The seller usually retains all tax risks from prior years associated with the business assets. Capital losses from an asset deal are in principle tax-deductible.
II. 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?

German tax law does in principle not provide for a tax-neutral step-up of the value of tangible or intangible assets in a share deal. Various options (e.g. sale, merger) are available to achieve a taxable step-up of the assets after the share deal. In this context a tax benefit could be achieved only if existing losses or loss carry-forwards can neutralise the taxable capital gain. However, minimum taxation rules have to be considered in cases where the taxable profit from the contribution exceeds EUR 1 million and no sufficient losses of the current year are available (see no. 3b) above).

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

German tax law allows a straight-line depreciation of goodwill over 15 years. For German GAAP purposes, however, the depreciation period of goodwill is generally 5 years.

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

Arm’s length principle

The interest rate on borrowings from shareholders or related persons must comply with arm’s length principles. This also requires that financing agreements are concluded in writing and beforehand in order to prevent the tax authorities from denying the interest deductibility.

Interest barrier rules

According to the German interest barrier rules, a taxpayer is able to immediately deduct net interest expenses (interest expenses minus interest income) only up to 30% of the taxable earnings before interest, taxes, depreciation and amortisation (taxable EBITDA). The tax EBITDA only includes taxable income and thus does not necessarily match with the GAAP EBITDA. The interest barrier rules apply to all interest and not only to interest on intra-group loans. The interest barrier rules allow EBITDA carry-forwards (broadly speaking, unused EBITDA in 1 year can be used to achieve an 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). Interest carryforwards are subject to the change-of-ownership rules (see no. 8); EBITDA carryforwards elapse after 5 years.

The interest barrier rules do not apply if 1 of the following conditions is met:

- The annual interest burden (interest expenses minus interest income) is less than EUR 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 or

- The taxpayer proves that the borrower’s equity ratio is at least as high as the world-wide group’s equity ratio. It is tolerable if the German entity’s equity ratio is 2 percentage points below the group’s ratio. This escape clause applies only 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.

Add-back for trade tax purposes

25% of the interest expenses have to be added back for trade tax purposes (unless an amount of EUR 100,000 is not exceeded).
7. **What are usual strategies to push-down the debt on acquisitions?**

Various options are available to achieve a debt-push down. 1 is to implement a tax group (Organschaft) between the debt-financed German acquisition vehicle and the target company. Such a tax group allows for a settlement of profits of the target company and the losses of the acquisition vehicle resulting from the financing expenses. Alternatively, the acquisition vehicle and the target company can be merged. Leveraged distributions or repayments of (free) capital reserves of the target company are other potential options. When determining the level of debt financing, the German interest barrier rules have to be considered. The German capital maintenance rules also have to be kept in mind.

8. **Are losses of the target company(ies) available after an acquisition is made?**

The direct or indirect transfer (or a similar transaction, such as a capital increase or an internal group restructuring) of more than 25% or 50% of the shares in a loss company to any shareholder or a group of shareholders with similar objectives within a 5-year period leads to a partial or complete forfeiture of current tax losses and tax loss carry-forwards. The law provides for several options to avoid the forfeiture of losses and loss carry-forwards:

**Intra-group escape (amended in 2015)**

The acquisition of shares in principle no longer results in the loss (or partial loss) of losses and loss carry-forwards if the same taxpayer indirectly or directly holds 100% of the shares in both the transferring and the acquiring entity, the acquirer indirectly or directly holds 100% in the shares of the transferring entity, or the seller indirectly or directly holds 100% in the acquiring entity. Intra-group reorganisations that fulfill these (strict) requirements can therefore be carried out without the loss of losses and loss carry-forwards.

**Hidden-reserve escape**

In addition, a corporation’s unused tax losses are preserved to the extent they are compensated for by hidden reserves that have been built into those business assets of the corporation that are subject to German taxation. If only between 25% and 50% of shares in the corporation are sold, the corresponding portion of hidden reserves is considered. The hidden reserves are evaluated 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. In a sale of more than 50% of the shares, the entire hidden reserves can be taken into account and be compared with the fair value of all shares.

**Restructuring escape**

The restructuring escape rule stipulates that losses and loss carry-forwards are not affected by changes in ownership of a corporation if the change is part of a restructuring measure. However, this rule is not applicable at the moment as it has been classified as forbidden state aid by the European Commission. Legal proceedings by Germany against the decision of the European Commission in front of the European Court of Justice were (for formal reasons) not successful. However, lawsuits of companies are pending.

9. **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. However, if the target company owns German real estate, Germany levies under certain requirements RETT on a specially assessed property value (see no. 14 below).

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

Acquisition costs are generally not deductible but have to be depreciated over the average useful life (if applicable; e.g. shares in corporations are not subject to depreciation). Incidental acquisition costs (e.g. for legal/tax advice) usually have to be allocated to the acquired assets and are – in principle – not immediately deductible but part of the pro rata depreciation (if applicable). An immediate deduction of such costs is possible if it can be proven that there is no economic connection between the acquired assets/shares and the corresponding costs. This is generally difficult to achieve. Costs in regard to failed acquisitions are in principle immediately deductible. RETT paid in an asset deal has to be capitalised whereas RETT triggered in a share deal transaction is in principle immediately deductible.
11. Can VAT (if applicable) be recovered on acquisition costs?

A VAT recovery requires that the person that wants to claim input VAT has to qualify as an entrepreneur for VAT purposes. It is further required that the acquired assets will be used for transactions subject to VAT. If VAT cannot be recovered on acquisition costs, it would increase the acquisition costs and be part of the pro rata depreciation (if applicable).

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)?

A foreign (non-German) acquiring company is subject to limited tax liability in Germany if it generates income from German sources. German sources are for instance given if (i) shares in a German entity with registered seat and/or place of management in Germany, (ii) real estate located in Germany or (iii) assets belonging to a German permanent establishment are acquired.

When a foreign company acquires shares in a German entity, withholding tax (WHT) of 25% (26.375% including solidarity surcharge of 5.5%) is generally levied on, for example, dividend, interest or royalty payments by the German entity to its foreign shareholder. An applicable DTT or EU directive (e.g. Interest and License Fee Directive, Parent-Subsidiary Directive) might fully or partially reduce the German WHT burden. The German entity may abstain from WHT deduction only if an exemption certificate is issued by the German Federal Central Tax Office prior to the relevant payment. A reduction or refund (without a prior exemption certificate) of German WHT is subject to the fulfillment of certain requirements concerning the activity and substance of the direct or indirect foreign shareholder of the German entity.

Please be aware that the German 95% tax exemption for dividend income is available for German and foreign shareholders only if the shareholding in the German company amounts to at least 10% for corporate income tax purposes and 15% for trade tax purposes (at the beginning of the fiscal year of the subsidiary in question).

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

There are various options to reorganise a group after the acquisition in a tax-neutral environment.

Options for tax-neutral reorganisation measures

In particular the RTA provides for tax-neutral reorganisations such as mergers, spin-offs, hive-downs, conversions, contributions of shares or specific business assets. The full or partial tax neutrality for the transferring entity in principle requires that (i) Germany retains the right to tax a capital gain regarding the assets transferred, (ii) the transferring entity only receives new shares in the receiving entity (or limited other considerations, see above), and (iii) the relevant entity files an application for tax neutrality with the competent tax office. If these requirements are met the transferring entity may recognised the assets at tax book value thereby avoiding a capital gain. These rules are also applicable in cross-border reorganisation measures.

German tax law also provides for structuring options outside the Reorganisation Tax Act. For instance, the assets of a partnership can be transferred to its sole remaining partner in a tax-neutral way.

Tax group

An income tax group can in principle be implemented between the acquiring entity and the target company. The main advantage of an income tax group is that profits and losses of the entities belonging to it are consolidated at the level of the parent company (controlling entity). Further benefits might be available (e.g. regarding the interest barrier rules, no 5% taxation of dividend income). The subsidiary (controlled entity) still qualifies as a taxable entity and has to file (annual) corporate income tax returns. Certain requirements for an income tax group must be met:

- The controlling entity must hold the majority of the voting rights in the controlled entity from the beginning of its financial year.
- The controlling entity and the controlled entity must enter into a profit and loss transfer agreement for at least 5 years. The agreement must be consistently applied throughout the term of the agreement.
14. Is there any particular issue to consider in case of companies of which main assets are real estate?

The main issue to consider when acquiring companies whose main assets comprise German real estate is that Germany levies RETT on the direct or indirect transfer of such real estate. The tax rates vary between 3.5% and 6.5% depending on the federal state in which the real estate is located. In an asset deal, RETT is always triggered (the purchase price is the assessment base; no avoidance strategies are available).

In a share deal regarding partnership interests, RETT is basically levied if at least 95% of the partnership interests are transferred within a period of 5 years. A transfer of shares in corporations triggers RETT only if a buyer (or a RETT group) acquires at least 95% of the shares. The tax base is in principle the fair value of the real estate. RETT can be avoided by, for example, selling only 94.9% to a single purchaser and having the shareholder or a third party retain the remaining 5.1% shareholding. RETT relief might be available for certain reorganisation measures (e.g. mergers, spin-offs, hive-downs or contributions and share-for-share exchanges). This requires, among other things, that the controlling company holds indirectly or directly at least 95% of the shares in the controlled company involved in the reorganisation within 5 years prior to the relevant transaction and for at least 5 years after it.

An increasing number of German DTTs allocate the right to tax a capital gain deriving from the disposal of shares to the state of residence of the target company if most of its assets comprise real estate (see also Art. 13(4) of the OECD Model Convention).

III. Sell-side

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

In principle, capital gains from the disposal of German assets (including partnership interest) are subject to German income taxation.

An important exemption is the capital gain deriving from the disposal of shares in a corporation by a corporation. Under German tax law, 95% of such a capital gain is in principle tax-exempt irrespective of any minimum shareholding or holding period. In the case of an individual person, the taxation of the capital gain from the disposal of shares depends on (i) the shareholding percentage, and (ii) whether the share is held as private property or as business property. For shareholdings of 1% or more, 40% of the capital gain is tax-exempt and 60% is taxable at the individual income rate (this ratio also applies to expenses in connection with the transaction). The same treatment applies (irrespective of the holding percentage) if the shares belong to a business or trade of the individual. In all other cases a capital gain is taxed at a beneficial lump-sum tax rate of 26.375% (costs are not tax-deductible at all). If a partnership generates a capital gain from the disposal of shares, the applicable tax rule basically depends on the tax status of the partner (being a corporation or an individual person).
16. **Is there any fiscal advantage if the proceeds from the sale are reinvested?**

Under 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 (intended to be) acquired. The capital gain from the sale is not immediately subject to income taxation but can be deducted from the acquisition costs of newly acquired assets. As a result, the depreciation base of the newly acquired assets is reduced. If no new assets are to be immediately acquired, the capital gain can be parked tax-free as reserve and deducted from new acquisitions within the next 4 or 6 years (as the case may be). However, if no new acquisitions take place in the relevant period of time, the reserve has to be dissolved, leading to retroactive taxation. Individuals selling shares can benefit from rules similar to those described for real estate (applicable to capital gains of up to EUR 500,000). There is no tax advantage to reinvesting sale proceeds from a share deal made by corporations.

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

The 95% exemption for capital gains and profit distributions (see above) are not available if the shares that are sold or that generate profit distributions are held in the trading book of a bank or financial services company. The same applies for shares that are acquired by a finance company with the intention of achieving a short-term trading profit (e.g. a holding or leasing company).

Foreign holding companies need to prove certain substance requirements in order to benefit from WHT relief under a DTT or German tax rules (see no. 12).

Holding companies do not qualify as entrepreneurs for VAT purposes if they are mere finance holdings. In this case no (full) input VAT deduction would be available. A different VAT treatment would apply if a holding company carries out management services with regard to its subsidiaries for which it receives an arm’s-length remuneration.

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

A new Income Tax Code (ITC) was enacted with effect for fiscal years starting as of 1 January 2014 and onwards heavily influenced by the international tax developments. In particular, the new ITC introduced for the first time a business restructuring provision based on the recommendation of the Committee on Fiscal Affairs of 22 June 2010 on the Transfer Pricing Aspects of Business Restructurings, CFC and thin – cap rules in line with Council’s Resolution of 8 June 2010 on the coordination of CFC and Thin Cap rules. New provisions were introduced, which taxpayers may optionally use for business restructurings (i.e. mergers, spin-offs etc.) as an alternative to existing incentive laws and, contrary to such existing laws allowed under conditions for transfer of losses of the restructured (i.e. absorbed etc.) entity. Furthermore, new statutory depreciation rates have been introduced as well as an explicit provision on tax residency of companies according to their place of effective management. Finally, the new Code of Tax Proceedings that is also effective as from 1 January 2014 has introduced a general anti-abuse rule (“GAAR”) in line with the European Commission Recommendation of 6 December 2012 on aggressive tax planning.

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?**

Greece is a member of the ad hoc group drafting the multi-lateral instrument, which shall, if signed, modify existing bilateral tax treaties in order to swiftly implement certain BEPS measures including those on treaty abuse (i.e. BEPS action Plan 6).

Furthermore, there are several anti-abuse measures contained in Greece’s bilateral tax treaties, including (general or income type related) subject-to-tax clauses and income type related PPT clauses.

The recent amendments to the EU Parent-Subsidiary Directive requiring adoption of a specific GAAR provision (“PSD GAAR”) as well as of a linking rule regarding hybrid financial instruments are currently in the process of being transposed into domestic legislation. In addition, a GAAR has been incorporated in the Code of Tax Proceedings that has been in force since 1 January 2014.

In particular, according to the domestic GAAR, the Greek tax administration may disregard any artificial agreement or series or arrangements that are aimed at tax avoidance and lead to a tax advantage. Such arrangements are treated according to their commercial substance. An agreement/series of arrangements are considered artificial if lacking commercial substance. The goal of an agreement/series of arrangements is perceived to be tax avoidance if, regardless of taxpayer’s subjective intention, it is contrary to the object, spirit and purpose of the tax provisions that would otherwise apply.

To be noted that the WHT relief available for dividends under tax treaties overrules the GAAR, thus the impact of the GAAR on tax treaty relief is expected to be low.
3. What are the main differences among acquisitions made through a share deal versus an asset deal in your country?

a. Share deal

Contrary to asset deals, share deals are not burdened by indirect taxes. An exception applies to the transfer of listed shares (either on a Greek or overseas stock exchange), in which case the seller is liable to pay a 0.20% transfer tax on the sale value.

In the field of direct taxation gain from both share and assets deal are included in the selling company’s corporate income and taxed at the ordinary corporate income tax rate, i.e., of 29%, for income accrued as of 1 January 2015 and onwards. However, contrary to asset deals, the buyer is not entitled to depreciate the acquisition value of the shares and to deduct business expenses incurred for the acquisition of the shares.

b. Asset deal

Asset deals are burdened by 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 in principle due at a 23% rate which is recoverable. Moreover, the transfer of real estate is subject to real estate transfer tax at a rate of 3.09%.

In the field of direct taxation, as in the case of share deals, gains from the transfer of assets are included in the selling company's corporate income and taxed at the ordinary corporate income tax rate, i.e. of 29%, for income accrued as of January 1, 2015 and onwards. The buyer is entitled to deduct for corporate income tax purposes business expenses incurred for the acquisition of the assets and depreciations.

4. 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.

5. 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 acquisition of the shares of the company being merged.

From an accounting perspective if goodwill that is invoiced separately (e.g. in the context of a transfer of a business as a going concern or single asset transfer) has an indefinite useful economic life, then it is not subject to amortisation but should be tested for impairment on an annual basis according to Greek Accounting Standards rules. In case the useful economic life of goodwill cannot be reliably estimated, goodwill is amortised equally within a period of ten years. From a tax perspective, goodwill is amortised at an annual rate of 10%.

In mergers, goodwill is considered to be the amount that reflects the difference between the acquisition cost of the shares and the net asset value of the assets and liabilities of the company being merged. According to Greek Accounting Standards, if that difference is positive, it represents goodwill, which should be recorded in a special account under the title “goodwill” and be subject to amortisation depending on its useful economic life. In particular, goodwill with indefinite useful economic life will not be subject to amortisation but annual impairment tests, while if its useful economic life cannot be reliably estimated it should be amortised in equal parts within ten years. Otherwise, if the difference is negative, it constitutes a gain from bargain purchase and should be recorded as profit in the profit and loss account of the respective consolidated accounts.
In share deals, either Greek or foreign, the purchase price and relevant costs are entered into the taxpayer's books and recorded in the respective accounts of participations. Therefore goodwill is neither recognised nor recorded in the buyer's accounting books. At the end of each year, shares are evaluated in the corporation's inventory in accordance with the valuation method and rules provided by Greek Accounting Standards. From a tax perspective, any loss arising from the valuation of shares (e.g. impairment loss) is in general not recognised for tax purposes.

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

In case of share deals and based on the guidelines of the Ministry of Finance interest on loans for the financing of the shares acquisition is not tax deductible. Relevant position does not seem to derive from the wording of the law while there are debatable views due to the fact that currently there is no capital gains participation exemption regime in Greece.

Based on the earning-stripping rules, which have substituted the former thin capitalisation rules, net interest expense, if exceeding 3 million euros, is deductible provided that it does not exceed 40% (30% as of 1 January 2017) of the company’s EBITDA, assessed under Greek accounting principles with the applicable tax adjustments. Net interest is defined as the amount by which interest expenses exceed interest revenues. Interest which exceeds the said thresholds may be carried forward indefinitely. Credit institutions, leasing and factoring companies are exempt from the scope of the earning-stripping rules.

Interest on related parties’ loans is subject to transfer pricing rules whereas interest on third party loans, other than interest on loans by banks, inter-bank loans, as well as corporate bond loans, exceeding specific statistical thresholds set by the Bank of Greece is not deductible. There are also restrictions on the deductibility of interest payable to tax residents (individuals or legal entities) in non-cooperative or preferential tax regimes.

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

Debt push down has been achieved in the past through the merger of the entity holding the debt and the target/operational entity. Following the introduction of the new ITC and the limitation of the interest deduction on borrowing for the financing of the acquisition of shares it is uncertain whether relevant interest would be deductible if the entity holding the shares was to be merged with the target/operating entity. Moreover, following the introduction of the GAAR and of the restructuring provisions in the new ITC, tax neutrality of the merger can be achieved only if the merger is carried out for valid commercial reasons. Greek ITC has in principle transposed in the restructuring provisions the Merger Directive provisions including the relevant anti-avoidance provision.

8. **Are losses of the target company(ies) available after an acquisition is made?**

Under the general rules, losses are fully carried forward for a period of 55 years. No carry back is available. It is noted that the losses carry forward right will be affected in a merger as regards the absorbed companies. However, if the merger is effected according to the provisions of the new ITC (which in general transpose the Merger Directive, but also cover purely domestic restructurings), tax losses of the absorbed company survive the merger, provided the restructuring is carried out for valid commercial reasons.

Furthermore, the new ITC introduced a rule according to which the right to carry forward tax losses ceases to apply if changes in ownership or voting rights exceed 33% in value or number, unless the taxpayer proves that the transfer was effected exclusively for commercial or business reasons and not for the purpose of tax avoidance or tax evasion.
9. Is there any indirect tax on transfer of shares (stamp duty, transfer tax, etc.)?

Acquisitions of shares are exempt from VAT. In addition, no stamp tax is imposed on share sales.

A 0.20% transfer tax applies on sales of shares listed on the Athens Stock Exchange, which burdens the seller of the shares (See above under question 3.)

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

Based on ministerial guidelines on the provisions of the new ITC shares acquisition costs are not deductible given that dividend income is tax exempt (see also above under question 6).

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

In case of shares deals VAT on acquisition costs, e.g. professional fees, is recoverable provided that the taxpayer engages in an economic activity and the relevant costs relate to such economic activity and not to a passive investment activity.

VAT paid on the value of the single assets is recoverable under the generally applicable rules.

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)

There are no non-resident taxation rules.

During the holding period dividends distributed by Greek companies are subject to dividends withholding tax which is currently 10%. Relevant withholding tax can be reduced or eliminated in case of distributions to foreign residents qualifying under the applicable Double Tax Conventions and/or the EU Parent Subsidiary Directive. In particular, no tax is imposed if the receiving EU parent company has a minimum 10% shareholding participation in a Greek company for an uninterrupted 2-year period and has a legal form qualifying for application of the Parent-Subsidiary Directive. On the other hand there is no profit withholding tax upon the remittance of profits from the permanent establishment to the head office.

In terms of exiting a Greek holding structure, foreign companies disposing their shares in Greek companies are not subject to Greek corporate income tax on their gain, provided that the shares were not held through a Greek permanent establishment of such foreign companies. Therefore share deals are preferable from the foreign tax resident seller perspective.

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

There are several frameworks for achieving a tax-neutral restructuring in Greece. Greek laws providing for a tax neutral restructuring are the Greek tax incentive laws (i.e. 2166/1993 or 1297/1972), law 2578/1998 on cross-border mergers among EU entities and the new ITC, transposing the EU Merger Directive into national legislation and applicable to both EU and domestic restructurings. Available options are mergers, spin-offs, contributions of businesses or business sectors, share exchanges and changes in the legal form of the company.

The requirements, procedure (requirement for prior valuation, implementation at book or fair market values), tax exemptions (exemption from corporate income tax, real estate transfer tax, indirect taxes) and impact (entitlement to carry forward tax losses, restrictions upon future sale of assets, legal and economic effects of the merger) vary depending on the legal framework to apply. Therefore an analysis is to be made prior to opting for the tax framework to apply in each merger taking into account the background of the companies involved.

From a practical perspective and despite the fact that the Ministry of Finance has not yet released guidelines regarding the implementation of the restructuring provisions of the new ITC, relevant framework has been extensively used for recent business restructurings. This is because, contrary to other applicable laws, the restructuring provisions of the new ITC allow under conditions for the transfer of losses of the restructured (i.e. absorbed etc.) entity.
The most straightforward and commonly used tax incentive law is Law 2166/1993 which is implemented at book values while its economic effects apply retroactively from the commencement of the merger procedure, i.e. from the transformation balance sheet date.

On the other hand, in case it is intended for the entity being restructured to step up the value of its assets, then Law 1297/1972 is to be opted for which however requires a prior valuation of the assets and liabilities of the entity being restructured and therefore renders the process more time consuming. The tax exemptions granted by means of Law 1297/1972 are to be revoked in case that (a) the company is dissolved prior to the lapse of five years following the merger, unless such dissolution results from certain forms of reorganisations and (b) the real estate property of the company is disposed of within five years following the merger unless the proceeds from the sale are used to finance qualifying payments.

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

Following changes in legislation back in 2012 real estate companies equally qualify for the application of Greek tax incentive laws (i.e. Laws 2166/1993 and 1297/1972) and the provisions transposing the EU Merger Directive into domestic legislation (i.e. Law 2578/1998 and the restructuring provisions of the new ITC, which also apply to purely domestic restructurings).

However, contrary to the provisions of the Greek tax incentive laws and Law 2578/1998, the restructuring provisions of the new ITC do not provide for an exemption from real estate transfer tax which is currently imposed at 3.09%.

In addition, restrictions on the transfer of real estate assets apply in cases of tax-neutral mergers under tax incentives law 1297/1972 as stated above.

Finally the new Greek ITC introduced a specific provision for real estate rich companies, i.e. companies deriving more than 50% of their value from real estate. Based on relevant provision capital gains from the transfer of shares of real estate rich companies are treated similarly to the capital gains from the transfer of the real estate. Relevant provisions seem to apply only with respect to private individual sellers and not to companies.

**Sell-side**

15. **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. No capital gains participation exemption exists. However, no corporate income tax is levied on the capital gain where the transferor is a foreign company and the capital gain (loss) is not attributable to a permanent establishment thereof in Greece, since corporate entities are currently taxed for the income generated through a permanent establishment in Greece.

16. **Is there any fiscal advantage if 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.
17. **Are there any local substance requirements for holding/finance companies?**

There are no local substance requirements per se from a tax perspective for holding/finance companies established in Greece.

A legal entity is considered as a Greek tax resident according to domestic tax residence rules and thus is subject to Greek corporate income tax on its worldwide income if it is incorporated, seated or effectively managed at any time of the year in Greece. Effective management is perceived as being exercised in Greece taking into account i.a. the place of:

- exercise of day-to-day business
- strategic decision-making
- annual shareholders’ meetings
- bookkeeping
- BoD minutes;
- residence of BoD members
- residence of the majority of shareholders may potentially also be considered along with the above mentioned factors

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General

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

   The Finance Act 2015 amended the requirements for determining the tax residency of companies. Earlier a foreign company could be considered an Indian tax resident only if the whole of the control and management was situated in India during the year. Now, companies having a place of effective management during the year in India would be considered as tax resident in India and hence the global income of these companies for that year would be taxable in India. The place of effective management has been defined to mean a place where the key management and commercial decisions that are necessary for the conduct of the business of an entity as a whole, are in substance made. This amendment is therefore expected to widen the scope for companies to be considered an Indian tax resident.

   The incidental draft guidelines were released in December 2015 for further deliberation by the stakeholders and the final guidelines are awaited. The amendment is intended to align the provisions of the Indian Income Tax Act with the Double Taxation Avoidance Agreements (DTAAs) entered into by India with other countries and is expected to be in line with international standards. However, pending finalisation of guidelines as to determination of place of effective management, the Finance Bill 2016 has proposed deferral of the applicability of the place of effective management based residence test by one year, and accordingly, the same shall be applicable from the financial year beginning from 1 April, 2016.

   The said Finance Bill also proposes a reduction in the existing corporate tax rate from 30% to 25% for domestic companies set up after 1 March, 2016 engaged in manufacturing / production activities, and which do not claim specified tax holiday and incentives. Further the Bill also provides for the roadmap for phasing out of the current tax exemptions and incentives under the overall plan of the Government to bring down the effective tax rates for Indian corporates while doing away with the exemptions and deductions.

   However, at the time of publication of this guide, the Finance Bill, 2016 has not yet been passed by the Indian Parliament, and accordingly, the proposals thereof are yet to be made part of the statute. It is possible that till the time the requisite formalities for the enactment of the Finance Bill, 2016 are completed, some of the proposals mentioned therein could undergo modifications.

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?**

   India is not a member of OECD group but has always asserted on principles similar to BEPS in trying to protect its corporate tax base and has thus welcomed the recommendations made thereunder. The revenue authorities in India have been particularly aggressive in their tax policy and assessment approach whilst establishing presence of an Indian PE or making transfer-pricing adjustments on the basis of the perceived value creation.

   Action 6 regarding preventing treaty abuse prescribes a Limitation of Benefits (LoB) clause besides a Principal Purpose Test (PPT) clause, currently forming part of some Indian tax treaties. The Government has already introduced the General Anti-Abuse Rules (GAAR) prospectively in its domestic tax law with effect from April 2017, which addresses PPT to some extent by way of a treaty override in case of any “impermissible avoidance arrangement”. The detailed guidance is awaited and could be in alignment with the BEPS outcome. Emphasising the principle of substance over form, India also amended the residency requirements of companies in Finance Act 2015 as stated above, introducing the concept of place of effective management.

   Taking this further, it is also understood that the Indian Government is in talks with Mauritius to amend the India-Mauritius tax treaty to incorporate a LoB clause to restrict treaty shopping and disallowing treaty benefits aimed at...
avoiding Indian taxes. Considering the erosion of such large tax bases through profit shifting, the European Council of the European Union had formally adopted the GAAR provisions by way of amending the EU Parent-Subsidiary Directive, however this has not evoked any response or in any way affected India.

Furthermore, the Finance Bill, 2016 has proposed certain amendments in line with the recommendations under the BEPS Action Plan 1, Action Plan 5 and Action Plan 13 respectively where under it is proposed to introduce an equalisation levy for specified services received by a resident, or a non-resident having a PE in India, from a non-resident (Action Plan 1), a patent box regime incentivising the companies by way of taxing the income derived from exploitation of patents in India at a concessional tax rate of 10 percent (Action plan 5) and also prescribed a reporting regime in respect of country by country reporting and a master file in line with the Action Plan 13.

However, at the time of publication of this guide, the Finance Bill, 2016 has not yet been passed by the Indian Parliament, and accordingly, the proposals thereof are yet to be made part of the statute. It is possible that till the time the requisite formalities for the enactment of the Finance Bill, 2016 are completed, some of the proposals mentioned therein could undergo modifications.

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

**Asset acquisitions**

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. Under the said mode of acquisition, 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 asset acquisition. The assets acquired are recorded in the books of account at the amount actually paid for the particular asset.

An asset acquisition may also be subject to Value added tax (VAT). 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 asset or goods. However subject to conditions, the VAT paid by the buyer may be offset against the buyer’s future output VAT liability.

A transfer of movable and immovable assets is also subject to stamp duty. A 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 assure 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 business itself, including its various components, such as the assets, liabilities, employees, licenses and existing contacts. The consideration for the transfer may be discharged by way of a payment in cash or shares. As it involves a transfer of the business as a whole without allocating value to the individual assets, the lump sum consideration would need to be split by the buyer among the various assets acquired for which a valuation of such assets would need to be undertaken.

This opens up some planning opportunities for the buyer in terms of ensuring that the depreciable base is of the asset is recorded in a tax-efficient manner.
Further, in a slump sale, the 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.

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 can take between six and eight months, depending on the number of states involved and status of the company, i.e. 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 appearing in 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.

Typically, no VAT arises in the case of a demerger.

Where the state law has a specific provision on the levy of stamp duty in the 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 market value of the shares issued under the scheme of arrangement or as a percentage of the market value of immovable property, whichever is higher. 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 had been proposed but had not yet been passed by parliament at the time of publication of this guide.

Where the demerger involves two states (i.e., the assets of the business division are located in two 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 brought forward business losses of the target company will not be allowed to be carried forward. (See “available losses after an acquisition” below.)

Gains arising on the sale of shares of an Indian company are normally liable to tax in India as either short term or long term capital asset (if held for more than 36 months, except in case of shares in a listed company, if held for more than 12 months shall be considered as a long term asset), unless specifically exempt or sheltered under a tax treaty. Stock acquisitions could also result in withholding tax obligations for the buyer. Indirect stock acquisitions are also liable to tax in India unless specifically exempt.

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 interest 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 Investments in India, the Foreign Company must adhere to the applicable limits. Further, Investment in certain selected industries require 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.

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 Indian tax law, in share acquisitions, the value of tangible and intangible assets continues to be recorded at the same values as prior to the transfer of shares. 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.

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

   Under Indian tax law depreciation is allowed on intangible assets such as know-how, patents, copyrights, trademarks, licenses, franchisees 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 under the Indian tax law.

   While recent rulings have supported claiming of the amortisation of goodwill, revenue authorities at the lower level could still litigate the same basis facts of the specific case. Through appropriate purchase price allocation exercises, the goodwill can also be split among the several business or commercial rights comprised. Subject to facts, depreciation can be claimed on some of these rights.

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

   Under Indian tax laws, there are no direct thin capitalisation rules, and deductions for interest on borrowings are allowed in the year in which the interest is paid or accrued. However, the interest paid or accrued on capital borrowed for the acquisition of an asset for the extension of 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 cost of acquisition 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 two 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 compiled with. For further details, see the following section.

7. **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 two 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 which 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 the following:

- 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 raised under automatic route 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 Indian company) and direct equity holders with more than 51% equity stake are also permitted, subject to certain monetary limits.
- Foreign debt may be raised totaling up to US$500 million (up to $750 million for companies in infrastructure and manufacturing sectors) during a financial year, subject to prescribed restrictions.
- Under the existing regulations, foreign debt is normally allowed for capital expenditure only and for making an investment outside India. Foreign debt can be used to meet working capital needs provided it is raised from the direct or indirect equity holder. However, it is specifically prohibited from being used for investment in the capital market or acquisition of a company (or part of a company) in India, for investment in real estate or for on-lending to other entities for any of the previous mentioned purposes.
- 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, expenses, charges, guarantee fees whether paid in foreign currency or Indian Rupees but will not include commitment fees, pre-payment fees / charges, withholding tax payable in Indian Rupees.
- The current all-in-cost ceiling varies between 300 and 500 basis points over the six-month LIBOR, depending upon the tenure of the loan. 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 two companies (i.e. the company which has taken the loan and the target company) or by passing on the debt to the target company. For a merger of the two companies, approval must be obtained from the jurisdictional high court by filing a scheme of arrangement. The entire merger process typically takes between six and eight months, depending on the states involved and the status of the company, i.e., whether the company is listed or a closely held company. Alternatively, the company taking the debt may pass on the debt to the target company, subject to the satisfaction of conditions prescribed under corporate law.

8. Are losses of the target company (ies) available after an acquisition is made?

Indian tax law allows business losses to be carried forward and set off within the eight years immediately following the tax year for which the loss was first computed. There is no limitation on carry forward and setting off unabsorbed depreciation.

Certain restrictions have been imposed on carrying forward business losses where the target company is a closely held company. In such a case, the carry forward and set-off 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 set-off. 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 shareholders of the foreign amalgamating company remain as the shareholders of the resulting company.
The above restrictions on the carry-forward and set-off of business losses do not apply to unabsorbed depreciation, which may continue to be carried forward and set-off without any restrictions. However, in the case of an amalgamation of a specific company or demerger, the accumulated losses and unabsorbed depreciation or amortisation of the amalgamating company or the business division being demerged are deemed to be the accumulated losses and unabsorbed depreciation or amortisation of the amalgamated or resulting company, as the case may be, for the tax year in which the amalgamation or demerger was effected, subject to the satisfaction of conditions prescribed under Indian tax law.

9. 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.

10. Are there any restrictions on the deductibility of acquisition costs?
India tax law provides for deductibility of the acquisition costs at the time of subsequent sale of the said asset. However, where the asset acquired is used for the purpose of business or profession of the acquirer, the said acquisition cost would be deductible as depreciation over the life of the said asset. Further, there is no specific provision for deduction of consultancy/advisory/legal fee paid for acquisitions. Any expenditure incurred wholly or exclusively for the purpose of the business or trade is allowed as a deduction under the Indian tax laws. Therefore, the tax deductibility of such expenditure depends on the facts and circumstances of the specific case. If the acquirer is able to establish business nexus then the acquisition costs could be claimed as deduction for tax purpose. The revenue authorities could however litigate the facts of the specific case.

11. Can VAT (if applicable) be recovered on acquisition costs?
VAT/CST is applicable on sale of goods. There would be no VAT/CST implications where the business is acquired as a whole, on a going concern basis with all assets and liabilities. However if the business is not acquired as a going concern, then the seller may charge applicable VAT on the assets transferred, input credit of which could be available to the buyer. Further no VAT is applicable to consultancy/advisory/legal fee paid for acquisitions. However such services would be subject to a service tax levy at the applicable taxes.

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)
Regulatory considerations
Foreign investments in India are governed by the exchange control regulations, namely the Foreign Exchange Management Act, 1999 (FEMA). Acquisition of shares in an Indian target company should comply with the Foreign Direct Investment (FDI) policy. The FDI Policy in India today is fairly liberalised allowing investments into most sectors under the automatic route i.e. without Government approval. There are certain sectors where investments are permitted up to prescribed sectorial caps and few prohibited sectors such as agriculture, plantation, real estate trading etc. Further, till recently, any foreign investment into a holding company required an approval form the Foreign Investment Promotion Board (FIPB). Now foreign investment into holding companies is permitted without any approval for sectors under the automatic route. However, FIPB approval is required if such Indian target engages in any activity under the government route. Additionally, in case of listed target companies, Takeover Code regulations under the Indian securities law, namely Substantial Acquisition of Shares and Takeovers (SEBI) Regulations, 2011 will need to be complied.
Tax Considerations
Setting up an optimal structure for investments in India requires taking into account the relevant tax treaty network and provisions under the Indian domestic law. Planning an efficient holding structure assumes significance in view of the fact that India levies an effective dividend distribution tax of 20.35% on distribution of profits from an Indian company/ target to the shareholder (foreign parent). Secondly, gains arising on the transfer of an Indian company shares by a foreign company held directly or indirectly i.e. qualifying under the indirect transfer rules, is subject to tax in India (except for listed company shares held for more than 12 months).

India’s network of tax treaties plays a crucial role in tax structuring of cross border investments into India. Even though most treaties follow source, country taxation for interests, dividends and capital gains from alienation of shares, specific provisions in some tax treaties offer planning opportunities for structuring investments and acquisitions in India. Certain holding jurisdictions which have a favorable tax regime and beneficial tax treaty with India whereby India has foregone its taxing right on capital gains arising to a resident of these countries on alienation of shares, can help structure exits in a tax neutral way. However, the use of these favorable treaties to structure investments and divestments has been a matter of debate with tax authorities if the structure is not backed by commercial substance. Most of India’s new treaties or negotiated treaties include a LoB clause to prevent abuse of the capital gains benefit under the said treaty. With the recent developments relating to introduction of GAAR and increased scrutiny, selection of an appropriate tax structure is critical while planning acquisitions in India.

13. Can the group reorganise after the acquisition in a tax neutral environment through mergers or a tax group?
A group may reorganise in a tax neutral manner after an acquisition by way of (a) a merger of the group companies into a single company; (b) a demerger of non-core businesses of the group into a separate company to attain value for shareholders; (c) a capital reduction whereby a company can cancel its capital for consideration or against accumulated losses, or (d) 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 laid under Indian tax law must be satisfied.

14. Is there any particular issue to consider in case of companies of which 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. The transfer of real estate assets directly, however, is subject to capital gain tax computed in the manner specified in the Indian tax laws. Similarly, the transfer of real estate directly 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.

Sell-side:
15. How are capital gains taxed in your country? Is there any participation exemption regime available?
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 any listed security or equity oriented mutual fund unit or zero coupon bond, 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. 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 in indices issued by the Indian government. Long-term capital gains are calculated as the sale consideration 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 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.

16. 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 six months from the date of transfer. However investment in the specified securities may be made up to INR 5 million. Furthermore the investments need to be locked in for the prescribed period (typically three years) to claim the exemption. If the investments are transferred or otherwise converted into cash they are taxable in the year in which conversion takes place.

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

Till recently, any foreign investment into a holding company required an approval of FIPB. Under the extant exchange control regulations, foreign investment into holding companies is permitted without any approval for sectors under the automatic route. However, FIPB approval is required if such Indian investee company engages in any activity under the Government Route. Foreign investment into finance companies is permitted up to applicable limits, subject to conditions including minimum capitalisation and prior approval of the FIPB in specified sectors.

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General

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

   In 2008, the Minister of Finance issued regulation regarding the use of book value for transfer of assets in the context of mergers, consolidations or expansions, which enables companies to conduct a merger using book value (tax neutral merger).

   The following conditions shall be applied to two or more companies that conduct a tax neutral merger:
   - There is no capital gain incurred from transfer of assets in the context of tax neutral merger.
   - Land and/or building value which is transferred by the dissolving entity to the surviving entity is subject to Article 4 paragraph (2) final income tax at the rate of 5% of the transaction price or Tax Object Sales Value (NJOP), whichever is higher.

   Meanwhile, the surviving entity should pay 5% Duty on the Acquisition of Land and/or Building Right (BPHTB) from the transaction price or tax object sales value (NJOP), whichever is higher after being deducted with non-taxable value of tax object acquisition/NPOPTKP (maximum of IDR 60 million). The surviving entity may request 50% reduction on this duty to the regional government. This reduction could be applied if the company has received a decision from tax authority to conduct a tax neutral merger.
   - No VAT is imposed due to the transfer of assets provided that both the dissolving and the surviving entities are registered as taxable entrepreneurs.

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?**

   Based on the prevailing Indonesian tax regulation, tax treaty abuse may occur in the following events:
   - Transaction without economic substance conducted using a structure/scheme in such a way with the sole intention to benefit from tax treaty
   - Transaction with a structure/scheme in which the legal form is different from the economic substance in such a way with the sole purpose to benefit from tax treaty
   - Income recipient is not the actual beneficial owner

   Furthermore, beneficial owner (either individual or entity) mentioned above shall be income recipient who acts not as an agent, nominee, and conduit company.

   In the event that the foreign taxpayer does not abuse the tax treaty, they will be entitled to obtain benefit from the tax treaty.

   The criteria to apply for tax treaty benefits are:
   - The income recipient is not an Indonesian tax resident
   - The administrative requirements to apply the tax treaty provisions have been fulfilled
   - There is no tax treaty abuse done by the foreign tax resident as intended in the provisions on the prevention of tax treaty abuse
The foreign taxpayer has to provide a certificate of domicile of non-resident for Indonesian withholding tax, named Form-DGT 1 (both page 1 and page 2) or Form-DGT 2 (for financial institution). The form is used by the Indonesian Tax Office to confirm that the recipient is the beneficial owner and the transaction does not aim to exploit the tax treaty. Form-DGT 1 (page 1) is only valid for a period of one year from the date of issuance and must be renewed annually. The Certificate of Domicile must be submitted by the deadline of Periodic Tax Returns for the period when the withholding tax is payable.

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

In Indonesia, the main differences among acquisitions made through a share deal versus an asset deal are as follows:

**Share deal**

- Capital gain received by entity in a share deal is subject to corporate income tax of 25%, while capital gain received by individual is subject to individual income tax in the range of 5% until 30%
- Since shares are categorised as non-taxable goods, there is no VAT applicable in share deal

**Asset deal**

**Moveable Assets**

- Capital gain received by entity in an asset deal is subject to corporate income tax of 25%, while capital gain received by individual is subject to an individual income tax in the range of 5% until 30%
- Generally, 10% VAT is imposed on transfer of moveable assets. However, this condition does not apply to:
  a. transfer of non-taxable assets (i.e., mining products, public essential commodities, foods and beverages, gold and commercial paper.)
  b. transfer of assets that have no relation with the company business

**Immovable Assets (land and/or building)**

- For the seller, transfer of immovable assets is subject to final income tax of 5% of market value or Tax Object Sales Value (NJOP) of the assets, whichever is higher (applicable to individual and corporate)
- For the buyer, acquisition of immovable assets is subject to 5% Duty on Acquisition of Land and Building Right (BPHTB) from the transaction price or Tax Object Sales Value (NJOP), whichever is higher after being deducted with the Non-Taxable Value of Tax Object Acquisition/NPOPTKP (maximum of IDR 60 million)
- Generally, 10% VAT is imposed on transfer of immovable assets. However, this condition does not apply to immovable assets that have no relation with the company business.

**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?**

In principle, there are no special provisions in Indonesian income tax law to step up the value of the tangible and intangible assets in case of share deals.

In 2015, the Minister of Finance issued a regulation regarding tax incentive on fixed asset revaluation. Tax incentive reduces the previous final tax rate of 10% to lower final tax rate. Below is the summary of special tax rate applied to asset revaluation:

- 3% for applications submitted starting from 20 October 2015 up to 31 December 2015
- 4% for applications submitted starting from 1 January 2016 up to 30 June 2016
- 6% for applications submitted starting from 1 July 2016 up to 31 December 2016
Asset revaluation is usually utilised by companies that need financing, so that the respective companies will have “more” assets to be used as collateral for bank loan. This is also a strategy to step up the value of tangible assets. Furthermore, capitalisation of surplus of asset revaluation to paid-up capital is not subject to tax. However, this is in contrast to Indonesian Accounting Standard, which regulates that surplus of assets revaluation could not be capitalised at once.

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

Amortisation of goodwill, which has useful life exceeding one year, may be treated as expenses proportionally during 4 years, 8 years, 16 years, or 20 years using the straight line or double declining balance method.

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

There are limitations to the deductibility of interest on borrowings. In 2015, the Minister of Finance issued regulation No. 169/PMK.010/2015 regarding Thin Capitalisation.

The debt-to-equity ratio should not exceed 4:1. The total balance of debts should cover the balance of long-term debts and/or balance of short-term debts, including balance of trade payable which is charged with interest. Meanwhile, the total balance of equity should cover equity as intended in the applicable finance accounting standard and non-interest bearing loan of related parties.

In the event that a taxpayer’s debt to equity ratio exceeds 4:1, the interest expense that can be deducted in calculating taxable income should amount to the interest expense in accordance with debt to the equity ratio of 4:1.

Please note that in the event that a taxpayer has zero balance of equity or less than zero, the related taxpayer’s entire interest expense cannot be deducted in calculating the taxable income.

Excluded from the provisions on the debt to equity ratio are banks, financing institutions, insurance and reinsurance taxpayers, and taxpayers who carry business in mining and infrastructure fields.

Furthermore, interest on loan used for shares investment with ownership of no less than 25% could not be treated as deductible expense since the dividend received by the investor is a non-taxable income.

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

There are no usual strategies to push-down the debt on acquisitions. However, there should be a consideration to complex tax issues such as transfer pricing, VAT, capital gains and interest deductibility prior to the implementation.

8. **Are losses of the target company(ies) available after an acquisition is made?**

The losses of the target company are available for 5-year carry-forward compensation. The tax authority might make an adjustment on the fiscal losses based on the tax audit process.

However, in context of tax neutral merger, the losses of the target company are not available after the effective date of merger.

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

Securities or documents with any name or in any form whatsoever (including shares) which have nominal value of up to IDR 250,000.00 (two hundred fifty thousand Rupiah) shall not be subject to Stamp Duty. If the value is above IDR 250,000.00 (two hundred fifty thousand Rupiah) and up to IDR 1,000,000.00 (one million Rupiah), the securities or documents shall be subject to Stamp Duty at the tariff of IDR 3,000.00 (three thousand Rupiah), while those having nominal value of more than IDR 1,000,000.00 (one million Rupiah) shall be subject to Stamp Duty at the tariff of IDR 6,000.00 (six thousand Rupiah).

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

Acquisition costs shall be the value of shares or asset and additional costs related to acquisition, such as advisory
fees from the corporate finance advisor and/or legal fees.

The value of shares or asset shall be recorded as an asset.

There are no specific tax regulations that set forth the tax treatment for additional costs related to shares or asset acquisition. Therefore, it should comply with the treatment of the prevailing Indonesian Financial Accounting Standard (PSAK).

 Acquisition of Shares

In case of a share deal, there are no restrictions on the deductibility of additional costs. The additional costs shall be treated as expense in the year of shares acquisition (PSAK 22).

 Acquisition of Assets

The additional costs for asset acquisition which have useful life exceeding 1 year shall be capitalised and depreciated over the useful life (PSAK 16). The depreciation could be treated as expenses proportionally during 4 years, 8 years, 16 years, or 20 years using the straight line or double declining balance method.

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

Generally, VAT input from assets acquisition could be compensated with VAT output in the following fiscal period or be claimed as tax refund at the end of fiscal year. There is no VAT input for shares acquisition.

However, VAT input for assets categorised as non-capital goods acquired by a company that has not yet delivered taxable goods or services could not be compensated with VAT output in the following fiscal period or be claimed as tax refund at the end of fiscal year.

The VAT input from the additional costs related to the shares or asset acquisition could be compensated with VAT output in the following fiscal period or be claimed as tax refund at the end of fiscal year.

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)

 Asset Deals

Foreign companies are not allowed to directly acquire land and/or building in Indonesia.

 Share Deals

Indonesian prevailing law regulates the percentage of foreign ownership limitation for different types of business in certain sectors.

In general, all types of business are open to foreign investment except certain closed type of business and limitation of maximum ownership in several types of industries.

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

Yes, the group can reorganise after the acquisition in a tax neutral environment through mergers.

To apply for a tax neutral merger, certain conditions must be satisfied. The conditions are the following:

 Submitting application using book value for merger to the Director General of Taxes, along with the argumentation and purpose of the merger

 Paying all tax payable from every related entity

 Satisfying the requirements of business purpose test
14. Is there any particular issue to consider in case of companies of which main assets are real estate?

VAT input for a company that purchases real estate as its inventory could not be credited in case that the company has not yet sold or delivered the taxable goods or services to other party.

Sell-side

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

Capital gain must be combined with the company’s revenue from its main business after being deducted with the deductible expense. The net profit is subject to 25% corporate income tax. Furthermore, for an individual, capital gain after being combined with their income should be subject to individual income tax in the range of 5% until 30%.

There is no participation exemption regime available in Indonesia.

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

There is no fiscal advantage if the proceeds from the sale are reinvested.

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

Indonesian prevailing law regulates the limitation of foreign ownership for finance companies. Meanwhile, the limitation of foreign ownership of a holding company in Indonesia depends on the type of industries of the operating companies under the holding company.

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General

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

A reduced rate of Capital Gains Tax (CGT) of 20% (as opposed to 33%) has been introduced for entrepreneurs and the self-employed with effect from 1 January 2016. The reduced CGT rate will apply to the disposal in whole or in part of a trade or business up to a maximum lifetime limit of €1 million of net chargeable gains. The relief will be available to the individual owners of a trade or business on the disposal of all or part of that trade or business. The individual must have owned the chargeable business assets for the last three years. Relief will apply to the disposal of shares in a private company provided the individual owned at least 15% of the shares in the company (or 15% of the shares in a holding company which holds 100% of the shares) and was a full time working director for at least three years before the sale. Relief will not apply to disposals of chargeable business assets by companies or to disposals of development land or a business consisting of dealing in or developing land, letting of land or buildings or holding investments.

Certain anti-avoidance measures were introduced in Finance Act 2015. Of particular relevance to M&A deals is a provision to counteract schemes which are designed to avoid a CGT charge on the sale of Irish shares by non-residents. Such schemes involved transferring cash to the company prior to the sale to ensure that the shares derived their value from cash rather than Irish land or buildings, and were therefore outside the scope of Irish CGT.

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?**

In general, Ireland’s tax legislation already covers many of the areas which the BEPS project has focused on e.g. anti-avoidance and mandatory disclosure. In addition, recently Ireland has introduced a number of measures with a strong focus on BEPS compliance, including Country-by-Country reporting. Ireland has signed up to the Multilateral Competent Authority Agreement for the automatic exchange of Country-by-Country reports. The Irish law implementing the EU Parent Subsidiary Directive was amended in Finance Act 2015 to introduce broader anti-avoidance measures. These changes ensure that the reliefs provided for under the PSD will not apply where arrangements are in place which are not genuine, and where the main purpose, or one of the main purposes of such arrangements is to obtain a tax advantage which defeats the objective of the PSD.

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

   a. Share deal
   b. Asset deal

**Buyer’s Perspective**

**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, the stamp duty rate in Ireland is 2% of the consideration paid or of the market value if higher. There is an exemption on the sale or transfer of certain intellectual property such as patents and trademarks. Where assets are capable of being transferred by delivery and are transferred by delivery, then no stamp duty applies.
VAT
The purchase of shares is a VAT-exempt activity. Therefore, a company which incurs costs in relation to the acquisition of shares in a newly acquired entity is not generally entitled to recover the VAT on such costs.

However, there are specific circumstances where the Irish Revenue Commissioners (“Revenue”) accepts that a company which has acquired shares can recover a portion of the VAT incurred on such costs. See section 11 below for further detail.

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 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.

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 which 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 the stamp duty is less on a share sale than on an asset sale, this may also be taken into account in the pricing.

Seller’s Perspective

Double taxation
The sale of assets in a company will typically result in two 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. CGT 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 CGT or corporation tax in the hands of the selling shareholder. In addition, in certain circumstances where a company disposes of shares it will be exempt from CGT under the participation exemption regime (see section 15 below).

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 8 below). However, in an asset sale, it is not possible to purchase losses.

VAT recoverability
Generally, the transfer of assets is subject to VAT. However, depending on the VAT status of the seller and purchaser, 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 transfer of shares is VAT-exempt under Irish VAT legislation. Therefore, where costs (e.g., 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 generally irrecoverable under Irish legislation (apart from transactions involving non-EU clients (i.e., qualifying activities).

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.
Exiting a group

If a company leaves a group as a result of a sale of shares, a CGT 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 the dividends paid to a company is more than would reasonably be expected to be made if there were no disposal of the shares.

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?

In share deals in Ireland, no step-up in value of any assets of the target company is possible.

5. 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 which is directly attributable to these intangible assets.

The definition of an ‘intangible asset’ which qualifies for this relief is very wide and includes patents, trademarks, brand names, domain names, any copyright, computer software, know-how generally related to manufacturing or processing and customer lists (except where such customer lists have been provided directly or indirectly in connection with the transfer of a business as a going concern).

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 the 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. Certain claw back provisions may apply if the asset is disposed of within 5 years of acquisition.

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

In considering whether any limitations apply to the deductibility of interest on borrowing, 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)
Subject to certain conditions, interest relief may be 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. 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.

Subject to a number of conditions being met, interest relief is available and can be treated as a ‘charge’. This means that it can be off-set against the company's total profits or, in the case of an individual, against the income for the year of assessment in which the interest is paid. The charge can also be used against profits in other group companies subject to certain conditions. It should be noted that this is a complex area which is subject to a number of detailed anti-avoidance provisions.

7. 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 (i.e. a 75% group). The interest surrendered can be off-set against the other company's total profits, minimising its tax.

8. 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, in general a trading loss in an accounting period may be carried forward indefinitely for off-set against the trading income from the same trade in succeeding accounting periods.

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, or
- At any time after the scale of the 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:

- A major change in the type of property dealt in, or services or facilities provided, in the trade, or
- A major change in customers, outlets or markets of the trade.

9. 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 of the 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.

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

If acquisition costs are capitalised they will form part of the base cost of the asset for CGT purposes and as such will not be deductible as a trading expense. Such acquisition costs should be deductible on a future sale of the property.
11. Can VAT (if applicable) be recovered on acquisition costs?

The purchase of shares is a VAT-exempt activity. Therefore, a company which incurs costs in relation to the acquisition of shares in a newly acquired entity is generally not entitled to recover the VAT on such costs.

However, there are specific circumstances where revenue accepts that a company which 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. Revenue reviews each transaction on a case-by-case basis. Therefore each transaction should be reviewed individually to determine whether the purchaser of the shares is entitled to an element of VAT recovery on the costs incurred.

Generally, the transfer of assets is subject to VAT. However, depending on the VAT status of the seller and purchaser, 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. Certain conditions need to be met in order for the exemption to apply.

Particular care should be taken to analyse the detailed rules which apply to immovable property.

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)

A company that is non-resident in Ireland is generally only liable to Irish CGT on the disposal of ‘specified assets’, including land and buildings in Ireland and the shares of an Irish company which derives its value, or the greater part of its value, from Irish land or buildings.

A foreign company should be aware that when acquiring shares in an Irish company which derives its value, or the greater part of its value, from Irish land or buildings, the purchaser is obliged to withhold 15% of the consideration and remit same to Revenue unless the vendor provides a Form CG50 (CGT Clearance Certificate) (see point 14 below for further detail). This will be relevant on a future sale of the shares in any such Irish company as revenue will only issue a Form CG50 to a non-resident where the non-resident has:

- Satisfied revenue that they have no CGT liability; or
- Satisfied revenue as to the amount of the CGT liability and that the tax will be paid by the non-resident.

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

The Companies Act 2014, which commenced on 1 June 2015 introduces a statutory framework for mergers and divisions between private companies in a purely national context for the first time under Irish law. Previously, mergers between private companies could only be implemented if there was a cross-border element to the transaction and by obtaining court approval. The Act allows for a merger of private domestic companies, without the need for court approval.

Subject to certain conditions it should be possible for a group to reorganise in a tax neutral manner. Relief is available from corporation tax, CGT and stamp duty on intra-group transfers. It should be noted that the definition of a “group company” or “associated company” differs for CGT, corporation tax and stamp duty. Any such reliefs may be clawed back if the group relationship is broken within particular time limits.

Entities established in Ireland that are 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.
14. Is there any particular issue to consider in case of companies of which 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 Revenue tax which amounts to 15% of the consideration unless the vendor provides a Form CG50 (CGT Clearance Certificate). A CG50 is also required when the consideration for the shares exceeds €500,000, the shares were acquired following 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 Revenue 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 use of the property over the period. An annual review will establish if there are any adjustments to be made. There are also record-keeping requirements over the life of the capital good.

**Close company**

A close company is a company which is 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 such income has not been distributed by the close company within 18 months of the end of the accounting period.

**Sell-side**

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

**CGT for residents**

The current rate of Irish CGT is 33%. Individuals who are resident or ordinarily resident and domiciled in Ireland are liable to Irish CGT on their worldwide gains. The charge to CGT 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 CGT, but the tax falls under corporation tax liability. As a general rule, companies incorporated in Ireland are resident in Ireland. However, 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 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.

**CGT for non-residents**

A company that is non-resident or an individual who is neither resident nor ordinarily resident is liable to Irish CGT on the disposal of ‘specified assets’, including land and buildings in Ireland and the shares of an Irish company which derives its value, or the greater part of its value, from Irish land or buildings.

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 the disposal of foreign assets to the extent that the gains are remitted into Ireland.

An individual who is temporarily non-resident in Ireland may, under Irish anti-avoidance legislation, be liable to Irish tax on any chargeable gain realised on a disposal during the period in which such individual is non-resident.
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 CGT 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 treaty.

✶ The company that disposes of the shares must, either directly or indirectly:
  ✶ hold at 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, and
  ✶ 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 than 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 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.

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

Generally, there is no rollover relief available in Ireland.

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

There are no requirements for holding or finance companies to have a certain level of substance. However, where a company has no substance in Ireland this will impact on the company’s VAT recoverability and the corporate tax rate which will apply. It would be necessary to consider whether any foreign tax implications would arise in such circumstances and whether benefits under the relevant tax treaty would be available.

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Italy
1. Recent tax developments which are relevant for M&A deals

Italy's corporate income tax rate (Imposta sul Reddito delle Società – IRES) is currently 27.5% but a new law states that the rate will be reduced to 24% for fiscal periods starting from 1 January 2017 onwards (with a 3.5% surcharge for banks and financial institutions, which will therefore maintain an aggregate 27.5% rate).

Italy applies also a regional income tax (Imposta Regionale sulle Attività Produttive — IRAP) which is applied on a taxable income specifically determined (the cost of labour is, from 2015, fully deductible from such a tax base). The rate applicable is 3.9%, which is raised to 4.65% for banks and financial institutions and 5.9% for insurance companies (further limited surcharges may be applied by each region).

Recent tax law amendments:

- the introduction of a patent box regime in line with OECD approach
- an exemption regime for foreign branches of Italian companies
- the full implementation of the OECD principles for the determination of the income of an Italian branch of a foreign company (distinct and separate approach based upon risks, functions and assets)
- the introduction of new types of rulings, including a special ruling for companies with considerable large investments to be realised in Italy (over EUR 30 million)
- a revision of the CFC legislation

Moreover, on 30 March 2016 the Italian tax administration issued a Circular which analysed various tax issues related to leverage buy-outs and private equity deals (including the tax deduction of interests on buy-outs and management fees charged by the private equity firms, the potential re-qualification of shareholder loans and the use of “conduit” companies or transactions).

2. General approach regarding the implementation of OECD BEPS actions and amendments to the EU Parent-Subsidiary Directive

Italian tax authorities are monitoring the BEPS Action Plan and some specific recommendations have already been introduced into Italian laws, like e.g.:

- obligation of the country-by-country reporting for Italian multinationals (over EUR 750 million turnover) and Italian subsidiaries if the controlling company is not subject to the same rule in its country or there is not a treaty allowing such exchange of information
- income paid by foreign companies may be taxable as “dividend” (i.e. substantially exempt) if it can be demonstrated that the same payment has not been deducted from the taxable income of the foreign company (rule against hybrid mismatches)
- a new anti-abuse rule, which unifies the previous anti-avoidance tax law and the jurisprudential concept of the abuse of law, was introduced in August 2015 and is applicable to transactions occurred after 1 October 2015 (and also prior to that date if the assessment is notified after that date). The new rule technically defines the concept of “abuse of law” according to the rules on aggressive planning and is in line also with the concepts described in the EU Parent –Subsidiary Directive
3. Main differences among acquisitions made through a share deal versus an asset deal

The main tax differences between an asset deal and a share deal may be summarised as follows:

- In an asset deal the capital gain (loss) realised by the selling company is taxable (deductible) for corporate tax purposes at IRES ordinary rates (in case of assets owned by more than three years, the gain may be deferred over maximum 5 tax periods) and is not subject to IRAP if the asset deal regards a going concern. In a share deal the capital gain (loss) realised by the selling company may benefit at certain conditions of the participation exemption regime (i.e. 95% exemption of the gain and full non deductibility of the loss).

- In an asset deal the buyer acquires tax relevant values, i.e. it implies a step-up also for tax purposes in the depreciable basis of assets transferred corresponding to the purchase price paid allocated to each asset. In a share deal, in principle there is no step up of the assets value unless certain extraordinary transactions are realised and/or a specific option is exercised which imply the payment of a substitute tax.

- In an asset deal the tax attributes (tax losses or interest not yet deducted carried forward) remain with the selling company and are not transferred to the buyer. In a share deal the said tax attributes carried forward stay with the company acquired, even if they are subject to certain limitation rules aimed to avoid the “trade of tax losses”.

- In an asset deal all the contingent tax liabilities remain in the company whose shares are sold for the statute of limitation period, i.e. 31.12 of the fifth year following the filing of the tax return for 2016 onwards (for tax periods until 2015 the reference is to the fourth year subject to a potential extension to eighth year in case of criminal proceedings) and therefore the buyer should in principle seek for guaranties of the tax risks.

- In an asset deal the contingent tax liabilities relating to the assets or the going concern transferred remain as a general rule with the transferring company. However, pursuant to Article 14 of Decree no. 472/1997, the buyer of a going concern is jointly and severally liable with the seller for the most recent tax liabilities and anyway for an amount not exceeding the value of the assets. A tax certificate stating the amount of tax liabilities attached to the going concern can be asked to the tax authorities and the buyer’s liabilities are limited to those resulting from it. The said liability rules do not apply if the asset deals occurs in a pre-bankruptcy regulated procedure.

- The share deal is not subject to indirect taxes, except in case the shares sold regards an Italian joint stock company (“società per azioni”) when a 0.2% tax (Tobin tax) has to be applied.

- In an asset deal realised through the transfer of a going concern, transfer taxes are paid usually by the buyer, even if both parties are jointly and severally liable for the payment of registration tax (which is generally applied at a 3% rate, except for real estate assets mainly subject to 9%).

Buy-side

4. Strategies to step up the value of tangible and intangible assets in case of share deals

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. Such accounting step up is not relevant for tax purposes unless the company exercises on of the following options regarding, in full or in part, one or more assets:

- according to the ordinary tax law applicable to mergers and other extraordinary “tax neutral” transactions (like contribution of business or demergers) the absorbing company is entitled to step up the tax value (for corporate income tax and IRAP purposes) of the fixed assets tangible and intangible received by paying a substitute tax at the rate of 12% on the portion of the step-up in value up to EUR 5 million, 14% on the portion of the step-up from EUR 5 million to EUR 10 million, and 16% on the portion of the step-up in value exceeding €10 million. The option for the step-up can be elected in the tax return of the year in which the merger has been done or in that of the following tax year. The step-up tax values are effective starting from the fiscal period in which the
option is exercised, subject to a recapture rule if the assets are disposed within the fourth fiscal period following the one in which the option is exercised (i.e. the capital gain/loss is computed on the basis of the pre-step up tax values and the substitute tax paid is deducted from the ordinary income tax due).

According to special provisions, the absorbing company is entitled to step up the tax value only of intangible assets (goodwill, trademarks and other intangible assets) by paying a substitute tax at the rate of 16% and obtaining a shorter depreciation period for goodwill and trademarks (see the following Section 4. for the consequences in terms of depreciation). This option for the step-up can be elected only in the tax return of the year in which the merger has been done and the tax step up is effective starting from the fiscal period following the one in which the option is exercised, subject to the same recapture rule described under the first point).

Moreover, a Decree 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%.

Finally please note that the above step up tax effects described under b) above may be reached even without any merger with the target. In fact, if the Italian acquiring company includes the target in its consolidated accounts, attributing in such accounts the price paid also to intangibles assets, it may optionally decide to pay a 16% substitute tax and get a tax deduction based upon a fictitious depreciation of such intangible assets to be computed on shorter periods than usual (see the following Section 4. for the consequences in terms of depreciation). Also in this case the recapture rule above described is applied if the shares or the intangibles are disposed within the fourth fiscal period following the one in which the option is exercised.

5. Depreciation of goodwill

In an asset deal where a business as a going concern has been acquired and a price for goodwill has been paid, such goodwill can be recorded in the balance sheet and amortised for accounting purposes over its useful life, as properly motivated in the accompanying notes or, if such life cannot be reliably estimated, within maximum 10 years. For tax purposes, the goodwill must be anyway amortised in not less than 18 financial years.

In cases where the goodwill has been subject to the optional regimes and the taxpayer voluntarily pays the 16% substitute tax, the tax depreciation of the goodwill can be reduced to not less than five fiscal periods, irrespective of its accounting depreciation. Such tax depreciation is valid both for corporate income tax and for regional income tax purposes.

Please note also that trademarks are treated exactly as the goodwill (i.e. ordinary 18 years tax depreciation or accelerated five years tax depreciation in case one of the art. 15/185 regimes is applied).

6. Limitations to the deductibility of interest on borrowings

According to the Italian tax code net interest expenses (i.e., 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. From 2016 onwards also dividends received from foreign controlled companies are included in the above EBITDA computation.

Interest expenses exceeding the 30% EBITDA threshold are not deductible in the relevant fiscal year and are carried forward in the following fiscal years (without any time limit) and may be deducted in a subsequent tax period if and to the extent the 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 in the future exceeding interest.

Excessive interest can be offset within a domestic fiscal unit in computing the total income within the group if (and to the extent) other companies within the group have their own 30% EBITDA exceeding their own interest expenses.

In a merger or a demerger, excess interest carried forward is subject to the same limitations imposed for the carrying-forward of tax losses (i.e., the net equity test and vitality test mentioned in Section 8.).

The above is applicable only for corporate income tax (IRES) while for regional income tax (IRAP) interests are fully non-deductible (except for companies of the financial sector).
The above regime is not applicable to companies operating in banking, finance, insurance and other particular industries listed by the law, for which only 96% of interest expenses accrued is tax-deductible both for corporate income tax (IRES) and regional income tax (IRAP). However, starting from 2017 for banks and financial entities interests will become fully deductible for both income taxes (IRES and IRAP).

Interests paid to foreign companies of the same group would be then subject to the transfer pricing rules as regards the application of an arm’s length interest rate or, in special circumstances, the re-qualification of a loan into equity according to OECD Guidelines.

7. Strategies to push down debt on acquisitions

Commonly, an acquisition of shares in an Italian target company is made through a leveraged buyout and through the merger of the acquiring company and the target 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 deduction of interests or transactions costs in a leveraged buy-out has been challenged by the tax authorities by considering them abusive tax schemes or by denying the inherence of the acquisition costs/interests of the acquisition debts. Although a consistent position is not yet formed, the jurisprudence has generally denied the validity of the tax assessments.

In a Circular, the tax administration has partially reverted its position and has recognised the general tax validity of the leverage buy-outs and the deduction of related interests, unless in purely artificial structures.

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 and to the “abuse of law” discipline.

8. Available losses after an acquisition

Such issue may regard only share deals since in an asset deal the tax losses always remain with the selling entity.

In principle tax losses can be carried forward without any time limit but can be used to offset the taxable income only within a 80% threshold, e.g.: 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 further carried forward without any time limit. Tax losses suffered in the first three years from the set-up of the company are not subject to the 80% threshold.

Limitations to the carrying forward of tax losses apply to the transfer of shareholdings and to mergers and demergers, as follows:

- no loss carry-forward is allowed 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, and
  - 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 the activity has to occur in the year the shares are transferred or during the previous two or the following 2 years

Nevertheless, even if the above conditions are met, a company can still carry forward losses if, during the two years before the transfer of shares, it did not reduce employees below 10 units and it exceeds in the profit and loss statement of the previous year certain thresholds (“vitality test”).

In a merger (or demerger), tax losses carried forward by companies involved are available for the absorbing company (i.e., the surviving entity) after the merger, on the condition that both the “vitality test” (see above) and the “net equity test” (i.e. 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.
9. Indirect taxes

In a share deal, no stamp duty or registration taxes are due (only fixed non material amounts could be due). However starting from 1 March 2013, a Tobin tax has been introduced in Italy at a 0.20% rate and it is applicable also to the transfers of shares of joint stock companies (“società per azioni”) even if executed outside financial markets.

In an asset deal, transfer taxes are paid usually by the buyer, even if both parties are jointly and severally liable for the payment of registration tax. Indirect taxes depend upon the type of transaction:

- in case a going concern is transferred, a registration tax is applied on the market value of the assets transferred, including goodwill, net of liabilities transferred as reported in the accounting books of the company. The applicable tax rate depends on the nature of assets transferred. Movable property, goodwill, patents and trademarks, inventory, etc., are taxed at the rate of 3%, while real estate assets are taxed mainly at the rate of 9%

- in case of the transfer of an isolated asset (i.e., not a business as a going concern), if the seller is a VAT-taxable person the transactions would be likely subject to VAT or in the opposite case of a non VAT seller (i.e. outside the exercise of a business activity), it should be liable to registration tax (VAT and registration tax are in principle alternative)

In terms of financing acquisitions, any bank loan which lasts for more than 18 months and is granted by an Italian bank could be optionally 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.

10. Restrictions on the tax deductibility of acquisition costs

In an asset deal the transaction costs are normally tax deductible if they are inherent to the business activity of the acquiring company. Advisory fees, banking fees, due diligence fees, legal and tax fees related to the asset deal are in principle considered as expenses to be recorded in the yearly profit and loss or capitalised as pluriannual multi-year costs to be depreciated in the fiscal periods of their estimated useful life (usually 5 years), depending whether such costs are related or not to future business profits.

In case of a share deal, it has to be analysed if the transaction costs above mentioned are in principle related to the acquisition of the participation or to the financing received for the acquisition or are sustained for both purposes. The costs directly related to the participation are usually capitalised as ancillary cost of the participation (and therefore they are not tax deductible) while the costs related to the borrowings are treated as ancillary costs of the financing and are deductible over the duration of the financing.

The said tax treatment does not change if the acquisition is followed by a merger since the costs allocated to the participation would become a not tax relevant merger deficit while the ancillary costs of financing would continue their deductible depreciation.

11. VAT recovery on acquisition costs

In case of a share deal, the treatment of the VAT paid on acquisition costs depends upon the general principles of VAT, i.e. the VAT paid on such service costs must have a direct and immediate link with the output transactions.

According to article 4 of Italian VAT Law, no VAT can be deducted if the acquiring company is a holding company operating without any direct structure aimed at exercising financial activities or other activities of direction and coordination or management activities in the participated companies. If instead the holding actively intervenes in the management of its participated companies, it may be deemed to exist the said link with the VAT output transaction and therefore VAT paid may, in principle, be recovered.

In case of a merger leverage buy out, although the holding used for the merger does not have usually any structure, the doctrine is inclined to support the VAT deductibility since the merger is a necessary part of the deal and allows the direct and immediate link with the target’s operations. In Circular n. 6/2016 the tax authorities seems to require also in this case that the activity of the vehicle company is not limited to the pure holding of the participation.
In case of an asset deal, VAT paid on acquisition costs is in principle deductible from VAT due, unless the going concern exercises a VAT exempt activity.

12. Special considerations in acquisitions by foreign companies

As regards repatriation of profits and exit, it has to be considered that dividends paid outbound are subject to a 27% w/h tax, unless in the following cases:

- no withholding tax is applied on dividends in cases where the EU Parent-Subsidiary Directive is applicable (i.e. an EU parent company has held at least a 10% stake for one year in an Italian subsidiary company); if the ultimate shareholder is an extra-UE entity, the tax authorities may ask the company to prove that the exclusive or main purpose of the use of an UE holding was not the benefit of the parent-subsidiary directive;

- a 1.375% withholding tax applies on dividends paid to UE companies or to companies of the European Economic Area giving exchange of information, if they are subject to ordinary income tax in their country (reduced to 1.20% from 2017 onwards);

- a reduced rate (generally 5% or 10%) may be provided by the applicable tax treaty signed by Italy.

In terms of exit, the capital gain realised by a foreign company selling shares of an Italian target is usually protected from taxes in Italy according to the applicable tax treaty.

In case the acquisition is made by a foreign company, special attention must be paid with the use of foreign holding companies which should have general substance requirements in order to support their foreign tax residence (see Section 17).

13. Reorganising after an acquisition

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 new rule regarding the “abuse of law” which is applicable to transactions lacking of economic substance which realise undue tax benefits and that can be consequently disallowed by the tax administration. The lack of economic substance regards facts, acts or agreements which do not produce any significant effect other than the tax saving, e.g. the use of juridical instruments not coherent or not adherent to market practice. An undue tax benefit occurs when it is realised in contrast to the specific tax rules or general principle of the tax discipline.

Taxpayers may ask for a ruling to determine if the transactions that they are about to carry out may constitute abuse of law. No criminal charges would be linked to the “abuse of law” behaviour.

14. Special considerations for companies whose main asset is real estate

In case of a share deal it has to be taken into account that the favourable participation exemption regime for the selling company (see Section 15) does not apply to the transfer of shares in real estate companies, and capital gains on these transfers are subject to corporate income tax at the ordinary rate.

A real estate company is defined a company having the value of its assets mainly represented (i.e., more than 50%) by real estate from the beginning of the third fiscal year before the shares are sold. Properties used for the purpose of a commercial activity are not deemed to be real estate assets for capital gain purposes.

In case of an asset deal made by a VAT subject, the sale of a commercial real estate is VAT exempt or, by option of the seller, is subject to ordinary VAT with the reverse charge system; anyway, a 3% cadastral and a 1% mortgage taxes are due in such case.

In case of a sale realised by a non VAT subject, the sale is subject to registration tax at 9% rate in case of a commercial building and 12% in case of agricultural land (cadastral and mortgage tax are applied for a fixed amount of EUR 200 each).
15. Taxation of capital gains

Italian companies are entitled to the 95% participation exemption (i.e. only 5% of the capital gain is subject to IRES tax) if the following requirements are met:

a) the shareholding has been held at least from the first day of the 12th month prior to the disposal

b) shares have been booked by the seller as a long-term investment (fixed financial asset) in the first balance sheet of the holding period (no minimum percentage is required)

c) the participated company is not resident of a tax haven

d) the participated company is exercising 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 above requisites under letters c and d must be fulfilled starting from the beginning of the third fiscal period prior to the sale.

Lacking any of the above conditions, the capital gain is fully subject to IRES corporate income tax in the same year or, if the shares were booked as fixed financial assets in the last three financial years, over a period up to five years.

For individuals resident in Italy, the taxation of capital gains in Italy depends on the level of shareholding, as follows:

- If the individual sells a “qualified” participation, i.e. more than 20% of voting rights or 25% of the paid-in share capital in the company if the company is not listed at the stock exchange and respectively 2% and 5% if the company is listed, the capital gain is subject to personal tax for 49.72% (i.e. 50.28% exempt). The taxable capital gain is subject to tax according to the progressive scale of rates, with a maximum tax rate of 43% (for income exceeding €75,000) and a 3% surcharge in income exceeding €300,000

- If the individual sells a “non-qualified” participation, the capital gain is instead subject to a 26% substitute tax

For foreign companies, the sale of a “qualified” participation is subject to IRES tax for an amount equal to 49.72% of the gain (subject to tax treaty exemption) while “non-qualified” participations sold by foreign companies located in “white list” countries (with exchange of information with Italy) are exempt from corporate tax according to our domestic law.

However, if a tax treaty is applicable, the capital gains are usually taxable only in the foreign country (except exceptions in certain treaties and subject to the substance requirements mentioned in Section 17).

16. Reinvesting proceeds from a sale

For companies, there is no specific fiscal advantage if the proceeds from the sale of shares are reinvested.

For individuals, non-profit entities and non-resident taxable persons Article 68(6-bis)(6-ter) provides the exemption of the capital gains realised upon the disposal of both qualifying and non-qualifying participations in stock companies and partnerships, provided that:

- the participated entity has been set up for no more than seven years

- the shares sold were held for at least three years, and

- the capital gains realised are reinvested in another Italian resident company or partnership operating in the same business sector and incorporated within the previous three years. The new investment must be made through the subscription or acquisition of the capital of such companies and within two years from the disposal of the participations previously held

However, the amount of the exempt capital gain cannot, in any case, exceed five times the costs borne by the company to which the transferred shares refer during five 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.
17. Local substance requirements for holding/finance companies

According to our domestic rules, a company is tax resident in Italy if at least one of the following conditions are met:

a) its registered place is in Italy
b) it has the place of administration in Italy (i.e. where strategic decisions are taken)
c) the main place of activity is in Italy

Moreover, there is a general presumption according to which a foreign company is deemed to be tax resident in Italy if the following conditions are both met:

a) the foreign company directly controls an Italian resident company and
b) the foreign company is directly or indirectly controlled by Italian residents or its Board of Directors is mainly formed by Italian resident individuals

If the above two conditions are met, the burden of the proof that the foreign company is not tax resident in Italy is shifted on the foreign company itself.

Moreover, the payment of dividends/interests/royalties from Italian companies to foreign holding/finance companies usually requires that the foreign company is the beneficial owner of the payments in order to apply reduced rates also according to the tax treaties.

Please note that, as regards capital gains realised by or dividends paid to foreign companies, the tax authorities have expressed the opinion that the tax treaties or directives or domestic reduced w/h tax would not be applicable in case of pure artificially structures and transactions, e.g. companies not economically rooted in the foreign territory or conduit transactions without non marginal economic (not fiscal) reasons.

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General

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

   Luxembourg has implemented Directive 2014/86/EU of 8 July 2014 which amends the EU Parent Subsidiary regime so as to stop situations of double non-taxation created by the use of certain hybrid instruments and Directive 2015/121 of 27 January 2015 which introduces a de minimis General Anti-Abuse Rule (GAAR).

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?**

   Luxembourg is supportive of the implementation of BEPS recommendations. However, since the release of the final BEPS report on Action 6, no action has been undertaken yet other than the implementation of the 2 Directives referred to under question 1 above. Luxembourg will probably await the final outcome of EU BEPS recommendations and directives before taking any additional actions. Still, the Luxembourg Tax Authorities (LTA) already require minimum substance requirements for Luxembourg companies performing intragroup financing activities (please refer to question 17 for more details).

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

   a. **Share deal**
   
   A share deal in Luxembourg enables the target company to continue to carry forward its losses.

   There are no taxes levied on a share sale unless the securities that are sold are those in a Luxembourg tax transparent entity (société civile) holding at least one Luxembourg real estate asset. The duties applicable upon disposal of certain assets (essentially real estate) in a share deal are lower than in an asset deal.

   b. **Asset deal**
   
   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 registration duties in an asset deal are higher than in a share deal.

   **Immovable asset**

   In case of disposal of a real estate located in Luxembourg, regardless of whether the contract is executed in Luxembourg or elsewhere, a transfer tax applies at the standard rate of 6%. If the real estate is located in Luxembourg City, an additional municipal surcharge of 3% is levied. A 1% transcription tax (droit de transcription) is also due on the sale of a Luxembourg real estate property. If the real estate asset sold is located abroad, no registration duty is due in Luxembourg.
Movable asset
There is no need to register the sale of a movable asset. However, if the contract is voluntarily registered, it is subject to a proportional registration duty at a rate of 6% (reduced to 1.2% where the sale is by way of judicial proceeding).

Debt instruments
It is not compulsory to register a document evidencing a debt instrument. However, a registration duty of 0.24% is due if such a document is voluntarily registered, unless the debt instrument is created under the form of a negotiable instrument (such as a bond).

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?
In principle, in share deals, it is not possible to perform a step-up in value in Luxembourg.

5. 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.

6. Are there any limitations to the deductibility of interest on borrowings?
Luxembourg has three types of limitation to the deductibility of interest on borrowings: limitations related to the purpose of the expense, limitations based on transfer pricing rules and limitations based on the re-characterisation of the interest expense into a dividend.

Limitations related to the purpose of the expense
Only expenses incurred exclusively for business purposes are tax-deductible. The purpose of this rule is to draw a line between operational and personal expenses (a comment relevant mostly for individual commercial enterprises). Thus, 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, limitations 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) LITL.

Article 56 LITL provides a legal basis for transfer pricing adjustments where associated enterprises deviate from the arm’s length standard. In other words, where a Luxembourg company shifts advantages to another group company, the Luxembourg tax authorities may increase the company’s taxable income (upward adjustment). Conversely, where a Luxembourg company receives an advantage from an associated company, the taxable income of the Luxembourg company may be reduced by a downward adjustment.

The scope of Article 56 LITL is not limited to cross-border transactions and is applicable to transactions between Luxembourg companies.

Article 164(3) LITL provides that hidden distributions (i.e., direct or indirect advantages granted by the company to its shareholder which, absent the shareholding relationship, would otherwise not have been granted) are non-deductible from the taxable basis of the company.

The Luxembourg tax authorities released two circulars regarding intragroup financing activities.

Amongst other requirements, such circulars provide for the transfer pricing guidelines to be relied upon by Luxembourg companies involved in intragroup financing activities to evidence that the remuneration and 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 re-characterisation of the 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 re-qualifed from debt into equity, the proceeds are no longer considered as interest but are instead as dividend for tax purposes and the payment will not be tax-deductible.

Article 164(2) LITL furthermore includes specific situations where interest might be re-characterised into dividends. Distributions of any kind made to holders of shares, 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 thus non-deductible.

7. 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.

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 intragroup financing activity, please refer to section “Limitations to the deductibility of interest on borrowings” 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.

8. Are losses of the target company(ies) available after an acquisition is made?

In an asset deal, losses of the target may not be carried forward by the purchaser.

In a share deal, existing losses of the target cannot be used through a tax consolidation.

9. 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 (i.e., 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) are exempt from proportional duties. The transfers must, however, be mainly remunerated (i.e., with more than 50%) with securities that represent share capital of the companies involved.
10. Are there any restrictions on the deductibility of acquisition costs?

Acquisition costs are in principle reported in the balance sheet, as part of the acquisition price of the asset. Therefore, acquisition costs can be depreciated. If the acquisition costs are not recorded as “fixed assets”, there is no limitation to their deductibility.

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

Within the framework of the M&A transactions, a specific attention must be paid on whether the deal is structured as an asset deal or a share deal.

For both asset deal and share deal (in case of VAT exempt transaction or transaction outside of the scope of VAT), the input VAT incurred on acquisition costs should in principle not be recoverable.

However, VAT could potentially be recoverable in some particular cases and under certain conditions.

It is however important at early stage of the M&A transaction to elaborate the cost structure in such a way that an optimal recovery of input VAT could be achieved.

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 acquiring Luxembourg resident companies or assets should pay attention to the following:

- Provided no double tax treaty which grants the exclusive taxation right to the country of the non-resident investor applies, capital gains derived from the sale of a substantial participation (i.e. more than 10% of the shares) in a Luxembourg company are taxable in Luxembourg if the period between the acquisition and the disposal is 6 months or less;

- Dividends distributed by a Luxembourg resident company to the foreign acquiring company are in principle subject to a 15% withholding tax in Luxembourg, unless the foreign acquiring company is eligible to the Luxembourg withholding tax exemption regime, or unless it benefits from an exemption or reduced rate based on a double tax treaty;

- The taxation of capital gains realised upon transfers of a Luxembourg company, a Luxembourg permanent establishment or Luxembourg business assets to another EU Member State, to a country of the European Economic Area (EEA) or to countries with which Luxembourg has concluded either a Double Tax Treaty with exchange of information provisions in line with the OECD Model Tax Convention or a tax information exchange agreement can be deferred upon request until the effective realisation of the gain.

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

Luxembourg’s corporate income tax law provides for a special tax-neutral regime applicable to certain qualifying corporate restructurings (such as mergers, demergers, etc.), 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 an 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 which 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 EUR1.2 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 are transferred to several Luxembourg-resident capital companies in the course of the demerger.

Under similar conditions, a tax-neutral demerger is available in an EU context.

The partners or shareholders of the demerged company have to receive shares in the beneficiary companies on a basis which is 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.

14. **Is there any particular issue to consider in case of companies of which 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 provisions should be checked carefully together with the local tax regime to analyse how the 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 thus 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 income of the company might be exempt by application of such rules, a minimum amount of corporate income tax will be payable according to the principles mentioned under section 6 above.
15. How are capital gains taxed in your country? Is there any participation exemption regime available?

Capital gains are in principle fully subject to corporate income tax and municipal business tax at a rate of currently 29.22% in Luxembourg. Subject to conditions, capital gains can be exempt based on the Luxembourg participation exemption regime.

Participation exemption regime

Capital gains deriving from the sale of shares held in a subsidiary should be fully exempt from taxation in Luxembourg at the level of the holding company should the conditions below be met:

The beneficiary is a Luxembourg fully taxable company, which holds a shareholding in:

- an undertaking resident of the EU covered by article 2 of the Council directive 2011/96/EU; or
- a Luxembourg resident capital company fully liable to Luxembourg tax; or
- a non-resident company liable to a tax corresponding to Luxembourg corporate income tax. For that purpose, a taxation of at least 10.5% on a basis comparable to the Luxembourg basis is usually required by the Luxembourg tax authorities.

At the date the capital gain is realised, the holder has held or commits itself to hold a direct and continuous shareholding of at least 10% in the capital of its subsidiary or the acquisition price of which amounted to at least EUR 6 million for an uninterrupted period of at least 12 months.

The beneficiary may hold its participation through a tax transparent entity as defined in article 175(1) of LITL, the underlying shareholding will be valued according to the proportion held in the net assets of the tax transparent entity.

Based on the 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, for instance, interest expenses on loans used to purchase the shares or any write-downs of the participation. However, the amount is usually offset by the tax losses carried forward previously incurred by the shareholder.

16. 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 which meets the participation threshold for such exemptions, the participation exemption will nevertheless be denied for a period of five years, to avoid reorganisations which are exclusively tax driven, i.e. the benefit of the participation exemption regime.
17. **Are there any local substance requirements for holding/finance companies?**

From a Luxembourg tax perspective, a company is considered tax resident in Luxembourg if its statutory seat or its central administration (i.e., place of effective management) is located in Luxembourg.

Luxembourg companies or Luxembourg permanent establishments of foreign companies performing an intragroup financing activity are subject to substance requirements as detailed in the Circular 164/2 dated January 28, 2011 issued by the Luxembourg tax authorities:

- **Board of managers**: The majority of the managers have to be either residents in Luxembourg or non-residents who perform a professional activity in Luxembourg and have at least 50% of their income taxable in Luxembourg (typically the case for commuters, i.e. persons living in a neighbouring country who work in Luxembourg). If a member of the board is a legal entity, the statutory seat and the central management will be located in Luxembourg. These directors/managers have to possess the required competencies to perform their function and have to be empowered to take decisions, which will bind the company.

- **Management**: The key decisions have to be taken in Luxembourg. In case shareholder meetings have to take place based on company law, these have to take place at least once a year at the address mentioned in the bylaws of the company.

- **Employees**: The company will have qualified employees (either employees of the company or external personnel) to execute and book the transactions performed by the company. The company will be able to supervise the activities performed by these employees.

- **Bank account in Luxembourg**: the company will have at least one bank account in Luxembourg.

- **Filing of tax returns**: the company will make sure that it has fulfilled all its obligations in terms of filing of tax returns in respect of taxes for which the direct tax authorities are competent.

- **Tax residence**: the company will not be considered a tax resident in another jurisdiction.

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General

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

So far there have been no major or significant changes to the tax legislation which are relevant to the M&A deals and which merit any special attention. However, recent and noteworthy changes include more anti-abuse provisions with respect to the transfer of immovable property situated in Malta. For example, mergers involving the indirect transfer of immovable property (situated in Malta) may be deemed to be a transfer of the immovable property itself and taxed accordingly.

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?

To date, no changes were made in the tax legislation as a result of the OECD BEPS actions and the amendments to the EU Parent-Subsidiary Directive (PSD). With regards to the latter, it is worth pointing out that Malta does not impose any withholding taxes (including withholding taxes on dividend income) and therefore the amendments to the PSD will have minimal impact, if any, on dividend distributions by Maltese companies. Also, the applicability of the participation exemption with respect to incoming dividend income (from EU resident companies) hasn’t changed and no changes are expected either.

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

a. Share deal

The purchase of assets through a share acquisition may be subject to duty on documents (commonly referred to as stamp duty). 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 two companies are considered to belong to the same group for income tax purposes. Common shareholding must exceed 50%, for companies to be considered to be 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 two companies are merged, unless the Inland Revenue Department considers such merger as being a scheme and thus 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 the transfer is made by a non-resident person 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.
b. 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 other taxes are 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 such as industrial buildings (including a hotel and offices) as well as plant and machinery, and used in the production of the income qualify for a tax deduction in form of capital allowances or wear and tear at prescribed rates (using the straight line method).

Purchase of individual assets may be subject to VAT (at the standard rate of 18%) unless the transfer of assets is considered to be a transfer of a going concern, in which case no VAT is applicable.

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?**

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 Maltese 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 or cost is not subject to any income tax or capital gains tax.

5. **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.

6. **Are there any limitations to the deductibility of interest on 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, for example, interest paid on a loan used to acquire an investment may be deducted from the dividend income received from such investment (unless the dividend income is exempt under the participation exemption provisions). Although there are no specific rules to limit the deductibility of interest on borrowings, general anti-abuse provisions may limit or disregard amounts, transactions or schemes which reduce the amount of tax payable by any person.

As a general rule, no distinction is made between intra-group debt and third-party lenders. However, intra-group debt may be subject to more scrutiny to ensure that such debt is at arm's length.

7. **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.

8. **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 the 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 two companies merge.

It is possible that the purchase and eventual merger of two companies may be viewed by the Inland Revenue Department as a scheme to utilise tax losses by the target company, in which case anti-abuse provisions will apply.

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

Duty on documents (or ‘stamp duty’) is payable by the buyer upon the transfer of shares at the rate of €2 on every €100 or €5 on every €100 of the market value of the shares. As pointed out above, 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 two years’ profit based on the performance of the company over the last five years of operation.

Share transfers are not subject to any value added tax.

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

Tax legislation provides for a deduction of expenses which are incurred in the production of the income. Acquisition costs are normally considered to be of a capital nature and therefore not allowable as a deduction. However, acquisition costs may be subject to capital allowances in the form of wear and tear or amortised over a number of years depending on the nature of the asset acquired and its use.

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

VAT incurred on the acquisition of an asset is usually recoverable for persons having an economic activity in Malta and if such asset relates to the business activity(ies) of the company (unless the input VAT is specifically blocked, e.g. on works of art, antiques, motor vehicles etc.).

Pure holding companies may not claim back any VAT incurred upon the acquisition cost but trading companies may claim back any VAT incurred, if the asset purchased (or the capital good as it is referred to in the VAT Act) is used in the economic activity.

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)**

There are no adverse tax implications for foreign parties acquiring shares in a Maltese company. Maltese legislation exempts foreign shareholders from the payment of duty on documents provided the Maltese company has its main interests or business activities outside Malta and the said Maltese company does not own real estate in Malta.

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

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 two companies which form part of the same group.
14. **Is there any particular issue to consider in case of companies of which main assets are real estate?**

Exemptions from capital gains tax upon share transfers exclude companies which hold immovable property situated in Malta.

Transfer of an immovable property is subject to property transfer tax at the rate of 8% applicable on the consideration / market value. Other property transfer tax rates apply in exceptional cases and range between 2% and 10%. Such tax is considered to be a final tax and no other taxes are applicable (except for the duty on documents payable by the buyer).

**Sell-side**

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

Capital gains are brought to charge together with any other income. Capital gains apply upon the transfer of shares (unless the participation exemption applies) and the transfer of immovable property. Capital gains may also apply on some other specific types of assets such as patents, trade-marks, trade names.

The applicable income tax rate depends on whether the gain is realised by 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. Also, 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 of the tax paid by the company so that the Combined Overall Malta Effective Tax (COMET) 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 situated 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.

If the equity investment made by a Maltese company qualifies as a participating holding, then any capital gains realised upon the disposal or transfer of such investment is exempt from any tax. An investment is considered to be a participating holding if any one 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 equity shares of the company, 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.

The participation exemption is also extended to dividend income received from a participating holding if the body of persons in which the participating holding is held, satisfies any one of the following three conditions:

- It is resident or incorporated in the EU;
- It is subject to foreign tax of a minimum of 15%; or
- It does not derive more than 50% of its income from passive interest and royalties.
Alternatively, the equity investment must satisfy the following two 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%.

If the dividend income does not qualify for the participation exemption, the Maltese company in receipt of dividend may avail itself of any double taxation relief or unilateral relief. If no proof of foreign tax suffered is available but the company has proof that the dividend income is foreign source, it may avail itself of the Flat Rate Foreign Tax Credit (FRFTC).

16. **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 three years and replaced within one 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 the tax liability until the asset is disposed of and not replaced.

Anti-abuse provisions apply to minimise tax avoidance when an asset is replaced by another asset of a lower value than the original one.

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

Malta does not have any specific legislative requirements with respect to local substance as the basis of taxation for companies incorporated in Malta is on a world-wide basis, thus subject to tax on all its income, irrespective to where such income is generated or remitted.

However, local substance is important and indeed necessary when determining the tax residency of companies incorporated outside Malta. Indeed, a company is considered to be tax resident in Malta if the company is effectively managed and controlled in/from Malta. The tax authorities normally look at the composition of the board of directors, where meetings are held and that the decisions are effectively taken whilst in Malta.

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

Most recent tax developments in the Netherlands are based on the OECD (BEPS) and EU actions (see further below under question 2). Nevertheless, the Netherlands remains a suitable and beneficial jurisdiction to facilitate (foreign) investments, following the stable political climate, extensive treaty network and the exemption of income from shares under the participation exemption. It was stated by the Dutch Ministry of Finance that the goal is to maintain the attractiveness of the Netherlands for multinationals with real economic presence in the Netherlands in a world after BEPS by inter alia defending and empowering the Dutch tax system.

The Dutch Ministry of Finance announced that they will propose new measures in order to tackle the perceived excesses of private equity acquisitions in the Netherlands. One of these measures concerns the tax deductibility of interest (see further below under question 6). Furthermore, a bill was introduced to extend the Dutch fiscal unity regime to EU situations. Developments within the EU may furthermore impact Dutch tax law significantly.

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?**

**OECD BEPS**

As other OECD member states, the Netherlands has committed to the OECD minimum standard concerning treaty abuse. The Dutch State Secretary has announced that the proposed anti-abuse rules will be part of treaty negotiations. On-going efforts to renegotiate tax treaties with developing countries in order to include an anti-abuse rule will continue.

Pro-active adjustments to Dutch tax law relate to county-by-country reporting for groups with a turnover exceeding EUR 750 million that is in force as per 1 January 2016. In addition, groups with a turnover that exceeds EUR 50 million are obliged to draft a master- and local file. The Netherlands will furthermore actively participate in the exchange of information on rulings. It was furthermore stated that the Netherlands will commit to the minimum standards for the existence permanent establishments (Action Plan 7) and the overall adjustments to the OECD transfer pricing guidelines.

Up to now, no countermeasures are proposed in the Netherlands regarding hybrid structures (Action Plan 2), CFC-regulations (Action Plan 3) or interest deduction (Action Plan 4), as the Dutch Ministry of Finance stated that it will await EU coordinated measures. In that regard, the EU anti-tax avoidance directive as published on 28 January 2016 will be of influence.

**Amendments EU Parent-Subsidiary Directive**

**a. Anti-abuse rules for non-resident corporate shareholders**

As a result of the amendments to the EU Parent-Subsidiary Directive, new anti-abuse rules for foreign companies investing in Dutch corporate structures were introduced as per 1 January 2016. Non-resident corporate shareholders that fall under the scope of the anti-abuse rules can be faced with Dutch corporate income tax (max. 25%) on income (dividend, capital gain, interest from a shareholder loan) derived from share interests (5% or more) in a Dutch company or membership rights in a Dutch Coop (a so called substantial interest).

The current tax legislation stipulates that foreign shareholders/members will be taxed with Dutch corporate income tax in the Netherlands if (i) the primary objective, or one of the primary objectives, for holding the substantial interest or the membership rights in the Coop is to evade dividend withholding tax or personal income tax and (ii) this involves an artificial arrangement.

Arrangements are artificial to the extent that they are not put in place for valid commercial reasons which reflect
economic reality. This definition is rather subjective and vague and is not further clarified in the legislation. The explanatory notes to the legislative proposal state however the following safe harbour situations in which an arrangement is not considered artificial:

i. The shareholder/member conducts operational business activities and the shares/membership rights are attributable to that business;

ii. The shareholder/member is the top holding company of the group and as such is performing substantial managerial, strategic or financial functions for the group; or

iii. The shareholder/member provides a “link” between the Dutch company/Coop and a company as mentioned in the first two bullets, and the shareholder/member has sufficient substance in its home jurisdiction. The existing substance rules applicable to Dutch holding companies will play a critical role in determining the substance at the level of the shareholder/member in the jurisdiction of residence. Please refer to question 17 for an overview of the minimum Dutch substance requirements.

In addition, a Dutch Coop is not considered artificial if the Coop runs an active business with its own office(s) and staff on the payroll.

The anti-abuse rules should not impact private equity investments (structured in line with the safe harbour rules as described above).

b. Hybrid mismatches

Following the amendment to the EU Parent-Subsidiary Directive, the Dutch participation exemption will no longer apply to income (dividend and other payments), insofar as this includes remunerations or payments from subsidiaries if such payments can be directly or indirectly deducted from the tax base for profit tax purposes.

The aforementioned also extends to any remuneration for the loss of such income or a write-off in this regard. It will be sufficient if the income is deductible from the taxable base, regardless of whether a restriction to interest deduction (such as thin capitalisation or earnings stripping) applies. This may result in double taxation. A review of the tax treatment of the income at the level of the subsidiary by the Dutch parent company will be necessary, leading to an increased administrative burden for the taxpayer.

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

a. Share deal

Tax advantages:

- The buyer may benefit from the target company's carry forward losses (see section 8 below).
- There is a lower chance of transfer tax on Dutch real estate.
- The seller may be able to apply the participation exemption, which exempts capital gains and dividends (see section 13 below).

Tax 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 tax-deductible.
- Limitation of interest deduction may apply at the level of the acquiring (Dutch) company.
b. Asset deal

Tax 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.
- No limitation of interest deduction should apply at the level of the acquiring (Dutch) company and no need for debt push-down structuring.
- The Dutch loss-making companies of the acquirer’s group (if any) can absorb profitable operations of the target company.
- In principle all acquisition costs are tax - deductible.

Tax disadvantages:

- Capital gains taxation arises at the level of the seller (reflected in the purchase price).
- Possible transfer taxes apply on Dutch real estate (6%).
- The potential benefit of the target company’s carry forward losses is retained by the seller (if still available after a gain on the sale 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?

Due to the application of the participation exemption there are very limited planning strategies to create a step up in share deals. A step up is in such situation however not considered beneficial.

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

Goodwill reported for financial purposes following a purchase price allocation of the shares acquired is ignored for tax purposes if the participation exemption applies. Acquired goodwill (in an asset deal) 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.

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

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 Income 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 (10% in accordance with Dutch standards) 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. 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 acquisition debt exceeds 60% of the acquisition price in the year of acquisition (this percentage subsequently declines by 5% over a 7-year period to 25%).

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. It is expected that a legislative proposal will be introduced as per September 2016 that may further restrict the interest deductibility as a part of the legislative proposal to tackle the perceived excessive debt financing in private equity acquisitions.

Anti-earnings stripping regulations that are possibly proposed within the EU as a part of the Anti-Tax Avoidance Directive may limit interest deductibility in the future.

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

As discussed in section 6 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 transferring company has carry forward losses available.

8. **Are losses of the target company(ies) available after an acquisition is made?**

Carry forward losses may not be available as a result of the transfer of the shares in the target company. Under anti-abuse rules the carry forward 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 (e.g. 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 and/or finance companies.

9. **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 as a real estate company, the transfer of shares in the company may trigger a 6% real estate transfer tax (see section 14).
10. **Are there any restrictions on the deductibility of acquisition costs?**

Transaction costs will, from a transfer pricing perspective, solely be tax deductible if the party that incurred the costs benefited from the services provided. In practice, this rule may limit the possibilities to report these costs at the level of the target company.

Transaction costs (incurred by the acquiring holding company) related to the purchase of a subsidiary to which the participation exemption will apply post-closing will not be tax deductible for CIT purposes. However, costs incurred during the exploratory phase when it is uncertain whether the transaction will take place, or costs related to the financing of the acquisition, such as advisory fees, will be tax deductible. In this regard, it is important to carefully document the timing and nature of the costs.

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

As a general rule, an acquisition vehicle that solely acts as a holding company post-closing cannot recover any input VAT on acquisition costs related the purchase of shares. However, under the condition a holding company that purchases the shares in the light of future management or advisory services against remuneration, should be entitled to claim a VAT recovery.

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)**

Anti-abuse rules apply with regards to non-resident corporate shareholders of Dutch entities (see question 2a). 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).

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

   a. **(de-)mergers**

   The Dutch law provides several facilities to reorganise in a tax neutral environment at two levels (i.e. for the Dutch tax resident shareholders and for the (de)merging entities), in line with the EU Merger Directive. Taxpayers can in principle claim a reorganisation facility in case of a legal merger, a demerger (this can be a full legal demerger a partial legal demerger), a business merger and a share-for-share merger. These reorganisation facilities may, under circumstances, also apply in cross border situations within the EU/EEA.

   The reorganisation facilities can in principle be claimed by law. In certain situations however (e.g. if the entities involved report carry forward losses, claim a reduction to avoid double taxation or apply the innovation box regime), the reorganisation facility is only applicable under additional conditions and parties involved should file a request for the applicability of the reorganisation facility to the Dutch tax authorities. Please note that a reorganisation facility will not be granted if the reorganisation is not based on business reasons, such as a valid restructuring or rationalisation of the corporate structure, but is (mainly) aimed to avoid / postpone taxation. It is possible to request the Dutch tax authorities in advance for certainty that the reorganisation is based on sound business reasons. A denial of such request is open to appeal.

   As a result of the reorganisation facility, the entity receiving the assets/shares will value these at the original book value as reported by the transferring entity. The tax claim is therefore postponed and possible claw back should be carefully monitored during future reorganisation (e.g. a claw back may arise if the acquiring entity is sold within three years after the reorganisation took place).

   b. **Tax group (fiscal unity regime)**

   Dutch resident corporate tax payers can in principle form a fiscal unity (a tax group) when certain conditions are met (e.g. the parent company holds at least 95% of the shares and voting interest in its subsidiaries). In line with EU case law, a fiscal unity can also be formed between Dutch tax resident companies that have a mutual EU parent company.
Within a fiscal unity companies can reorganise in a tax neutral way, as transactions between companies belonging to the same fiscal unity are, generally, disregarded for corporate income tax purposes. Anti-abuse provisions may trigger a tax claw back however and should be carefully monitored in future restructuring. In case of a transfer outside the ordinary course of business between companies included in a fiscal unity of an asset that contains a hidden reserve, a claw-back may arise if the fiscal unity ceases to exist within six years after the transaction (three years in case of a transfer of an on-going business against shares).

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

Yes, there is an anti-abuse rule for companies that are considered real estate companies. The transfer of shares in such a company can trigger in principle a 6% real estate transfer tax. A 2% tax rate applies to the acquisition of owner-occupied housing. However various reorganisations exemptions may apply.

A company qualifies as a real estate company if:

i. 50% or more of the company’s consolidated assets constitute real estate, and at least 30% of the assets constitute Dutch real estate;

ii. at least 70% of the real estate is used for exploitation (i.e. sale / lease) and not for its own offices, production facilities, etc.; and

iii. the purchaser directly acquires an economic interest of more than 1/3rd in the company.

**Sell-side**

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

In principle, capital gains derived from the sale of shares are taxed at the Dutch corporate rate of 20-25%. The first EUR 200,000 of profits is taxed against 20%, the remainder up is taxed against 25%. Capital gains derived from qualifying participations are however fully exempt under the Dutch participation exemption.

The participation exemption is applicable to a share interest of at least 5% in a corporate entity that has an equity that is divided into shares (the so-called “shares test”) and which is not held as portfolio investment (the so-called “motive test”).

A shareholding is considered to be held as a portfolio investment if the shareholding is not held in line with the business activities of the shareholder (because the shareholder and the subsidiary do not conduct a business enterprise) and no activities are performed to increase the return on investment in the shareholding (i.e. the shareholder is not involved in the management of the subsidiary).

If participation is however, (deemed) to be held as a portfolio investment, the Dutch participation exemption still applies if the share interest can be considered as a “qualifying” portfolio investment participation. Such participation is present if one of the following conditions is met:

(i) the participation is subject to a profits tax that results in an effective tax rate of at least 10% according to Dutch tax standards (“the reasonable levy test”); or

(ii) the directly and indirectly held assets of the participation generally consist for less than 50% of low taxed free portfolio investments (i.e. not subject to an effective tax rate of at least 10% according to Dutch tax standards).

This is the so called “asset test”.

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, are generally not considered a free portfolio investments.

In principle no minimum holding period applies for the participation exemption. Please note however that the participation exemption still applies to income from a shareholding that at a certain point drops below 5% for a period of three years, starting at the moment that the shareholding dropped below 5%, but only if that the share interest was held for at least one year during which the participation exemption continuously applied.
16. **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 three years after the year of disposal. Various anti-abuse rules apply with respect to this regime.

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

Dutch corporate entities, such as a limited liability company (a BV), are considered a Dutch resident corporate tax payer based on their incorporation under Dutch law, regardless of the level of substance in the Netherlands.

Minimum substance requirements apply however, to companies that qualify as so called “financial service companies” (i.e. its activities consist for at least 70% out of intra-group financing or licensing activities) as well as companies that requests an Advance Pricing Arrangement or Advance Tax Ruling (“APA/ATR”) from the Dutch tax authorities. Please find an overview of the minimum Dutch substance requirements below. These minimum substance requirements are furthermore of importance for the non-Dutch corporate shareholders as mentioned in question 2.

The minimum Dutch substance requirements are the following:

- At least 50% of the board of the statutory (and competent) directors should be resident in the Netherlands.
- The directors of the company should be qualified, in order to be able to properly perform their duties.
- The company employs personnel that are qualified to properly manage and administrate the transactions of the company.
- All key management decisions are made in the Netherlands.
- The entities’ principal bank accounts must be kept in the Netherlands.
- The bookkeeping / audit activities take place in the Netherlands.
- The company meets at any time its filing obligation for all tax returns (i.e. VAT, wage tax, and CIT).
- The business address and registered office of the company are located in the Netherlands.
- To its best knowledge, the company is not considered a tax resident in any other country.
- Companies carrying out finance, licensing or leasing activities should be exposed to a certain minimum risk (e.g. no full non-recourse provisions) and have sufficient equity to cover those risks.
- The cost price of subsidiaries held by holding companies is financed for at least 15% with equity.

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General

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

   The corporate tax rate is being reduced to 25% for the income year 2016, and it has been stated that the rate will go down to 22% in 2019.

   Norway introduced interest limitation legislation with effect from 2014. Please see question 6 for further information. The interest limitation rules are tightened with effect from 2016, and they are also considered to limit external debt under the legislation.

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?**

   The Norwegian government is generally positive with regards to the BEPS initiative, and will most likely follow up on most BEPS actions. Several rules have already been implemented (e.g. anti-hybrid rules, rules limiting the deductibility of related party interest costs).

   Please note that Norway is not an EU member, and the Parent-Subsidiary Directive does not apply.

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

   a. **Share deal**
      - Not taxable for seller;
      - No step up for the purchaser;
      - No transfer taxes or stamp duty;
      - Most acquisition costs are not deductible.

   b. **Asset deal**
      - Fully taxable (some gains may be deferred);
      - Step up for the purchaser;
      - Stamp duty on real estate;

   Acquisition costs usually deductible, however often through depreciation.

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?**

   None.

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

   Purchased goodwill (asset deal) may be depreciated with 20% on a declining balance basis.
6. **Are there any limitations to the deductibility of interest on borrowings?**

   Yes. There are rules limiting the deductibility of interest costs to related parties. Net interest costs, per entity, exceeding 25% of the tax EBITDA is not deductible, if the interest costs are considered as related party interest costs. Other interest costs are fully deductible, but will use up the available interest ceiling before related party debt. If the net interest cost, per entity, does not exceed MNOK 5 the interest costs are fully deductible. Interest on guaranteed loans can be considered as related party interest.

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

   Typically a Norwegian holding company (or several) is used as an acquisition vehicle. The Norwegian tax consolidation rules can be used to transfer profits from the target company to the holding company by way of group contributions.

8. **Are losses of the target company(ies) available after an acquisition is made?**

   Generally yes. There is a special anti-avoidance rule which apply if the acquisition is mainly tax motivated. If the acquisition is mainly tax motivated, the losses will be eliminated.

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

   No.

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

    Yes. Typically most acquisition costs for share deals will not be deductible. The nature of the costs must be assessed. Costs related to the financing are normally deductible.

    Acquisition costs related to assets deals must typically be capitalised on the purchased assets, and deducted through depreciation.

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

    In share deals it is not usually possible to recover such VAT. In asset deals it is often possible to recover such VAT, however depending on the assets transferred, how the assets will be used after the transfer, and the VAT status of the buyer.

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)**

    Yes. There is withholding tax on dividends and an acquisition should therefore be structured in a way that eliminates the withholding tax. It is preferable to utilise a holding jurisdiction where there is both domestic ("substance requirement", see 17 below) and treaty protection ("beneficial owner").

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

    Yes. There are tax consolidation rules and rules which provide for tax neutral reorganisation. There may, however, be restrictions with regards to mergers in the Norwegian company law. The acquisition debt cannot be placed in the acquired company.
14. **Is there any particular issue to consider in case of companies of which main assets are real estate?**

There is a stamp duty of 2.5% of the fair market value of transferred real estate if an asset deal is carried out.

VAT implications must also be considered. Such transaction may have severe impacts on the deductibility of VAT on accrued costs. In addition, Norway has adjustment rules for VAT on capital goods which must be considered.

The seller must normally give the purchaser a tax rebate if the real estate is sold through a share deal. The rebate is linked to the lost step up at the hand of the purchaser (lost tax depreciation).

**Sell-side**

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

Capital gains on shares are fully tax exempt for corporate shareholders and there is no withholding tax. Other capital gains are taxable.

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

No. Gains on assets which may be depreciated (real estate, IPR, goodwill, machines etc.) may be deferred under special rules. Most gains are taken as income with 20% on a declining balance basis.

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

No substance requirement for domestic holding companies. It is, however, recommended that the company fulfills the Norwegian tax residency test, which is similar to the test in most tax treaties.

Foreign holding companies are subject to withholding tax, and there is a domestic exemption for companies within the EEA. The holding companies must fulfill certain substance requirements. The withholding tax exemption will only apply if the company is genuinely established and performs real economic activity in the relevant country. The fulfillment of this criterion is based on the particular facts and circumstances where a key factor is whether the foreign entity is established in a similar way as an equivalent to a Norwegian company.

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**Norway**

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General

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

   **CFC**
   As of 1 January 2015, CFC regulations were implemented in Poland. Under new rules income of foreign companies controlled by a Polish taxpayer may be subject to 19% CIT in Poland. A foreign company may be regarded as CFC if:
   
   1. it has tax residency in a country qualified as a tax haven, or
   2. has its tax residency in a with which Poland/EU did not conclude an agreement, including a double tax treaty that is the basis to the exchange of tax information, or
   3. jointly satisfies the following conditions:
      
      i. a Polish tax resident holds directly or indirectly for a period of at least 30 days at least 25% (in capital, profit or voting rights);
      
      ii. at least 50% of the income of the company is derived from passive sources (i.a. dividends, capital gains, interest, royalties);
      
      iii. at least one of the above mentioned passive income sources is (i) exempt or outside of the scope of taxation (excluding Parent-Subsidiary Directive exemption) or (ii) taxed with a rate lower than 14.25% in the country of residence.

   There are certain exemptions when CFC rules are not applicable.

   **Thin capitalisation**
   As of 1 January 2015, new thin capitalisation rules were introduced. Further to the new rules the limitation on the tax deductibility applies to interest on loans that (i) exceed the value of equity of the company and (ii) were granted by companies holding directly or indirectly at least 25% shares in the taxpayer (or if the lender and the taxpayer are both directly or indirectly held in at least 25% by the same company).

   The new provisions include also an alternative thin capitalisation calculation method which takes into account (i) tax value of assets, (ii) value of profits and (iii) nominal interest rate announced by the National Bank of Poland.

   Under the grandfathering rules, the new provisions should generally apply to loans granted and paid as of 1 January 2015. Interest on loans granted prior to this date fall under the “old” thin capitalisation rules under which the indebtedness ratio was established at the 3:1 debt to share capital level and loans from indirect shareholders were not qualified for thin cap purposes.

   **Other**
   As of 1 January 2015 the dividends received by domestic company which were in any form deductible by the distributing company will not qualify for the Parent-Subsidiary based exemption.

   Moreover, on 1 January 2015 new regulations on in-kind repayments of liabilities (such as loans, dividends or redemptions of shares) entered into force. Under the provisions in-kind repayments of liabilities should be treated for tax purposes as sale of asset.

   As of 1 January 2016 dividends paid/received by the domestic companies may be exempt from tax under condition that there was a business substance for the activities which preceded the dividend (dividend like income) distribution.
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?**

Generally, Poland implements OECD BEPS actions and the amendments to the EU Parent-Subsidiary Directive. In respect to OECD BEPS Action 6 the Polish Ministry of Finance is renegotiating some double taxation treaties (DTTs) in order to eliminate the possibility of so called treaty shopping. Among DTTs which have recently been amended are the treaties with Luxembourg or the United Arab Emirates.

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

   **a. Share deal**
   
   From the buyer’s perspective share deals do 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 a year of acquisition and unsettled losses from previous years (no change of control rule). There is no legal possibility to cut off the liability of the target company from its tax liabilities arisen prior to acquisition.

   Expenses incurred on acquisition of shares (e.g. price paid) constitute tax deductible costs on the date of disposal of the shares, while interest on the loan for purchase of shares are in general regarded as 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 Tax on Civil Law Transaction (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.

   From the seller’s perspective both sale of shares and sale of assets are taxable events. Any income realised on the transactions is subject to standard 19% CIT rate. In both cases, income realised on disposal may be off-set 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 tax burden on sale.

   **b. Asset deal**
   
   From the buyer’s perspective the general result of concluding an asset deal is that the purchase price paid will constitute tax depreciation base as well as tax cost basis (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 the 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 the 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.

   Transactions regarding sale of business assets are generally subject to VAT (currently 23% standard rate). As long as the buyer runs VAT-able 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; OPE), or be exempt from VAT (e.g. certain types of real estate). Sale transactions falling outside the scope of VAT and transactions regarding real estate and shares which are VAT exempt are subject to TACL. The rates of TACL vary from 1% to 2% of the market value of assets (meaning usually purchase price).
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?**

Generally share deals do not result in step-up in the value of assets of the target company.

The current existing step-up opportunities include structuring with tax capital groups and closed-end investment funds (FIZ) which are tax exempt in Poland irrespectively of the source of income.

With respect to assets there exists also a possibility of implementing a scenario which includes such steps as exchange of shares and use of a partnership.

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.

5. **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 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) i.e. 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.

6. **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. Please note however that based on the current judgements of administrative courts, including the 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 (i.e. upon payment, off-set, 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 associated entities is subject to thin capitalisation restrictions. Please note that provisions on thin capitalisation were amended as of 1 January 2015 (please refer to point 1 above).

The Polish CIT law provisions include also an alternative method of thin capitalisation calculation which takes into account (i) tax value of assets, (ii) value of profits and (iii) nominal interest rate announced by the National Bank of Poland.

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.

Tax treatment of the takeover of debt and payment of related interest is not regulated by the provisions of Polish CIT law. Therefore, tax consequences of such operations should be carefully analysed case by case. 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 his participation.
7. **What are usual strategies to push-down the debt on acquisitions?**

A typical strategy to push-down the debt is post-acquisition merger. Another strategy could be acquisition of assets of a target company financed by debt (e.g. a loan granted by an affiliated company or a third party bank) or liquidation of a target company.

It should be stressed that Poland has not introduced any specific anti-abuse provisions regarding merger of the entity acquiring shares with the target (apart from the general merger anti-abuse clause). However, deductibility of interest in the case of post-acquisition merger is usually confirmed in individual tax ruling.

Somewhat less frequently used strategies are the establishment of Tax Capital Group or consolidation with tax transparent partnerships.

8. **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 NOL and un-utilised losses of the target company remain with the seller. In case of acquisition of shares of the target company, NOL of such company arisen prior to acquisition, may be off-set 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 a 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 the capital company).

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

According to the Tax on Civil Law Transactions (TACL) Law, the acquisition of shares is subject to 1% TACL paid by the buyer (regardless if a Polish or foreign entity). In certain cases i.e. when acquisition is performed via foreign or Polish investment enterprises or stock-listed company is subject to acquisition transaction will be TACL exempt.

The tax base is the 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 a Polish entity and the transaction is performed in Poland i.e. the contract is concluded in Poland).

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

The acquisition costs are in general tax deductible. However, expenditures which are necessary so that the acquisition of shares become possible and effective such as TACL paid on the purchase price or notary fees becomes tax deductible costs when the shares are sold. Other acquisition costs of shares such as legal or financial advisor fees are deductible when they are incurred.

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

In general, VAT on acquisition costs is not recovered unless the acquisition of shares is made in order to effectively participate in managing the target.

Further to the judgment of the CJEU in the case C-29/08 AB SKF, the right to deduct VAT would be granted if the expenditures constitute part of the price of the transactions covered by the economic activity of the taxpayer and are not included in the price of the shares sold.

VAT related to expenditures linked with mergers, acquisitions, divisions or the changes of the legal form of a business is deductible provided that these expenses have been incurred in connection with a planned or carried out business activity being subject to VAT.
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 may not benefit from tax consolidation regime provided under the Polish CIT law. However, certain objections may be raised against such regulations under the EU law principles.

On the other hand, the general tax exemption for investment funds is accessible also for foreign investment funds (provided that they satisfy the statutory conditions for Polish investment funds).

When a foreign company acquires shares in Polish entity, 1% TACL of the FMV of shares is due (safe for certain exemptions) – see more in question 9.

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

Under the Polish CIT law: in kind contribution of a 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).

The possibility for tax neutral reorganisation comprises also 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 8.

When planning the merger, special attention should be paid to business justification for the restructuring. This operation, along with division, was in 2015 the only one with respect to which the domestic legislation introduced an explicit anti-avoidance clause.

Moreover, please note that Polish transfer pricing regulations have been amended. Under the new provisions the tax authorities are entitled to examine the arm’s length conditions of remuneration in relation to restructuring between related entities (including exit charge or its lack).

Also, Polish Minister of Finance is working intensively on the general anti abuse law.

For further details see section 17.

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

Generally Polish domestic law does not contain specific regulations for real estate entities. It should be kept in mind however that certain Polish Double Tax Treaties (DTT) provide for a rule leading to taxation of income realised on alienation of shares in real estate company in Poland (so called ‘real-estate clause’ – e.g. DTT with Luxembourg).

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.
Sell-side

15. 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 a transaction are generally subject to 19% CIT. However in practice, tax effective share deals are achieved through exchange of shares transaction prior to the sale. Also the structure which is very frequently used is sale of shares in Polish company via foreign holding company located in a jurisdiction providing for participation exemption regime and with which Poland has a DTT under which capital gains will be fully taxable at the level of seller (i.e. no real estate clause).

16. 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 closed-end investment funds (FIZ) should allow the postponement of effective taxation of profit until it is paid, which gives the possibility to conduct neutral reinvestment.

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

Under the general rule, the company will be regarded as a tax resident in Poland if it has its seat or place of management in Poland. There are no specific rules or interpretation how the place of management should be understood. To some extent, CFC provisions regarding genuine business activity requirements, can served as a point of reference. It should be also noted that the Ministry of Finance is working intensively on the general anti abuse law, which applicability may set down some new directions in this respect. The date of entry into force of the clause is not yet known. However, it is probable that the clause becomes a binding law in 2016.

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**General**

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

Starting January 2016 a new fiscal code entered into force in Romania.

Amongst the changes brought by the new code, certain amendments relevant for mergers and acquisitions (M&A) were implemented in the field of corporate income tax (CIT) and value added tax (VAT). Specifically, stricter conditions shall apply starting 2016 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).

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?**

So far, no specific action regarding the implementation of OECD BEPS action Plan 6 was taken in the domestic legislation. However, the Romanian tax law already contained general anti-abuse provisions.

For example, the fiscal code provides that cross-border transactions that are qualified as artificial by tax authorities would not enjoy the benefits of double tax treaties. Artificial cross-border transactions are those transactions lacking economic content and which cannot be normally used within usual business practices, their essential purpose being the tax avoidance or obtaining tax benefits that would otherwise not be granted.

Regarding domestic and EU cross-border M&A deals, they may not enjoy tax neutrality if they result in fraud and tax evasion detected according to the law.

Separately, Romania transposed in its domestic tax law the amendments brought by EU Directives 86/2014 and 121/2015 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.

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

**Share deal**

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 applicable before the transaction.

No Romanian VAT applies, as transfers of shares are exempt without credit operations from a VAT perspective.

No Romanian stamp duties or other indirect taxes apply on sale of shares. However, potential notary fees may be due if the parties agree to notarise (authenticate) 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 two parties.

The tax value of the shares is the acquisition price paid 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 share deal, if the specific exemption does not apply – see question 15.
The target is entitled to recover its fiscal losses within the legal deadline to carry forward the fiscal losses (i.e. 7 consecutive years; the recovery has to be performed based on FIFO method). It should be noted that special rules apply in case the target has to shift to the taxation system applicable to micro-enterprises (one of the conditions required to qualify as a micro-enterprise is to obtain yearly revenues below €100,000).

No real estate tax implications arise in the case of a share deal, as far as the assets of the target are concerned. 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 deal**

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 via tax depreciation charges. The applicable VAT rate depends on the nature of assets transferred. In 2016 the standard VAT rate dropped from 24% to 20% (it shall be further decreased to 19% starting 2017).

Any 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 buildings and land. The simplification measures provide that the buyer accounts for VAT via reverse charge mechanism (both as input and output VAT) 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, no Romanian VAT should apply because the 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 off-set 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 where the transfer of the ownership legal title is authenticated by a public notary, when notary fees become due. Transfer of the ownership of 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.

If the assets sold constitute real estate, vehicles or other assets for which local tax is due to the city hall, certain procedural requirements must also be fulfilled by both the seller and the 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.

Starting 2016, 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 tax rate will increase.

When a building is sold during a fiscal year, the building tax continues being due by the seller for the remaining period of that calendar year. The buyer owes build tax starting the 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, provided that the target’s accounting policy is to...
revaluate its depreciable non-current assets. Nevertheless, the increased tax depreciation corresponding to the revaluation surplus is netted-off by an equal taxable item for CIT purposes. 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 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 of 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 10 years, and it is disclosed and justified in the explanatory notes to the annual financial statements.

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

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

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 4% p.a. This interest rate limitation is revised periodically by Government decision, and therefore the 4% cap may change in the following years, including 2016;
- For loans denominated in Romanian currency (i.e. 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 December 2015 was of 1.75% p.a.).

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 exceeds 3:1, or the equity records a negative value, 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.

Qualifying debt refers to credit or loan defined for this purpose as any agreement between the parties that generates for one of the parties the obligation to pay interest and to repay the borrowed capital. However, for determining the debt/equity ratio, also non-interest bearing loans should be considered, if entered for a period of more than one year.

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.
7. **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, 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.

Fiscal unity is not available in Romania for corporate income tax purposes. However, in case of 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 the PE which was assigned to handle the corporate income tax related liabilities.

As a general rule, expenses are deductible if they are incurred for business purposes. Nevertheless, expenses related to non-taxable income should be consequently 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 exempt from 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.

8. **Are losses of the target company(ies) available after an acquisition is made?**

The target company’s losses are available to be off-set against its own future taxable profits if the buyer acquires the target under a share deal scenario. If further to the share deal, the target is absorbed by the buyer, any fiscal losses recorded by the target entity can be off-set against the buyer’s taxable profits.

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

9. **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 an ‘exempt without credit operation’ for VAT purposes, and therefore no Romanian VAT should be charged.

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

There are no specific restrictions regarding the deductibility of the acquisition costs of the assets. 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.

Separately, other acquisition costs such as costs with services provided by finance advisory and/or legal firms are deductible for CIT purposes on the basis the taxpayer can prove that they are incurred for business purposes.

If these kinds of costs are incurred in view of a share deal, they should be entirely non-deductible if the investment generates only non-taxable income (e.g. exempt dividends received or exempt 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 expense which should be non-deductible is to be determined based on an appropriate allocation key or based on the proportion of non-taxable income out of the total income.
11. Can VAT (if applicable) be recovered on acquisition costs?

No Romanian VAT applies, as transfers of shares are exempt without credit operations from a VAT perspective. Any input VAT incurred by the buyer in case of an asset deal may be deducted 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 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.

Conversely, if the buyer would also be involved in the management of the subsidiaries acquired by supplying various services (subject to VAT), the buyer is deemed as undertaking an economic activity being a taxable person from a VAT perspective and being able to deduct the input VAT on acquisitions which have a direct and immediate link with the output economic transactions giving rise to a right to deduct. If the services are used by the holding company in order to perform both economic transactions giving rise to a right to deduct and economic transactions which do not, the deduction is allowed only in respect of the part of the VAT which is proportional to the amount relating to the former transactions.

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)

In principle the same rules apply as those applicable to the acquisition of Romanian companies (e.g. deductibility on interests of borrowings as detailed in section 6 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 which may be subsequently earned by the Romanian corporate income tax payer, as provided by the EU Parent-Subsidiary Directive (Directive 2011/96/UE) — that is, a minimum holding percentage of 10% and minimum uninterrupted holding period of 1 year before the dividend payment (and certain formal conditions to be met).

Controlled foreign companies’ legislation is not available in Romania. Starting 2014 a tax beneficial regime was introduced for the so-called holding companies, based on which dividends/ capital gains/ liquidation proceeds may be non-taxable in certain conditions (generally, the requirement is that the income beneficiary has maintained a minimum participation of 10% in the investee’s share capital for at least 1 year).

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, depending on the status of the Romanian entity (large tax payer or not) and thresholds of related-party transactions.

Romanian legal entities are entitled to receive fiscal credit for any tax paid on foreign-sourced income (e.g. 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.

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

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 price 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 surviving 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’. Under Romanian legislation the write-off of own shares should be performed against equity items.

No taxation arises for provisions and reserves that were previously deemed as deductible 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 surviving 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) trigger corporate income tax liabilities.

Also the usage (i.e. for share capital increase or to off-set of losses) of legal reserves and reserves representing tax incentives trigger 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). Starting 2016, 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.

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

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.

Therefore it should be checked whether, according to the above-mentioned DTT, Romania has the right to tax the 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, save for the case where the seller resident in a treaty country has maintained a participation of minimum 10% in the target’s capital for at least 1 year prior the sale.

**Sell-side**

15. **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%. 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 to declare and pay 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.

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

The profit reinvested by Romanian corporate income tax payers in technological equipment, computers and peripheral equipment, cash registers and machineries for control or billing activities and software programs is exempt from corporate income tax, in certain conditions. This incentive is in force until 31 December 2016.

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

There is no specific substance requirement for holding/finance companies included in the Romanian tax legislation. 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.

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General

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

   The M&A scheme for income tax and stamp duty relief was revised in 2015. This scheme is only for a share deal.

   Under this revised scheme, 25% of purchase consideration paid by an acquirer for a qualifying M&A can be converted into an allowance, which can be deducted against taxable income. This allowance is given over 5 years, and is capped at SGD5 million a year.

   Relief from stamp duty is also granted on documents for transfer of shares in a qualifying M&A. This relief is capped at SGD40,000 a year.

   Further, double tax deduction is allowed for transaction costs incurred on qualifying M&A. Transaction costs are professional fees incurred for the qualifying M&A, such as legal fees and corporate finance advisor fees. This double tax deduction is subject to a cap of SGD100,000 of expenditure a year.

2. **What is the general approach of your jurisdiction regarding the implementation of OECD BEPS actions (Action Plan 6 specifically).**

   Singapore supports the OECD project to combat base erosion and profit shifting (BEPS). To this end, Singapore has actively participated in BEPS-related discussions through a number of platforms.

   Therefore in response to Action Plan 13, the Inland Revenue Authority of Singapore has released a public consultation paper that asked for feedback on proposed revised guidelines on transfer pricing documentation to improve compliance. Subsequently, the Inland Revenue Authority of Singapore has released the revised guidelines.

   Singapore has been paying close attention to Action Plan 6, and will work with the global community to make coordinated effects to implement international tax rules.

3. **Which 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 and not for the purpose of obtaining a tax benefit, relief for unabsorbed trading losses or capital allowances brought forward from prior years continues to be available post acquisition. Conversely, such unabsorbed losses or capital allowances do not avail to the acquirer in an asset deal post acquisition.

   In an asset deal, where capital allowance relief had been claimed for that asset, 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. (There is no such balancing charge in a share deal.) 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.
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.

As for Goods and Services Tax (GST) i.e. Singapore’s Value-Added Tax, a transfer of undertaking is prima facie a taxable supply unless it meets the conditions of a transfer as a going concern. Conversely in a share deal, the transfer of shares is always exempt from GST.

Buy-side

4. Which 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 target 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.

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

Where goodwill includes intellectual property (IP) which has been defined in 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 the law, the Revenue may require the support of a bona fide valuation of the IP acquired for the purpose of the taxpayer’s trade as a condition for their applicability.

For assessment years 2011 to 2018, 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 (i.e. the preceding calendar or accounting year) for those assessment years.

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

Singapore has strict rules that seek to inhibit the deductibility of interest expense to only income-producing assets which are funded by the borrowing that incurs the interest expense. These restrictions have, for example, 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 share purchase of 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. And 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.
7. Which 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, the 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 cease trading 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 brought forward losses, are transferable.

8. 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 one fiscal year to the next. In a qualifying amalgamation this test may be satisfied. But the relief for such past unabsorbed losses or capital allowance is restricted 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, the relief available to the loss amalgamating company for its brought forward unabsorbed losses against current and future years’ income is not restricted only to income from a continuing trade. It could also be granted against investment income.

9. 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.

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

As mentioned, the allowance given for qualifying M&A is capped at SGD5 million a year.

Double deduction allowed for transaction costs incurred on qualifying M&A is subject to a cap of SGD100,000 of expenditure a year. Transaction costs in excess of this cap are not allowed any double deduction or normal deduction. That is, transaction costs above this cap are disregarded. Transaction costs are professional fees incurred for the qualifying M&A, such as legal fees and corporate finance advisor fees.
11. **Can VAT (if applicable) be recovered on acquisition costs?**

In Singapore, there is no GST on the transfer of shares.

As for the GST incurred on acquisition costs, (e.g. transaction costs such as legal fees and corporate finance advisory fees), such GST generally cannot be recovered.

12. **Are there any particular issues to consider in the acquisition by foreign companies?**

Singapore’s tax system is semi-territorial. It does not tax unremitted offshore income. In other words, the gains from trading shares of foreign companies may well not be taxed in Singapore if the income therefrom is not remitted into Singapore. If the income is remitted, it is exempted from tax in Singapore if certain conditions are met i.e. 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.

The M&A scheme for income tax and stamp duty relief only avails to acquiring companies which are Singapore companies i.e. Singapore incorporated and tax resident. Foreign companies do not avail to this scheme.

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

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 one-tier dividends from Singapore companies are tax exempt, so the interest on debt cannot be granted tax deduction. It is preferable for all debt financing to be raised by operating subsidiaries where taxable profits from the carrying on of a trade can be reduced by interest expense from debt financing.

As for stamp duty, relief can apply to group reorganisation, subject to conditions.

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

Unless the ownership of a real estate investment is connected with an active trade — eg management of hotels, property development, management of sports complexes — 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 than stamp duty for transfer of shares (which is only 0.2% of consideration), transferring shares in a company whose assets are substantially real estate instead of transferring that underlying real estate may not result in lower stamp duty. This is because anti-avoidance legislation exists to enable the Inland Revenue of Singapore 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 which are targeted for disposal.
Sell-side

15. **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.

16. **Is there any fiscal advantage in case 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.

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

There are generally no local substance requirements for holding companies.

However, holding companies with little substance in Singapore (e.g. have no business activities or have no key employees in Singapore) may have difficulty obtaining a certificate of residence.

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

Previously, interest incurred on debt acquired to fund acquisitions utilising the tax roll-over provisions of the Income Tax Act No. 58 of 1962 (the Act) was not automatically deductible by a purchaser, which had to apply for a directive from the South African Revenue Service (SARS) in order to obtain approval for such deduction. New interest limitation rules have been inserted into the act which provide for the limitation of the amount of interest which may be deducted by a purchaser. No directive needs to be obtained from the SARS in this regard.

With effect from 1 March 2015, a withholding tax on interest of 15% (may be reduced by the applicable DTA) is imposed on interest paid by a South African resident which is received by or accrues to a non-resident.

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?**

South Africa is a non-member country of the OECD, however, it has a working relationship with the OECD, and collaborates with it on a variety of policy issues. South Africa is also party to various OECD instruments, including most recently, the Declaration on Automatic Exchange of Information in Tax Matters.

The Davis Tax Committee has been tasked with reviewing a number of issues relating to the South African tax system, with its terms of reference being fairly wide and including BEPS among the issues to be considered. With regard to action Plan 6 relating to treaty shopping, the Davis Committee has made the following recommendations in its Interim Report:

- The general anti-avoidance rule (GAAR) contained in sections 80A to 80L of the act should be applied to prevent tax abuse.
- Existing treaties should be renegotiated or protocols signed to clarify that they are not intended to create opportunities for non-taxation through treaty shopping.
- Limitation on benefit provisions should be included in new treaties to limit the benefits to a foreign company which can show that it has a close connection to its country of residence, e.g. a majority of its shareholders are resident in such country of residence.
- The principal purpose of interposed companies should not be to obtain a tax treaty benefit.

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

   **a. Share deal**
   - The entire corporate history of the entity is assumed by the purchaser, and the purchaser would typically therefore require an in-depth due diligence review and/or comprehensive tax indemnities and warranties.
   - The purchaser acquires the tax losses of the target company.
   - The supply of shares is an exempt supply for VAT purposes where the purchaser and seller are registered for VAT.
   - Securities Transfer Tax (STT) is payable upon the transfer of securities (which includes unlisted shares, shares listed on the JSE, as well as member’s interests in close corporations) at a rate of 0.25% on the greater of the consideration given or the market value of the shares in the case of unlisted securities, and the greater of the consideration declared by the acquirer or the closing price in the case of listed shares.
Interest incurred on debt acquired to finance the acquisition of the assets may be deductible (subject to the interest limitation provisions).

b. Asset deal

- The existing tax liabilities of the target company are not assumed by the purchaser.
- The amount allocated to the various assets would become the base cost of such assets in the purchaser’s hands for CGT purposes, which would, where such base cost is high, result in lower capital gains tax implications upon the disposal of such assets (where the purchaser is subject to South African CGT).
- The purchaser may be entitled to certain allowances or deductions on certain assets which are acquired, however, where the purchaser disposes of such assets, a recoupment of allowances or deductions claimed may arise.
- VAT may be payable, thereby increasing the acquisition costs.
- The purchaser may acquire only part of the target company’s business.
- Interest incurred on debt acquired to finance the acquisition of the assets may be deductible (subject to the interest limitation provisions which would apply in instances where the purchaser and the target company are connected persons).

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?**

None. As the purchase price would be allocated to the shares, the purchase price would be used to determine the tax cost of the shares and would have no impact on the value of the underlying assets.

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

No depreciation may be recognised in respect of goodwill for tax purposes, and the parties should therefore ensure that the purchase price is allocated as much as possible to other asset categories that qualify for tax deductions or allowances.

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

**Asset deal:**
The act provides that interest will be deductible by the taxpayer where such interest is incurred for the purpose of earning taxable income in the course of trade. Where the purchaser is a trading entity and acquires the business/assets of the target company in order to derive taxable income from its operations, the interest would be deductible from its income.

**Share deal:**
Generally, interest incurred on debt acquired to fund the acquisition of shares would not be deductible as it would not be incurred for purposes of earning taxable income, as the dividend income earned by shareholders is generally exempt income. However, the act provides that the purchaser will be entitled to a deduction on the interest incurred for the acquisition of the shares where the target company is an “operating company” and the purchaser would, at the close of the day of the transaction, be a controlling group company in relation to the target company i.e. will hold more than 70% of the shares in the target company.

The amount of interest which may be deducted by the purchaser would be limited by the interest limitation provisions of the act, in terms of a formula which provides that the taxpayer may not deduct interest exceeding 60% of its so-called “adjusted taxable income” in any year of assessment. Any interest which is not deducted may be carried over and deducted in the following year of assessment. The interest deduction limitation would not affect the purchaser too adversely where the acquiring entity has a high “adjusted taxable income”.
7. **What are usual strategies to push-down the debt on acquisitions?**

Typically, a South African intermediary holding company is incorporated by a foreign purchaser as a vehicle to purchase the shares in an existing target company, which newly incorporated intermediary holding company may then incorporate a subsidiary which will then acquire debt to acquire the shares of the target company. The business and/or assets of the target company are then acquired (by either the intermediary holding company or the subsidiary of the intermediary holding company) utilising the tax roll-over intra group transaction relief provisions of the act. As the debt will be incurred by the entity which will be conducting the trade, the interest incurred on the debt to acquire the assets of the target company should be deductible, subject to the interest deduction limitations (see 3 above).

8. **Are losses of the target company(ies) available after an acquisition is made?**

The tax losses of the target company are retained by the purchaser in the case of a share deal, but not where assets are acquired.

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

STT is levied upon the transfer of shares in listed and unlisted companies at a rate of 0.25% on the greater of the market value of the share or the consideration given in the case of an unlisted share, and the greater of the consideration declared by the acquirer or the closing price in the case of listed shares. STT is payable by the company which issued the share in the case of an unlisted share or the person who transfers the share in the case of a listed share, but may in both scenarios be recovered from the person to whom the share was transferred.

VAT is not payable upon the transfer of a share as such transfer is an exempt supply.

No transfer duty would be payable as transfer duty is only levied upon the transfer of immovable property.

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

**Costs incurred to acquire shares/assets**

**Share deal:**
Where the purchaser is a share trader, the shares would likely constitute trading stock and the acquisition cost will be deductible from the purchaser’s income. However, the act contains a provision which deems shares to be capital assets where the taxpayer holds the shares for a period of more than three years. Should this deeming provision be applicable, the cost incurred to acquire the shares and deducted will be recouped.

**Asset deal:**
Where assets are acquired which qualify for deductions or allowances, the purchase price will be allocated to such assets and the purchaser will be entitled to claim such applicable deductions or allowances.

**Costs incurred in relation to advisory services**
Generally, fees relating to advisory services provided by financial and legal advisors etc. incurred by a purchaser would not be deductible as such fees would generally be regarded as being expenditure of a capital nature. With regard to certain finance charges, depending on the nature of the charge, such charges may be deductible. The deductibility of advisory fees would be dependent on the contractual nature of such fees. Therefore, fees incurred in relation to the funding of the transaction could possibly be structured in a manner which would render same as deductible.

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

**Costs incurred to acquire shares/assets**

**Asset deal:**
An input tax credit may be claimed by the purchaser where VAT was charged on a supply of goods or services made to the purchaser and the purchaser utilises the goods or services acquired in the course of furtherance of its VAT enterprise for the purposes of making taxable supplies.

Where the purchaser acquires the business (or part thereof) of the target company as a going concern as
envisaged in section 11(1)(e) of the VAT Act, VAT will be payable at a rate of 0%. In order to qualify for the zero-rating, the following requirements must be satisfied: both parties to the transaction must be registered for VAT, and agree in writing that the business is sold as a going concern, the business be disposed of must be capable of separate operation and must be an income-earning activity on the date of transfer, the assets which are necessary for the carrying on of the business must be transferred to the purchaser, and the purchase price is inclusive of VAT at a rate of 0%.

**Share deal:**
No VAT liability would arise upon the acquisition of shares as the supply of shares is a supply of financial services, which is an exempt supply for VAT purposes.

**Costs incurred in relation to advisory services**

**Asset deal**
In respect of an asset deal, an input tax credit may be claimed by the purchaser where VAT was charged on a supply of services made to the purchaser, and the purchaser utilises the goods or services acquired in the course of furtherance of its VAT enterprise for the purposes of making taxable supplies.

**Share deal**
Generally speaking, VAT incurred on fees for advisory services are not deductible for VAT purposes as the acquisition of shares is not a taxable supply for VAT purposes. It appears as though the current policy of SARS is that they require that there must be a direct and immediate link to a taxable supply for VAT of an expense to qualify as input tax – the ultimate purpose of the expense is disregarded by SARS. However, the phrase “in the course of” in the context of the claiming of input tax, requires that there must be some relationship between the consumption or use of the service and the making of taxable supplies – no direct or immediate link to taxable supplies is necessary.

This issue remains a contentious one for VAT purposes and is guided by domestic and foreign case law.

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 purchasers should consider the appropriate acquisition vehicle when structuring the acquisition of a South African target company. In this regard, the purchaser may elect to structure the acquisition through a South African intermediary holding company, a subsidiary or a branch.

The incorporation of a local intermediary holding company offers the purchaser limited liability protection (i.e. the intermediary holding company is a separate legal entity and the liability of the shareholders is limited to the value of their shares). Any dividends received by the local intermediary holding company would be exempt from income tax and dividends tax (levied at a rate of 15%), and interest received from local operating companies would not be subject to interest withholding tax (levied at a rate of 15%). The local intermediary company could therefore be utilised as a vehicle for reinvestment. However, any expenditure incurred by the intermediary holding company would likely not be deductible from its income.

The purchaser may also elect to operate through a local subsidiary or a branch of the foreign purchaser which is registered in South Africa. A South African resident company is taxed on its worldwide income at a rate of 28% (subject to the applicable DTA which may reduce the rate), while a branch, which is a non-resident, will be taxed on the income sourced in South Africa at a rate of 33% (save for where the entity constitutes a permanent establishment, in which case it will be considered a resident).

Upon the repatriation of funds to the foreign parent company, dividends declared by a subsidiary will be subject to dividends withholding tax at a rate of 15% (subject to the applicable DTA which may reduce the rate), and any interest paid to the parent company will be subject to interest withholding tax at a rate of 15% (subject to the applicable DTA which may reduce the rate). In addition, any profits repatriated to the foreign parent company by way of management and other fees will be subject to transfer pricing rules.

The repatriation of funds by a branch to its foreign parent company will not be subject to any withholding taxes.
Much like a subsidiary, the branch is entitled to a deduction of its expenditure incurred in the production of its income, however, where a foreign parent company operates more than one South African branch, the losses of one branch may be set off against the taxable income of another branch in the determination of the South African tax payable.

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

Yes. Various special rules are provided for in the act to allow for tax neutral mergers, acquisitions, and restructuring. The act specifically provides for asset-for-share transactions, amalgamation transactions, intragroup transactions, unbundling transactions and liquidation distributions (tax roll-over provisions), each with specific requirements which must be met by the parties to the transactions before they will be applicable.

South African has no “group tax provisions”.

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

The act contains provisions relating to the taxation of Real Estate Investment Trusts (REITs). A REIT is a resident company the shares of which are listed on a recognised exchange. Essentially, the act allows for a “qualifying distribution” to be made by a REIT or a controlled company (a company that is a subsidiary of a REIT) for which the REIT or controlled company that is a resident gets a deduction from its income for the year of assessment to which that qualifying distribution relates. A “qualifying distribution” means dividends paid or payable by the REIT or a controlled company or interest incurred in respect of debentures that form part of a linked unit in that company where 75% of the gross income of that company consists of “rental income”.

Amounts distributed by a REIT are fully taxable in the recipient’s hands. Where such distribution is in the form of a dividend, the dividend is not exempt from income tax in the recipient’s hands. This exclusion from the dividend exemption also applies in respect of dividends distributed by a controlled company.

There are a number of further specific provisions dealing with the taxation of REITs and controlled companies, including, inter alia, provisions dealing with the receipt or accruals by a REIT or a controlled company in respect of a financial instrument, the disallowance of deductions in respect of immovable property and specific rules in respect of the receipt or accrual of amounts of interest in respect of debentures forming part of a linked unit.

**Sell-side**

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

CGT is payable by residents upon the capital gains arising from the disposal of capital assets.

Non-residents will only be subject to CGT upon capital gains arising from the disposal of:

- immovable property situated in South Africa;
- any interest in or right to immovable property situated in South Africa, where more than 80% of the market value of the interest at the date of the disposal relates directly or indirectly to South Africa immovable property which is not trading stock (“South African property rich company”). An interest would include equity shares in a company where more than 20% is held (together with connected persons) in the company being disposed of, or a right of ownership, or a vested interest.; and
- Any asset effectively connected with a permanent establishment of the non-resident in South Africa.

Therefore, where a non-resident acquires an interest in a South African property-rich company, whether South African or foreign, such non-resident will be liable for CGT upon the disposal of such equity shares, subject to treaty relief.
Only a portion of capital gains are taxable, and at the tax rate applicable to the particular taxpayer – for example:

- 33.3% inclusion in the case of a natural person or special trust; and
- 66.6% in the case of a company.

A foreign company will thus suffer an effective tax rate of 18.64% on capital gains (66.6% x 28% corporate tax rate).

Where a non-resident disposes of immovable property in South Africa or an interest in a South African property rich company, the transaction may be subject to withholdings tax. The purchaser will have a duty to withhold a portion of the purchase consideration where tax is due on the transaction, and remit this to SARS. The amounts to be withheld amount to 5% of the purchase price where the seller is a natural person and 7.5% if the seller is a company and 10% if the seller is a trust. This amount will be allocated towards settling the CGT liability of the non-resident seller, who will be obligated to register as a taxpayer with SARS for purposes of making payment of its CGT liability.

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

No.

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

There are no specific substance requirements for obtaining/maintaining South African tax residency.

Foreign incorporated companies will be tax resident in South Africa when they are effectively managed in South Africa. South African incorporated companies will automatically be South African tax resident, unless they are exclusively resident in another country by way of a DTA. It is thus important that, where the holding/finance company wants to apply South Africa treaties and that the company’s place of effective management remains in South Africa. Place of effective management is not defined in the act, and is open to interpretation, but the current SARS view appear to be that a company’s place of effective management is the place where key management and commercial decisions that are necessary for the conduct of its business as a whole are in substance made. This approach is consistent with the OECD’s commentary on the term “place of effective management”.

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General

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

   A new Corporate Income Tax (CIT) act, which was approved on November 27, 2014 and entered into force on January, 1, 2015, has substantially modified the CIT regime previously in force. The main aspects being modified, which are analysed in greater depth in the sections below, are the following:

   - The scope of the participation exemption on dividends and capital gains on transfers of shares, which was previously in force only for foreign subsidiaries, has been extended to domestic source dividends and capital gains. Likewise, the requirements to have access to the exemption have been modified.
   - The tax treatment of capital gains obtained by EU corporate investors on the sale of Spanish subsidiaries has been amended in order to align it with the tax treatment of those obtained by Spanish resident corporations.
   - The deductibility for tax purposes of merger goodwill disappears as a mechanism for avoiding double taxation and the requirements for amortization of goodwill acquired following an asset deal become more flexible.
   - The rules regarding the deductibility of financial expenses have been modified, restricting the effectiveness of traditional structures which were implemented to finance acquisitions and push-down the debt.
   - NOLs can be carried forward in future years without a time restriction, but the taxable base that can be offset yearly against NOLs has been limited. Likewise, the anti-NOL trafficking rule has been modified.

   Specific CIT legislation is applicable in the Basque Autonomous Community, which has autonomous legislative powers in tax matters. Companies subject to Basque autonomous regulations may benefit of significant tax advantages: dividends received and capital gains on transfers of participations are generally exempt, while impairments on the participations can be deducted; financial expenses are fully deductible (subject only to the thin capitalisation rules); goodwill embedded in the acquisition price of the participations may be deducted; losses of foreign permanent establishments may be deducted, while the income is exempt. The main specialties of Basque tax regulations are explained below.

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?**

   Spain has partially adapted the CIT regulations to some of the measures proposed under some of the OECD BEPS action plans (as specifically remarked in the preamble to the new CIT Act) and Spanish regulations set forth a wide range of anti-abuse rules which are in line with the principles stemming from the OECD BEPS works, among others:

   - An anti-abuse rule regarding hybrid instruments which limits the deductibility of expenses with related companies which, as a result of a different tax classification at the level thereof, do not generate income or generate exempt income or income subject to a tax rate of less than 10%
   - A limitation to the access to the participation exemption regime of hybrid instruments has been introduced, by which the participation exemption does not apply when dividends distributed by a non-resident subsidiary generate a deductible expense at the level thereof.
   - Specific restrictions are laid down as regards the tax treatment of some hybrid instruments (i.e. participating loans, return on certain types of equity instruments, among others).
   - The Spanish CFC rules and transfer pricing rules were modified as well to adapt them to the OECD BEPS recommendations.
The above anti-abuse rules related have not been included in the Basque CIT regulations.

On the other hand, Spain does not have a model Double Tax Treaty (DTT) or a standard anti-abuse clause. However, it has generally tried to introduce anti-abuse rules in the DTTs that it signs—specially the most recent ones—and, where the old DTTs are renegotiated, anti-abuse clauses are in most cases included.

In regards to the amendments to the EU Parent-Subsidiary Directive, Spain already has an anti-abuse rule in place according to which the domestic exemption implementing the EU Parent-Subsidiary Directive does not apply if the parent company is located in a tax haven or if the majority of its voting rights are held, directly or indirectly, by an individual or legal entity not resident in the EU or a country in the European Economic Area with an effective exchange of information with Spain, unless the parent company has been established to operate on valid economic grounds and for substantive business reasons. The Spanish government will have to review whether the domestic anti-abuse clause is in line with the EU Parent-Subsidiary, but, in principle, its current wording is very similar to that of the general anti-abuse clause foreseen in the EU Parent-Subsidiary Directive.

3. 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 on-going concern the pre-closing tax liabilities related to 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 therein.

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 (see section 5 below for details of the goodwill deductibility). The target’s existing tax attributes, such as Net Operating Losses (NOLs) however do not carry over to the buyer.

Asset sales may also be subject to Value Added Tax (VAT) at the applicable VAT rate (the general VAT rate is 21%). 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 (TT) at a rate that would vary between 7% and 11% (depending on the Spanish region that would be entitled to tax the transfer).

However, if the real estate 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. As a consequence, and in accordance to the VAT act, the purchaser, in his condition of VAT taxpayer, must self-assess the relevant VAT quota. If the VAT exemption is waived, TT would not be levied and VAT would apply. In such case, the transaction will be subject to stamp duty at a rate that would vary between 0.5% and 2.5%.

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 amortisable goodwill – see section 5 below for further information). In Spain sellers, are generally not inclined to structure 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 if they are not exempt) 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 offsetting of NOLs, 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 licenses, 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.

In Spain NOLs can be carried forward with no time limit (the carry-back is not permitted). However, the right of the Spanish Tax Authorities to audit tax losses which have been off-set or are carried forward prescribes in 10 years, starting to count from the date after filing the CIT return corresponding to the fiscal year in which the tax loss was generated. Once the 10-year period is expired, the Spanish Tax Authorities are not entitled to audit the tax losses; nevertheless, the taxpayer must be capable of demonstrating the origin of the tax losses which it is willing to off-set with the exhibition of the tax return and accounting records.

In addition to the absence of a time limit for the offset of tax losses, the amount of taxable income in a year that may be offset by NOLs is limited to 70% (temporarily, to 60% in fiscal year 2016) of the tax base, and admitting, in all cases, the offset up to an amount of €1 million.

Under Basque CIT legislation NOLs can be carried forward for 15 years (for NOLs generated before 2014, this 15 year period starts on 1 January 2014), but they can offset 100% of the taxable income of any year.

With regard to NOLs, Spain’s CIT rules provide for certain anti-NOL trafficking rules where all of the following circumstances occur:

- The majority of the share capital of the target is obtained by a person or entity or group of persons or entities after the end of the fiscal year in which the tax loss was generated.
- The persons/entities stated above (i.e. those taking control of the company) held less than 25% of the share capital in the company at the end of the fiscal year in which the tax loss was generated.
- The acquired entity falls under one of the following circumstances:
  - It had not been carrying out an economic activity in the 3 months prior to the acquisition;
  - It carries out an economic activity in the 2 years following the acquisition which is different from or additional to the one carried out before the acquisition, which implies a net revenue in the years following the acquisition which is 50% higher than the average net revenue obtained by the entity in the 2 years preceding the acquisition;
  - It is qualified as an instrumental entity; or
  - The entity has been de-registered from the tax entities’ registry.

Under Basque CIT, anti-NOL trafficking rules only apply if the acquired entity has not carried out an economic activity in the six months prior to the acquisition.

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 amortization or depreciation 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.
Under Basque tax regulations the buyer may benefit from an indirect deduction for the depreciation of goodwill or any latent gains existing in the target 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 4 below.

Finally the sale of shares of a Spanish company is not subject to any indirect tax, except TT (from 7% to 11%) if the purpose of the sale is to avoid the tax payable for the real estate properties owned by the companies whose shares are transferred.

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 market 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 destined to an economic activity and three years have not elapsed between the date it was contributed and the transaction date.

The rules foreseen in the previous CIT Act which allowed for the step-up and deduction of merger goodwill have been abolished (see sections 4 and 5 below). However, the deduction of merger goodwill is still possible under Basque tax regulations.

4. 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 CIT law that provide a step-up in value of the target’s underlying assets upon acquisition of its shares.

Under Basque regulations the acquirer may, subject to certain requirements and anti-abuse provisions, take an indirect deduction for the depreciation of any latent gains existing at in the target at the time of acquisition by means of the recognition of an impairment of such investment. A step-up of the assets may also be achieved through a merger, whereby the acquiring company absorbs the target after purchasing the target’s shares (see section 5 below).

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

The CIT regulations state that goodwill acquired following an asset deal can be amortised for tax purposes over a period of 20 years (at a maximum 5% annual rate). This will not be applicable to the goodwill acquired prior to January 1, 2015 from entities which form part of the same group of entities.

Under Basque regulations the maximum deductible depreciation rate for goodwill is 12.50%.

As mentioned, the new CIT Act foresees that the underlying goodwill embedded in the shares being acquired (i.e., 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 when a further merger between buyer and target takes place.

Under Basque regulations, subject to certain requirements and anti-abuse provisions, the buyer can deduct for tax purposes at a maximum 12.50% yearly rate the goodwill embedded in the acquisition price of the shares (without the need of absorbing the target). This deduction does not require an impairment to be booked. The acquiring entity may absorb the target and book this as a merger goodwill which can be deducted at a maximum yearly rate of 12.50%.
6. **Are there any limitations to the deductibility of interest of borrowings?**

From 2012 onwards, thin capitalisation rules previously in force were replaced by two new relevant measures:

Borrowing costs for the relevant fiscal year are not deductible if they relate to debts generated within the corporate group and 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 (i.e., these borrowing costs will be deductible) if the taxpayer evidences the existence of valid economic reasons for performing these transactions.

Borrowing costs over and above a ceiling equal to 30% of the operating income for the period are not deductible. 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, among others, 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 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 €20m, unless the holding was acquired with funds borrowed from group entities and the related borrowing costs are not deductible.

This ceiling has been established subject to the following rules:

(I) Where the net borrowing costs for the tax period amount to €1m or less, they will be deductible in all cases;

(II) 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 the following periods, 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 five 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.

Moreover, the CIT Law establishes the following rules that could have a bearing on the tax deductibility of borrowing costs:

- The transfer pricing rules, which limit deductibility of interest expenses when the conditions of the lending between related parties, is not arm's length.

- The non-deductibility of the return on equity, clarifying that this rule would apply to any securities representing the capital or equity of entities, regardless of their accounting treatment (e.g., non-voting shares or redeemable shares). Included in this category are participating loans granted by entities in the same group of companies (as group is defined in article 42 of the commercial code), the interest on which will not be tax deductible. This restriction on the deductibility of the remuneration of participating loans will not apply to contracts executed before June 20, 2014.
The non-deductibility of expenses with related companies which, as a result of a different tax characterisation at the level thereof, do not generate income or generate exempt income or income subject to a tax rate of less than 10% at the recipient level (hybrid transactions).

A specific restriction is laid down in cases of acquisitions of holdings in other entities if, thereafter, the acquired entity is included in the tax group of the acquirer or is merged with the acquirer, with a view to preventing the acquired activity from bearing the finance cost incurred on its acquisition. In this situation, borrowing costs related to the acquisition of these holdings over and above a ceiling equal to 30% of the operating income of the acquirer for the period are not deductible.

For these purposes:

- The restriction is limited in the case of a merger or an inclusion in a consolidated tax group taking place within 4 years following the purchase.
- It is possible to offset the finance costs that are not deductible for this reason in the following years (according to the general rules on deductibility of finance costs).
- This limitation on the deduction of finance costs will not apply if the debt incurred to finance the transaction does not exceed 70% of the acquisition cost of the shares and the debt is repaid at the rate of at least 5% annually for 8 years (until the debt reaches 30% of the acquisition price).

Under Basque regulations the above limitations to the deduction of interest do not apply. Instead a 3-to-1 thin capitalisation rule applies to net debt with non-related entities. A different ratio may be applied if the company's debt leverage is proved to be set at arm's length. No limitations apply if the net debt from related entities does not exceed EUR 10 million at any time in the tax year. Transfer pricing rules should also be considered.

7. 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, has traditionally been 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 were also strategies to consider for pushing down debt.

All these strategies have to be carefully analysed to ensure that they are not challenged on the basis of the general anti-abuse provisions, as well as to comply with the transfer pricing rules and, most significantly, with the requirements and limitations recently introduced regarding interest deductibility as set forth in section 6, which have substantially restricted the ability of companies to push down debt connected to acquisitions of equity interests by Spanish companies.

8. 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 without a time limit (for 15 years under Basque tax regulations) considering the limitations described above in previous sections.

Spanish CIT law does not provide for a carry back rule. Conversely, it provides for change in control limitations (see section 3).

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 3).

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

Please see section 3 above.
10. **Are there any restrictions on the deductibility of acquisition costs?**

There are no specific restrictions on the tax deductibility, for the purposes of the buyer's CIT, of acquisition costs, as long as these costs give rise to accounting expenses on their profit and loss account. This applies both in the context of share deals and of asset deals.

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

VAT borne on acquisition costs may be totally recovered when the company is entitled to offset 100% of the input VAT. Therefore, companies which do not fall within the scope of Spanish pro-rata rules (i.e. deductible proportional rules) which limit the right to offset input VAT will be able to fully recover VAT. The refund will be requested through the last VAT return filed for a natural year and the Spanish Tax Authorities have to carry out the refund within 6 months following the request or late payment interest will be accrued in favour of the taxpayer.

In order to recover VAT without waiting until the last return of the year, companies may opt for the (voluntary) monthly return regime if certain requirements are met. The Spanish Tax Authorities have to carry out the refund within 6 months following the request or late payment interest will be accrued in favour of the taxpayer (in practice, the term is reduced after the Spanish Tax Authorities approve the first refund).

12. **Are there any particular issues to consider in the acquisition by foreign companies?**

Where a foreign buyer acquires a Spanish target, the following aspects should be taken into account:

- Whether dividends and capital gains obtained by the foreign buyer in connection with the participation held in the target would be taxed in Spain;

- Whether the investment through a company that benefits from the Spanish holding company regime (the ETVE regime, or entidad de tenencia de valores extranjeros) would be more advantageous from a tax perspective (e.g. from the perspective of future repatriation of funds to a foreign shareholder);

- The financing of the acquisition;

- The tax incentives connected to the investment.

Dividend distributions made by a Spanish company to non-resident shareholders are generally subject to withholding tax at a 19% rate. However, this rate may be reduced in the following situations:

- Where the parent company is a resident of an EU jurisdiction (or EEA country with an effective exchange of information with Spain) no withholding tax applies if certain conditions are met (mainly, a participation over 5% held for more than one year). Spanish non-residents income tax law includes an anti-abuse clause regarding dividend exemption which states that the exemption is not applicable if the parent company is located in a tax haven or if the majority of its voting rights are held, directly or indirectly, by an individual or legal entity not resident in the EU or a country in an EEA country with an effective exchange of information with Spain, unless the parent company has been established to operate on valid economic grounds and for substantive business reasons.

- Where a tax treaty provides for a lower withholding tax rate, the treaty rate will be applicable;

- Where the Spanish company distributing the dividends is subject to Basque tax regulations and the earnings being distributed originated in dividends or capital gains from foreign subsidiaries benefitting of the participation exemption or from exempt income from permanent establishments abroad, such distributions are not subject to withholding tax (provided the shareholder is not resident in a tax haven).

The implications of the sale of shares in a Spanish company are described in more detail in section 15 below.

The ETVE regime provides that 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 underlying 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 (e.g. 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, bearing in mind the existing restrictions to deduct borrowing costs.

Several strategies are commonly used to leverage Spanish acquisitions. If a financing vehicle resident in an EU jurisdiction is used, it could benefit from the exemption from Spanish withholding taxes on interest payments (under Spanish domestic provisions, interest payments to EU lenders are tax-exempt). Careful attention must be paid to the substance of those vehicles and the business reasons behind their existence; otherwise the exemption could be challenged on the grounds of anti-abuse provisions.

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 an SPV is not deemed to be resident in tax-haven jurisdictions under Spanish tax law). The securities issued by the SPV must be publicly traded and both the SPV and its ultimate owner are subject to the strict ownership, legal and information reporting requirements. From a tax perspective this regime provides advantages for both the issuer (e.g. deductibility of interest, exemption from capital duty) and investors (i.e., exemption of interest paid to non-resident investors).

In this respect, it should be noted that the CIT Law establishes the non-deductibility of expenses with related companies which, as a result of a different tax classification at the level of those companies, do not generate income or generate exempt income or income subject to a tax rate of less than 10% (hybrid transactions).

Finally, Basque tax regulations allow for the deduction at a maximum 12.50% yearly rate of financial goodwill embedded in the acquisition price of the shares in the target, both in Spanish and non-resident companies. Accordingly, Basque holding companies are commonly used for the acquisition of the target.

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

The Spanish CIT law provides for a special 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. Under Basque regulations this tax neutral regime may also apply to global transfers of assets and liabilities to shareholders owning 25% or more of the company’s share capital.

This is configured like the standard regime for restructuring transactions and there is a general obligation to inform the tax authorities when transactions eligible for the regime are carried out. (In the case of companies subject to Basque tax regulations an election for the tax neutral regime is required.)

This regime provides for a tax neutral treatment for restructuring transactions (both from a CIT and indirect tax perspective), by providing that:

- Capital gains or losses realised on the transferred assets are not included in the CIT 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 to be carried out under valid economic purposes and not with the sole purpose of obtaining a tax advantage.
14. **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 directly or indirectly real estate located in Spain are deemed to be subject to tax in Spain, at a 19% rate. The domestic exemption on capital gains on the sale of qualifying subsidiaries obtained by EU tax residents does not apply if the main assets of the subsidiary are, directly or indirectly, Spanish real estate properties. 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, though the vast majority of such treaties allow the source State to impose tax on those gains.

Capital gains obtained by resident entities in connection with transfers of Spanish companies whose main assets are real estate located in Spain are taxed in the same terms as capital gains on companies without real estate at the ordinary CIT rate (25% or 28% under Basque regulations). However, the capital gain may qualify for the participation exemption if the relevant requirements are met.

In either case, it is important to note that Spanish transfer tax (from 7% to 11%) may apply to transfers of shares in case that it was deemed that the transaction had the objective of avoiding the tax otherwise payable for the transfer of the real estate properties owned by the companies represented by the shares. 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.

**Seller’s side**

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

**Share deals**

Capital gains obtained by Spanish residents from sales of shares are generally subject to a 25% CIT rate (28% under Basque CIT rules). However, a participation exemption regime may apply. The new CIT Act unifies the treatment given to dividends and gains on holdings in Spanish resident and non-resident entities, by making the participation exemption regime available to both domestic and cross-border transactions, for which certain requirements must be met. To these regards, capital gains resulting from the sale of shares of a resident and non-resident company may benefit from the Spanish participation CIT 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 minimum 5% stake is not held, the acquisition cost must be at least €20m and must have been acquired at least one year prior to the sale;
- If the target is a non-resident it must be subject to a tax similar to Spanish CIT with a tax rate of at least 10%. 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 target’s country of residence;
- The exemption will not be applicable to capital gains obtained on the sale of stake held directly or indirectly in instrumental entities.
- The exemption will not be applicable to capital gains obtained on the sale of stake held directly or indirectly in entities which fall under the scope of the Spanish CFC rule and the said regime applies, at least, to 15% of their income.
- The exemption will not be applicable when the subsidiary is 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, if any) is granted. Fulfilment of the above requirements should be carefully analysed on a case-by-case basis since certain anti-abuse rules might be applicable.
Capital losses derived from the sale of shares can be offset against the ordinary income and capital gains obtained in the same fiscal year. Certain restrictions to deduct the loss may apply when the investment generated exempt income in the previous years or for intra-group transactions.

Taxable capital gains obtained by non-residents are taxed at a flat 19% rate. However, an exemption might be available further to the provisions of a tax treaty or to domestic law. 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 (i.e., 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.

Domestic law foresees that capital gains resulting from the transfer of movable property, obtained without a permanent establishment, by residents in an EU member state or by EU permanent establishments of residents in EU member states, will be tax exempt. This exemption will not apply to capital gains obtained in the transfer of shares when one of the following circumstances occurs:

- When the assets of the company consist principally, directly or indirectly, in real estate situated in Spain.
- For individuals, when in the 12 months prior to the transfer, the taxpayer held, directly or indirectly, at least 25% of the stake in the transferred entity.
- In the case of non-resident companies, when the requirements to apply the participation exemption regime for CIT purposes are not met.

**Asset sales**

If the seller is a Spanish resident company, capital gains derived from asset sales are generally subject to CIT at a 25% rate. Any potential capital gain can be offset against NOLs and other negative income, considering the limitations already described. Additionally, the capitalisation reserve can be applied (see section 19 below).

Under Basque regulations, a full exemption of the gain is available subject to reinvestment of the sale proceeds. The general CIT rate is 28%.

If the seller is a non-resident company, capital gains obtained thereby in connection with the sale of assets located in the Spanish territory are generally subject to Spanish taxes, at a 19% rate. 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 CIT (at a 25% rate or 28% under Basque regulations).

The access to the domestic exemption for EU movable assets and the provisions of an applicable tax treaty may reduce the tax burden.

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

As a “replacement” for the traditional reinvestment tax credit, the CIT Law includes the so-called “capitalisation reserve” as an incentive for the reinvestment and capitalisation of companies.

Taxpayers subject to the standard tax rate can reduce their tax base by 10% of the increase in their equity provided that (i) this increase is maintained over a period of 5 years and (ii) a reserve is created for the amount of the reduction, duly separated and restricted (as non-distributable) over the 5-year period.

The reduction cannot exceed 10% of the positive tax base prior to the application of this reduction, the inclusion of adjustments for deferred tax assets and the offset of tax losses. If there is insufficient tax base, the outstanding amounts can be applied over the next 2 years, together with that of the year itself, subject to the same limit.

A number of rules are established for determining the increase in equity, mainly excluding shareholders’ contributions or variations for deferred assets, which means that as a general rule the equity increase has to come from the year’s undistributed income.
Under Basque tax regulations, reinvestment exemption applies to capital gains arising on the sale of tangible or intangible fixed assets used in the company's economic activities, where the full proceeds are reinvested in tangible or intangible fixed assets used for the company's economic activities or holdings of at least 5% in companies engaged in an active business operation. The reinvestment of the proceeds should be completed within 1 year before, or 3 years after, the transfer. The new assets should be held for at least 3 years (5 years for real estate), unless their useful life is shorter.

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

There are not specific substance requirements set forth for regular resident companies, but the access to the domestic participation exemption when investing in companies deemed as purely instrumental as well as certain tax benefits (for instance, benefits for small and medium entities) can be denied where an insufficient level of substance is deemed to exist. On the other hand, the ETVE regime will only be applied to holding companies whose activities (i.e. the management of the stake held in their subsidiaries) are carried out through an adequate organization of human and material means.

As regards non-resident companies, the benefits of a domestic exemption or an applicable DTT may be denied if the foreign company does not have sufficient substance to evidence its effective tax residence in the foreign jurisdiction or if, as a consequence thereof, the relevant structure was regarded as purely tax driven (i.e. merely aimed at benefitting from the relevant DTT or domestic tax advantages).

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General

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

   Swiss tax authorities scrutinise more closely transactions in view of anti-avoidance and anti-abuse rules and in particular the achievement of a tax-free capital gain in a share deal if the seller is an individual and holds his/her shares as part of his/her private wealth.

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?**

   Switzerland will implement the minimal standards according to the OECD BEPS Project (i.e. nexus approach for IP boxes, abolishment of harmful tax practice, exchange of information on tax rulings, anti-abuse provisions in double taxation agreements and Country-by-Country-Report) as well as optional recommendations if they are implemented by a large number of countries.

   Regarding action Plan 6, Switzerland supports the Principal Purposes Test (PPT rule). Switzerland will implement the new anti-abuse rules either by a revision of the existing double taxation agreements or by the new multilateral instrument according to action Plan 15.

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

   a. **Share deal**

      **Buy-side**

      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.

      **Sell-side**

      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 shares as part of their private wealth, the gain is in general 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/her shares to a company he/she controls
      - Securities dealer: If the seller qualifies as a professional securities dealer – or if, according to the Swiss Supreme Court 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 are sold from the private assets of an individual investor to the business assets of a corporate or an 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 cooperation of the seller

      The transfer of shares is not subject to Swiss VAT.
b. Asset deal

Buy-side
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. However, the buyer cannot use any losses carried forward by the seller.

Sell-side
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 (i.e. no cash flow).

Buy-side

4. Which are the strategies, if any, to step up the value of the tangible and intangible assets in your country?

There are no strategies to step up the value of assets in share deals in Switzerland. A step up in the value of tangible and intangible assets leads to a taxable profit.

5. Which are the particular rules of depreciation 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 (e.g. if the acquired company encounters serious financial difficulties), it is not possible to write off the goodwill component on shares for tax purposes. As a contrast, in an asset purchase 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.

6. 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 building land – 70%
Other real estate – 80%
Cost of foundation, 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 2015, the maximum interest on loans between related parties denominated in Swiss francs amounted to 3% 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 2015, the maximal interest rates for loans denominated in US dollars amounted to 2.25% and for loans denominated in Euros amounted to 1%. 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.

7. **Which are the 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, the Swiss tax authorities will likely qualify this as an abuse, with the result that the interest paid on debt is 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.

8. **Are losses of the target company (ies) available after an acquisition?**

The target companies carried-forward tax losses can generally be used within the maximum offset period of 7 years, even after the transfer of the target companies shares. In the case of an acquisition of a shell company (a mostly liquidated company holding cash) the tax losses may not be used.

In an asset deal the target company’s losses are not available.

9. **Is there any indirect tax on the 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.

Security dealers are banks, actual dealers in securities and, among others, Swiss companies that hold securities
with a book value of more than CHF 10 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 CHF 10 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.

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

Acquisitions costs are in general tax deductible for the buyer. Such costs are tax deductible for the target company only, if the corresponding costs qualify as services providing added value to the target company, and therefore, may be considered as commercially justified.

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

Basically, VAT incurred on acquisition costs is deductible as input VAT. Restrictions exist for the acquisition of shares below a 10% quota or for the acquisition of assets that are used for VAT exempt activities. In all other cases, the input tax deduction can be claimed.

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)**

Dividends from a Swiss target company are subject to Swiss withholding tax of 35%. Switzerland has concluded tax treaties with numerous countries which provide a full or at least a partial reduction of the withholding tax on dividends. In addition, for EU countries, 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 Swiss participation to an EU parent company, if the participation amounts to at least 25% and a holding period of at least 2 years is met.

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

A company reorganisation can qualify as a 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 basically also tax neutral for the shareholders. However, 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 value of the total consideration, 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.

14. **Is there any particular issue to consider in 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 in Switzerland indirectly through a corporation
- The owner transfers major parts of the shares in the real estate corporation (i.e., 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.

**Sell-side**

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

Capital gains are in general taxed with federal income tax and cantonal or communal income tax for entities and individuals holding the assets as business assets.

Participation relief for entities applies for capital gains derived from the disposal of qualifying participations. However recaptured depreciations on participation are not subject to participation relief. The requirement to qualify for participation relief is a participation of at least 10% and a holding period of at least 1 year.

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 costs need to be deducted. The percentage of the net participation income calculated in this way to the total taxable income determines the tax abatement for the participation income.

For individuals holding their assets as part of their private wealth, capital gains are in general not taxable in consideration of certain exemptions (please see Sections 3a and 14 above).

For individuals holding their assets as business assets a reduction of 40% - 60% is granted on the taxable capital gain for qualifying participations (participation of at least 10% and a holding period of at least 1 year) depending on the canton involved.
16. **Is there any fiscal advantage in case 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 the future realisation of the new asset.

5 cumulative conditions must be fulfilled:

- The replaced asset and the new asset 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 a reasonable period, the provision is dissolved, and the amount is added to the taxable profit.

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

There are no local substance requirements for holding / finance companies under domestic Swiss tax law.

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

Recently, there are no tax developments in Turkey which are relevant for M&A deals. The regulation regarding the deductibility of the expenses and cost items relating to foreign resources utilised in companies, was valid effective from 1 January 2013. According to this regulation, if the amount of foreign resources exceeds the equity capital of the company, financial expense restriction will be applicable. The rate of restriction for the concerned type of expenses shall be determined by the Council of Ministers, but this rate will not exceed 10%. Please note that as of February 10, 2016, Council of Ministers decision related to this issue is not published yet.

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?**

The OECD introduced the Base Erosion and Profit Shifting (BEPS) project with 15 Action Plans including Action 6: Preventing the granting of treaty benefits in inappropriate circumstances. The preparation process for the adaptation of the action plan to local legislation still continues in Turkey. However, as of today there is not any regulation for BEPS and Action 6. Ministry of Finance announced that some regulation will be in new Tax Procedures Law.

3. **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, value added tax, stamp duty and other taxes in Turkey.

**Share deal**

If the shareholder is an individual:

- If the seller has held the shares of a joint stock company for more than two 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, i.e., 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.

- Share sales to individuals are not subject to value-added tax.

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 two 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%.

<table>
<thead>
<tr>
<th>Sale price</th>
<th>200</th>
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<tbody>
<tr>
<td>Cost price</td>
<td>(100)</td>
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<tr>
<td>Capital gain</td>
<td>100</td>
</tr>
<tr>
<td>Exempt income</td>
<td>75</td>
</tr>
<tr>
<td>Taxable income</td>
<td>25</td>
</tr>
<tr>
<td>Corporate income tax (20%)</td>
<td>5</td>
</tr>
</tbody>
</table>
For a buyer 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 five years.

If the holding period is less than two 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 between Turkey and the country where the seller is resident, the treaty is applicable.
- If the shareholder is a company that has held the shares for more than two 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.

**Asset deal**

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 in the balance sheet and the sale price.

There is VAT of 18% on the sale price.

On the other hand, 75% of the gains from the sale of any real estate assets that have been held for at least two years may be exempt from corporate income tax, if:

- The sale price is collected before the end of the second calendar year following the year in which the sale occurred;
- That portion of the gain benefitting from the exemption is maintained in a special reserve account on the balance sheet for 5 years; and
- The selling company's business is not the trading or leasing of real estate.

In addition to this, the sale of any real estate assets that have been held for at least two years may be exempt from VAT.

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. However, the stamp tax is subject to a ceiling for stamp tax liability, which for the year 2016 is set at TL 1,797,117.30 per each copy.

Land and building transfer will be subject to title deed charge at a rate of 2%. The basis of deed is sale price where the sale price is lower than the tax value determined by the municipality, the tax value is the base. Title deed should be paid on registration day at the title deed office. Applicable for both buyer and seller, therefore total rate is 4%.
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?

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.

These assets are subject to valuation, which may affect the sale price of the shares.

Transfer pricing rules — i.e., the arm’s length principle — apply in the case of a sale to related parties.

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

Depreciation rates are determined and announced by the Ministry of Finance, based on the useful life of the assets. The latest rules are applicable to fixed assets purchased after January 1, 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: straight-line method and 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 five years. For start-up costs and goodwill, the declining-balance method is not allowed under the Turkish procedures code.

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

Effective from 1 January 2013, regarding the deductibility of the expenses and cost items relating to foreign resources utilised in the companies such as interests, commissions, delay interests, foreign currency losses and other costs and expenses. According to this regulation, if the amount of foreign resources exceeds the equity capital of the company, financial expense restriction will be applicable. The rate of restriction for the concerned type of expenses shall be determined by the Council of Ministers, but this rate will not exceed 10%. Please note that as of 10 February 2016, Council of Ministers decision related to this issue is not published yet. However, the following 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 preference of the taxpayer.

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 subjected to depreciation. Moreover, during the 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 in a definite manner 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 party” in the regulation refers to the real persons or entities to which the corporation, its own partners or the real persons or entities who 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 (three 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 three 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 (i.e., 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. Loans from third parties under a non-cash guarantee (like a letter of guarantee) of a related party, however, 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, and
- 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.

VAT: 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 treated as “financial institutions” as per the domestic laws and regulations of the country of their residence (including banks) are not subject to VAT.

Stamp duty: Where there is a written loan agreement, there might be stamp tax of 0.948% on the principal amount mentioned in the agreement.
Resource Utilisation Support Fund (RUSF): According to Communiqué Series No. 6 of the RUSF, the loans in foreign currency obtained from abroad by persons resident in Turkey is subject to RUSF at the rate of 3% if the term is less than one year; 1% if the terms is one to two years; 0.5% if the terms is two to three years; 0% if the terms if more than three years. The loans in Turkish currency obtained from abroad by persons resident in Turkey is subject to RUSF at the rate of 3% over interest amount regardless of the maturity of the loan.

7. What are usual strategies to push-down the debt on acquisitions?
Debt push-down strategies are generally criticised by Turkish tax inspectors.

8. Are losses of the target company(ies) available after an acquisition is made?
As per the corporate income tax code, the previous five years’ losses are available provided that the losses are shown on the previous years’ corporate income tax declarations separately.

9. Is there any indirect tax on transfer of shares (stamp duty, transfer tax, etc.)?
As per 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 and 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 this transfer should be done by notaries, stamp tax is applied by notaries as 0.948% on the sale price.

10. Are there any restrictions on the deductibility of acquisition costs?
In principle, there is no restriction on deductibility on acquisition costs.

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

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 investors can acquire 100% of the shares of Turkish companies in general.

There are no substance rules on the other hand there might be some legal issues or procedures to follow. For example;

- If the Turkish company is a limited liability company the share transfer agreement should be signed before notary public.
- The foreign investors should be notified to Ministry of Economy
- If 100% of the shares are transferred to foreign investors then there is a need to notify the Trade Registry.
- If there is a regulatory authority in the sector of the Turkish company and if there are restrictions concerning % of foreign investment there might be a need to get a pre-approval from the regulated authority.
Double tax treaty effect
If the target company is registered in a country with which Turkey has a double tax treaty, dividend withholding and capital gains taxes can be reduced.

Controlled foreign corporation regime
Turkey applies controlled foreign corporation legislation. If the participation of the Turkish company is more than 50% in the target company, the income of the target company 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 TL 100,000.

Turkish holding regime 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 two years.

Additionally, under the following conditions, the dividend income from non-resident companies is tax-exempt in Turkey:

- Participation is at least 10%.
- The holding period is at least two 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.

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

After an acquisition, a group can reorganise in a tax-neutral manner, but this transaction may have tax results depending on the reorganisation. See “Share deals versus asset deals” above for what to take into consideration in a share deal.

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.

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

If a Turkish resident company is selling real estate that has held for more than two years, then 75% of the capital gain is exempt from taxation and the remaining 25% is subject to corporate income tax of 20% — that is, 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 the sale transaction is realised. Additionally, the exempt amount cannot be distributed for five years, and the seller company should not be in real estate trading activities.

If the holding period is less than two years or the company is in the business of trading real estate, there is 20% taxation on capital gain.
Sell-side

Depending on the nature of the transaction, asset sales can be more taxable in Turkey. Indeed, share sales can even be non-taxable in Turkey, depending on the structure. (See the section “Share deals versus asset deals” from a buyer’s perspective above.)

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

There are no separate capital gains taxations in Turkey, as capital gains tax is part of the corporate income tax base. But there are some exemptions to capital gains tax — see the sections “Share deals versus asset deals” (from the buyer’s perspective) and “Special considerations for companies whose main asset is real estate” above.

16. 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.

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

There are not any local substance requirements, specifically for holding/finance companies.

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General

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

The main developments in the UK relevant to M&A transactions are the implications of the BEPS actions. The UK is generally supportive of the BEPS actions and has already issued various statements and draft legislation.

- **Action 2:** draft hybrid mismatch legislation has been published to take effect from 1 January 2017
- **Action 4:** a consultation has been issued on interest deductibility although rules are not likely to be in place before April 2017
- **Action 5:** HMRC is amending the UK patent box regime to incorporate the nexus principle
- **Action 6:** it is expected that the UK will prefer the principal purpose test and to implement this via the multilateral instrument being developed under Action 15
- **Action 13:** The UK has already implemented country-by-country reporting, effective from 1 January 2016

No amendments were required to UK legislation in respect of the EU GAAR being incorporated into the PSD as the PSD is not used for dividends paid from the UK and there are already anti-avoidance rules to counter tax avoidance motives for dividends paid into the UK.

The UK's current corporation tax rate is 20% and it has been announced that this will decrease to 19% from April 2017 and to 17% from April 2020. The decrease in the tax rate is expected to be offset with an increase in the tax base by increasing anti-avoidance provision. Therefore tax-payers should take care when undertaking tax planning.

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.**

Please see question 1.

3. **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 purchaser acquires 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 its future profits, subject to anti-avoidance provision mainly aimed at ensuring that the profits are generated from the same activity. 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 relieve 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 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% or more in trading companies or trading groups are
exempt from tax, under the “substantial shareholding exemption”.

The sale of shares is often more attractive to vendors because there are more reliefs available and lower rates of tax on gains.

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 choose 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 certain intangible assets, would typically qualify for tax deductions. Furthermore, 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.

However, any accumulated losses would remain with the vendor entity.

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.

**Pre-sale hive down of trade and assets**

Prior to April 2011, where a company left a group holding assets that have been transferred to it from other group companies, these assets were deemed to have been disposed of at market value and then re-acquired. This crystallised a capital gain ‘de-grouping’ charge in the transferee company. This generally made a pre-sale hive down unattractive.

However, since 1 April 2011, these rules have been relaxed. The de-grouping charge is calculated in the same way but now the gain is 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. Any accumulated trade losses would also transfer to the new company.

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

There is generally no ability to step up the value of assets in a share deal. However, this can effectively be achieved by a pre-sale hive down, as described in the previous section.

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

UK tax legislation enables a company that has purchased “intangible fixed assets”, to claim tax relief broadly to the extent that the acquisition cost is amortised in the company’s accounts. A buyer can elect to have intangible fixed assets 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.
6. **Are there any limitations to the deductibility on interest of borrowings?**

UK Revenue authorities may restrict interest deductions on intra-group debt (e.g. 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 [from whom] and would consider the level of interest cover and gearing ratios, comparing these to what would be required by a third party lender. 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. However, this will often include gearing covenants.

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 that the loan was obtained to secure a tax advantage).

From 1 April 2017, the UK will implement a fixed ratio rule limiting UK corporation tax deductions for net interest expense to 30% of a group’s UK EBITDA (earnings before interest, tax, depreciation and amortisation). If it gives a more favourable answer, groups will be able to use a group ratio rule to determine whether additional interest amounts are deductible in the UK. This will be based on the net interest to EBITDA ratio of the worldwide group. The rules will not apply to groups with net UK interest expense under £2m.

7. **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 profits under the UK’s group relief provisions. 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 may also be possible to borrow to finance distributions from the target company although this would need more careful consideration in respect of anti-avoidance provisions.

8. **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
- 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.

**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 sale 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 to be offset against profits after the change of ownership.

Similar anti-avoidance rules also apply to surplus management expenses and interest losses.

**Capital losses**

UK tax legislation contains anti-avoidance rules designed to restrict the offset of losses against gains when 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.

Currently losses carried forward can only be used by the company that incurred the loss, and not used in other companies.

In addition, some losses carried forward can only be set against profits from certain types of income, for example trading losses can only be set against future profits of the same trade. For corporation tax losses incurred on or after 1 April 2017, companies will be able to use carried forward losses against profits from other income streams or from other companies within a group.

From 1 April 2017 only 50% of taxable profits can be offset by carried-forward losses. The restriction is intended to apply to profits in excess of £5m.

9. **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 depending upon specific ownership requirements. Typically these requirements hold that the companies must form part of a group in which (i) are 75% subsidiaries of a common parent or (ii) have at least a 75% parent-subsidiary relationship.

There should be no significant VAT issues. VAT is not charged on the disposal of shares, although there may be restrictions on the recoverability of VAT on legal and professional costs associated with the share disposal.

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

Costs relating to obtaining loan finance are tax deductible. Relief will generally be available following in accordance with the accounting treatment. These costs would include bank arrangement fees, loan arrangement fees and professional fees incurred to secure the finance.

Expenses relating to the acquisition of an investment which are capital in nature are not tax deductible. Generally expenditure on appraising and investigating investments will be revenue in nature (and deductible) until the time when the ‘acquisition process’ commences. Expenditure incurred from that point will be capital in nature.

11. **Can VAT be recovered on acquisition costs?**

In the past, the UK tax authorities took a tough stance on VAT recovery in relation to corporate acquisitions and challenged many taxpayers claiming recovery of VAT on these costs. However, since the CJEU released its judgment in Larentia+Minerva in July 2015, they appear to generally accept that an active holding company should be entitled to recover VAT incurred when acquiring a new subsidiary, provided the holding company will actively manage the new subsidiary and charges fees for doing so.
12. **Are there any particular issues to consider in the acquisition by foreign companies?**

There are few particular issues to consider when a UK company is acquired by a foreign company. This is largely due to:

- The UK not imposing withholding tax on dividend payments
- The absence of non-resident capital gains tax

However, the UK does impose withholding tax on interest payments and for a foreign company to benefit from reduced rates under tax treaties, the lender would need to have beneficial ownership of the interest income. There is a statutory exemption from withholding tax if the debt is listed on a recognised stock exchange.

13. **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, together with accumulated losses, within a group without a charge to tax
- The tax neutral transfer of assets within a group under the chargeable gains regime
- The ability to surrender tax losses within 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 may apply for 6 years if the company is sold outside the group. There are also stamp duty and stamp duty land tax relief clawback provisions that apply for 3 years.

14. **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 main assets are real estate. However, anti-avoidance provision may apply where a property trading, rather than investment, activity is undertaken in a corporate wrapper in order to achieve capital gains treatment on sale of the shares.

**From a Seller's Perspective**

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

Capital gains realised by companies is subject to tax at the standard corporation tax rate.

Capital gains tax realised by individuals is generally taxed at 28%. Reduced rates may be available if the shares disposed of were structured as an employee incentive scheme.

The only participation exemption for capital gains tax is in the substantial shareholding exemption. This exemption applies to the disposal of shareholding greater than 10% held for a continuous period of more than 12 months. The seller must be a trading company or a member of a trading group and the company sold must also be a trading company or the holding company of a trading group.
16. **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. 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 (i) 12 months prior to the sale or (ii) 3 years following the sale. For this purpose, qualifying assets include freehold land and buildings, as well as plant and machinery. Alternatively, a separate form of relief is available on the acquisition of depreciating assets (e.g. leasehold property), so that the gain can be held over for a maximum of 10 years with potential for further rollover.

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 rollover relief.

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

The main UK requirement arises where a UK company is paying interest and is claiming a reduced rate under a double tax treaty. Here, to benefit from the treaty, the recipient would need to have beneficial ownership of the interest receipt. Following the famous Indofoods, HMRC take the view that beneficial ownership should be determined using the “international fiscal meaning”, whereby the recipient should ‘enjoy the full privilege to directly benefit from the income’. Where the recipient is bound in legal, commercial or practical terms to pass on the income, they will not be the beneficial owner of the income. Although, following implementation of BEPS Action 6, the position is likely to become more onerous.

As the UK does not impose withholding tax on distributions or on a non-resident’s capital gain, substance considerations are not usually an issue here.

In 2015 the UK introduced the ‘diverted profits tax’ which in summary charges tax (at a higher 25% rate) where a company, which is taxable in the UK, creates a tax advantage by involving entities or transactions which lack “economic substance”. For example, a UK company transfers IP to a related entity and then pays a UK tax deductible royalty to such related entity and the related entity does not have the technical and management capacity to develop, maintain and exploit such IP or, a foreign company structures its affairs so as to avoid a UK taxable presence where there is UK based activity.

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General

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

Notice 2015-54
The Internal Revenue Service (IRS) issued Notice 2015-54 in August 2015 to address perceived abuses relating to the transfer of appreciated property (including IP) to a partnership with foreign partners. The notice outlines new regulations to be written by Treasury regarding the transfer by a U.S. person of appreciated property to a partnership that has a foreign partner related to the transferor. Under the new regulations which will be retroactively effective from August 6, 2015, income or gain attributable to the transferred property will be taken into account by the transferor either immediately or periodically using the remedial allocation method. Under the old rules, there was greater possibility for tax deferral.

Inversions
In recent years, Treasury has issued regulations under Sections 7874 and 367(a), as well as issued Notice 2014-52 and Notice 2015-79 to curtail inversions of U.S. companies. When a U.S. corporation becomes a subsidiary of a non-U.S. corporation or transfers its assets to a non-U.S. corporation, and the foreign corporation is owned 80% or more (by vote or value) afterwards by former owners of the U.S. corporation, the foreign corporation will be taxed as a U.S. corporation. Where less than 80% but at least 60% (by vote or value) of the foreign corporation is owned post-inversion by former owners of the pre-inversion U.S. entity, the U.S. corporation may not be able offset any gain from establishing the inverted structure with any tax attributes (e.g. net operating losses or foreign tax credits) for 10 years after the inversion. The ownership calculation is subject to a variety of modifications that can have the effect of increasing the ownership percentage of the U.S. shareholders for purposes of these rules. Proposed regulations will be issued this year to implement the 2014 and 2015 notices. The Obama Administration continues to study the feasibility of issuing regulations to limit the deduction for interest.

Section 336(e)
On May 15, 2013, Treasury published final regulations under Section 336(e), which permits taxpayers to elect to treat certain dispositions of a target corporation’s stock as an asset sale for federal income tax purposes, thus delivering a step-up in basis of the target’s assets to the buyer.

Prior to the issuance of the Section 336(e) regulations, taxpayers wishing to characterise stock acquisitions as asset acquisitions for federal income tax purposes (and deliver a step-up in the target’s asset basis to the buyer) looked to Section 338(h)(10) or Section 338(g) (See Question 4 for discussion of Section 338 election).

In the context of a Section 338(h)(10) election, the focus is on the acquisition of stock by a corporate buyer, while in the context of a Section 336(e) election, the focus is solely on the seller’s (or sellers’) disposition of stock. As such, the Section 336(e) election may be made by the seller and the disposition can take the form of a sale, exchange, distribution or any combination thereof, provided that it is a taxable event (but not with a related party). In addition, provided that there is a “qualified stock disposition,” then a Section 336(e) election may be made by the seller, regardless of the legal form of the buyer. As a result, individuals and partnerships, who are normally precluded from making Section 338(h)(10) elections, may engage in transactions where a Section 336(e) election is made.
Net Investment Income Tax
Effective January 1, 2013, the Net Investment Income Tax (NIIT) is imposed by Section 1411. The NIIT applies at a rate of 3.8% to certain net investment income of individuals, estates and trusts that have income above the statutory threshold amounts.

In general, investment income includes, but is not limited to: interest, dividends, capital gains, rental and royalty income, non-qualified annuities, income from businesses involved in trading of financial instruments or commodities and businesses that are passive activities to the taxpayer (within the meaning of Section 469).

Common examples of gains that are subject to the NIIT include gains from the sale of stocks, bonds, and mutual funds. In addition, gain from the sale of a partnership interest or S corporation stock generally is required to be included in net investment income, as the gain would not be considered derived in the ordinary course of a trade or business. However, there are special exceptions for non-passive owners of flow-through entities and for non-resident aliens.

Rev. Proc. 2015-13
In the course of negotiating a deal, potential unreserved tax liabilities may be identified by the buyer, such as positive (unfavorable) Section 481 adjustments related to accounting method changes. Historically, the change in method of accounting would be filed with the first post-acquisition tax return, with the result being that the buyer would suffer the effect of the unfavourable adjustment by recognising the additional income over the subsequent four year period.

However, a new elective mechanism has been introduced to resolve tax liabilities in the pre-closing period related to accounting method changes. Effective for changes to accounting methods after January 16, 2015, a buyer and seller may elect to recognise any additional taxable income that results from an acquisition-related accounting method change entirely in the final pre-acquisition tax year for the target.

This treatment effectively takes the additional taxable income that a buyer would have to recognise in the periods following an acquisition and places the tax burden back on the target in the pre-acquisition period. A buyer should ensure that target's final tax return for the pre-acquisition period includes the change in method of accounting, as well as the corresponding amount of additional taxable income.

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?

There have been no legislative changes made or proposed to implement the recommendations in the final BEPS reports.

The IRS has issued proposed regulations to implement Action 13 (Country-by-Country Reporting) which would be effective beginning in 2017. The IRS is considering how to coordinate the effective date of its regulation with most other countries that are implementing Country-by-Country Reporting beginning in 2016.

With respect to Action 6 the United States has issued proposed changes to the U.S. Model Income Tax Treaty that are expected to be finalised in the first half of 2016. The United States has limited interest in a multi-lateral instrument to amend its income tax treaties as nearly all U.S. income tax treaties now contain a limitation on benefits article.

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

a. Share deal
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 be taxable or non-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. Where the target corporation is a corporation or a subsidiary in a consolidated group, however, it may be possible to make an election under Section 338 to treat the stock acquisition as if it were an asset purchase for tax purposes, resulting in a step-up in the basis of assets to fair market value.

In the case of a stock acquisition without a deemed asset purchase election under Section 338, any tax attributes, such as net operating losses 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 two levels of income tax or because it would be too difficult to transfer the assets, contracts and licences into the name of the acquirer.

The sale of stock in a corporation generally does not result in transfer tax. However, where the corporation owns real estate, some states 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 stock transfers to non-U.S. resident buyers (entities or individuals).

It should also be noted that the gain on the sale of stock is generally capital and therefore subject to preferential rates if the seller is an individual. As described in Question 14, foreign persons are not generally taxed in the U.S. on gains from the sale of a corporation’s stock, except where the corporation is a U.S. real property holding corporation.

b. Asset deal

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 and 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, however, 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 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. In contrast, where the target assets are appreciated and held in a C corporation, an asset sale may not be practical because there are two levels of income tax: (1) corporate-level tax on the gain and (2) 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. 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, licenses or contracts that would be administratively burdensome or expensive to transfer or renegotiate.

It should also be noted that 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 U.S. tax.

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?**

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 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.

As discussed above, a step-up may also be obtained under Section 336(e) where there is a “qualified stock disposition.” A qualified stock disposition is a taxable disposition by a domestic corporation or the shareholders of an S corporation of at least 80% (by vote and value) of the stock of a domestic corporation during a 12-month period. A seller can make a Section 336(e) election, regardless of the legal form of the buyer(s). The Section 336(e) election may be most appealing in circumstances in which the acquiring entity is an LLC or partnership.

In the context of a foreign target, a Section 338(g) election should be considered, which also causes the transaction to be treated as an asset purchase for U.S. tax purposes. This election enables the target to step-up its basis in its assets and purge its pre-closing earnings and profits, thereby making it easier to push down debt and repatriate profits efficiently.

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 Section 754. Otherwise, the partnership’s assets are not ordinarily stepped up.

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

Depreciation rules vary depending on the nature of the asset.

- Furniture, fixtures, machinery, equipment and computers are generally depreciated using an accelerated method over a five- to seven-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 three years.
6. Are there any limitations to the deductibility of interest on 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 here:

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, and
- The thinness of the capital structure and the risk involved.

Transfer pricing: The Internal Revenue Service 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: Section 163(j) limits the deductibility of interest paid by a U.S. corporation if the debt is borrowed from or guaranteed by a related foreign person and the interest is exempt from U.S. tax. Section 163(j) applies if the U.S. 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 five years,
- Has a yield to maturity of five percentage points over the “applicable federal rate” (as published by the IRS), and
- Has “significant original issue discount” (an excess of original issue discount accruals over actual interest payments).

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

There are many ways to push down debt in acquisitions of U.S. 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 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 (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 U.S. 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.
8. Are losses of the target company(ies) available after an acquisition is made?

Generally, a net operating loss may be carried back to the two 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 net operating losses remain intact and may be used by the acquiring corporation, subject to certain change in control limitations. The most common limitation is imposed by Section 382. Here, where a corporation undergoes an “ownership change”, generally defined as a more than a 50 percentage point change in its ownership over a three-year period, U.S. 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 net operating loss 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 which 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.

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

As indicated in Question 3 above, the sale of stock in a corporation generally does not result in transfer tax. However, where the corporation owns real estate, some states may impose a “controlling interest” transfer tax on the underlying real estate of the acquired entity in the taxing state.

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

Generally, the ability to deduct or the requirement to capitalise costs associated with acquisitive transactions hinges principally on the point in time at which the costs are incurred. The tax treatment of expenditures incurred in business acquisitions and dispositions is based on a fact intensive determination of the nature and reason for such expenses.

The general rule under Treas. Reg. Section 1.263(a)-5 requires the taxpayer to capitalise all costs that facilitate a transaction. In general, amounts paid in the process of investigating or otherwise pursuing a transaction are deductible only if the amount relates to activities performed before the earlier of (a) the date on which the letter of intent, exclusivity agreement, or similar written communication is executed by representatives of the acquirer and the target, or (b) the date on which the material terms of the transaction are authorised or approved by the board of directors (in the case of a transaction that does not require authorisation or approval by the board of directors, the date on which the acquirer and target execute a binding written contract reflecting the terms of the transaction).

Those costs that are inherently facilitative of the transaction are required to be capitalised regardless of whether they are incurred before or after the transaction commitment dates. Costs that are typically classified as inherently facilitative may include costs associated with appraisals, fairness opinions, structuring the transaction, preparation and review of transaction documents, obtaining shareholder approval and property conveyance costs (i.e., transfer taxes and title registration costs).

In addition, taxpayers can elect to treat any success based fees (e.g., banker fees) in accordance with Rev. Proc. 2011-29, which provides a taxpayer with a safe harbour that generally allows for the deduction of 70% of the success based fee (though certain other limitations may apply) and capitalisation of 30% of the fee.

A certain portion of the costs incurred in an underlying transaction may relate to debt issuance costs. In general, the costs associated with a borrowing are required to be capitalised. Debt issuance costs are generally amortised over the term of the underlying debt. When a debt obligation is satisfied, retired, or exchanged the taxpayer may deduct the unamortised debt issuance costs.
Determining the deductibility of transaction costs is a very facts intensive analysis, especially when dealing with multinational target companies where the transaction costs must be allocated across the different entities and jurisdictions involved. When transaction costs are expected to be significant, we recommend undertaking a formal transaction cost analysis, as this area is consistently challenged by the IRS.

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

There is no VAT, or related tax, imposed on transaction costs incurred in the U.S..

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)

Choice of entity: Foreign investors may choose from several types of entities to invest in the U.S.. Partnerships or Limited Liability Companies (LLCs), are generally not subject to income tax but instead are treated as “flow-through” entities where their income is taxed to their owners. Alternatively, corporations are subject to tax on their income and their shareholders are subject to tax when the income is distributed to them. Flow-through entities provide the advantage of a single layer of tax (as opposed to the double layer of tax in the corporate regime) and provide a seller a more tax efficient means to convey a step in the basis of the underlying assets to a buyer. Importantly, flow-through entities subject their owners to U.S. income tax and filing requirements and, for this reason, many foreign investors prefer to invest in the U.S. through a blocker corporation.

Capitalisation: Investors may choose between a combination of equity or debt. Debt may be from an external source or related party. The choice of debt versus equity may influence a company’s taxable income and its ability to repatriate earnings efficiently. A key differentiating feature is that interest is deductible (subject to certain limitations) whereas dividends are not. Furthermore, repayment of debt is not subject to withholding whereas redemption of equity may be treated as a dividend subject to withholding.

Treaty protection: The U.S. has an extensive network of treaty partners. The ability to choose a favourable jurisdiction from which to invest should be a significant consideration.

Inversions: The Inversion rules discussed in Question 1 above need to be considered when a U.S. corporation is acquired by a foreign company. These rules can impact the U.S. tax treatment of the foreign acquirer, as well as the recognition of gain or loss related to the transaction.

Real estate: Special rules apply when investing in real estate which are discussed in question 14 below.

Exit considerations: Capital gains recognised by foreign persons are not generally taxed in the U.S. However, capital gains realised on the sale of an interest in a partnership engaged in a U.S. trade or business are generally subject to tax in the U.S.

Other considerations: Where a foreign buyer with a U.S. 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.

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

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 U.S. law also codified the use of “economic substance” doctrine. In general, the 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 between 20% - 40% of the underpayment of 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 U.S. tax law. Therefore, a buyer should focus on the tax planning alternatives as early in the acquisition process as possible.
14. **Is there any particular issue to consider in case of companies of which main assets are real estate?**

In general, foreign persons are not taxed in the U.S. on gains from the sale of a corporation’s stock. The Foreign Investment in Real Property Tax Act (FIRPTA) however authorises the U.S. to tax non-resident aliens and foreign corporations on dispositions of a U.S. Real Property Interest (USRPI), including dispositions of a U.S. Real Property Holding Corporation (or USRPHC). A withholding tax of 15% of the amount realised by the foreign transferor is generally required to be withheld by the seller of a USRPI to ensure that an appropriate amount of tax is paid upon the disposition (higher withholding rates can apply in certain circumstances). The buyer can choose to file a U.S. tax return and report and pay tax on the actual gain realised at standard U.S. tax rates. A withholding tax also applies to non-resident aliens and foreign corporations that are partners, trust beneficiaries, or estate beneficiaries on the distribution of an interest in a partnership, trust, or estate that is attributable to a USRPI.

In general, a domestic corporation is a U.S. real property holding corporation if the market value of its U.S. real property interests constitutes 50% or more of the sum of the fair market value of (1) its U.S. real property interests, (2) its real property interests located outside the U.S. and (3) any of its other trade or business assets.

Legislation enacted late in 2015 would extend a favourable exception to FIRPTA for certain investments in a domestically controlled Real Estate Investment Trust (REIT) to similar interests in a Regulated Investment Company (RIC or mutual fund).

**Sell-side**

15. **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 15-20% federal rate for the sale of assets held for longer than a year vs. a maximum 39.6% federal rate for “ordinary” type income), while those recognised by corporations are taxed at the corporate rate (currently a maximum 35.0% federal rate). Capital gains are also subject to state income taxes with rates ranging from 0% to approximately 10%. Capital gains recognised by foreign persons are not generally taxed in the U.S., however capital gains recognised on the sale of an interest in a partnership that is engaged in a U.S. trade or business are generally subject to U.S. tax. As noted above in U.S. individuals, estates, and trusts may be subject to the 3.8% net investment income tax.

The U.S. does not have a participation exemption regime.

16. **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.
17. Are there any local substance requirements for holding/finance companies?

The U.S. imposes federal income tax on a residence basis, so any holding or finance company established in the U.S. will be subject to corporate level tax in the U.S., regardless of their substance. Companies not incorporated in the U.S. are generally not subject to U.S. income tax unless they have a sufficient presence (amounting to permanent establishment or “U.S. trade or business”) or receive certain passive type income subject to withholding.

Generally, choosing a holding company jurisdiction for the purpose of avoiding or reducing withholding tax can be challenging in the U.S. because of anti-conduit provisions under U.S. law and the constantly intensifying limitations on benefits clauses in the various U.S. treaties. Generally, substance in the holding company jurisdiction is required. That said, various treaties provide reduced treaty rates. For example, assuming a UK holding company has adequate substance, 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 U.S. company to related parties.

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