SWEDEN

SWEDEN

INTERNATIONAL DEVELOPMENTS

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

Interest has been fully deductible for Swedish companies in the past, except for interest on certain loans between affiliated parties. According to a new proposal (bill 2017/18:245), interest deduction rules are proposed in accordance with the Anti-Tax Avoidance Directive and will apply to interest that is not non-deductible under the specific limitation rules on intra-group loans.

The proposal is to limit the deductibility of net interest expense to 30 percent of taxable EBITDA. A "safe harbor"-rule is however proposed, and interest is not limited when the net interest expense within a company group is below an amount of SEK 5 million.

The first step is to determine the company's net interest, calculated as interest income less interest expense. A specific tax definition of interest is proposed and includes interest, other expenses for credit, and expenses that are equal to interest. The definition of interest is broader than the definition of interest for accounting purposes and includes, for example, foreign currency exchange gains or losses on loans/receivables in foreign currencies when hedged through a derivative (the profit/loss on the derivative as such is also deemed to be interest in this context).

If the net interest expense exceeds 30 percent of taxable EBITDA, the excess net interest expense is not deductible. Instead the non-deductible net interest expense is carried forward, for a maximum period of six years (there are exceptions to this rule).

For group companies, the proposed rules allow for, if certain requirements are met, a netting of net interest income/expense between the companies in the group where group tax consolidation possibilities are available.

The current limitation rules on loans between affiliated parties will also be amended. Interest is proposed to be deductible if the end recipient is taxed at a rate of at least 10 per cent, or is located within the EEA or a country with which Sweden has an unlimited tax treaty. If the sole or almost sole reason (90-100 per cent) for the debt is to create a significant tax benefit for the group, the interest is also not deductible. There are also further aspects to consider in the assessment (e.g. back-to-back loans and intra-group transfer of shares).

In February 2018, The Swedish Ministry of Finance presented a proposal to amend the current Swedish CFC rules. The proposal was based on the EU's Anti Tax Avoidance Directive. The proposed amendment mainly concerns the so-called white list (countries whose domestic companies are not CFCs), where some jurisdictions has been removed. In addition, specific types of income (e.g. royalties and income from financial activities) are also removed from the white list in relation to several jurisdictions. This means that the scope of Swedish CFC taxation will be broadened.

For VAT purposes, the Swedish Supreme Administrative Court (SAC) has delivered a judgment on deductibility of VAT on external costs attributable to the sale of shares, e.g. legal fees, costs for due diligence. See further below.

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

BEPS

The implementation of the BEPS rules in Sweden has in general focused on actions 8-10 and action 13 regarding aligning transfer pricing outcomes with value creation, transfer pricing documentation and country-by-country (CBC) reporting. New rules regarding transfer pricing documentation (master file/local file) and CBC reporting entered into force on 1 April 2017. The documentation rules will apply for the first time for fiscal years commencing after 31 March 2017. First year covered by the CBC is any financial year starting after 31 December, 2015. The first CBC report should be submitted by the end of the year following the financial year (i.e. by end of 2017 for most MNEs). Entities of a MNE group that have to submit a CBC report need to notify the Swedish Tax Agency (STA) which entity is the reporting entity by the end of the financial year covered by the report (extended to 30 April 2017 for first financial year covered). As Sweden follows the OECD Transfer Pricing Guidelines, no changes in domestic law have been implemented related to action 8-10. The STA has stated that the updated guidelines may be applied both retroactively and going forward. Action 6 provides for changes to the preamble to clarify that tax treaties are not intended to be used to generate double non-taxation. It seems likely that Sweden will conform to the new preamble in future tax treaties. In addition, action 6 provides the inclusion of a limitation of benefits test and principal purpose test. Sweden has not negotiated new treaties following the outcome of the BEPS project. However, it can be assumed that Sweden will in general accept the inclusion of both a limitation of benefits test and principal purpose test in its future treaties (limitation of benefits articles already exists in certain tax treaties, e.g. the treaty between Sweden and the US and the treaty between Sweden and Japan).

As regards the multilateral instrument, Sweden was part of the working group that developed the multilateral instrument, and Sweden was one of the signatories. Sweden included 64 treaties, and approximately half of them are so-called matching treaties. Some treaties were not included since they are already under bilateral negotiations. Sweden chose to include articles 6, 7, 16 and 17, which are all minimum standard articles. In addition, Sweden also included 18-26 on arbitration. Sweden made reservations as regards the other articles in the multilateral instrument (i.e. articles 3-5 and 18-26).

The amendments to the EU Parent-Subsidiary Directive

As concerns outbound dividends, the Swedish government is of the opinion that no changes to Swedish tax legislation were needed in order to implement the amendment to the EU Parent-Subsidiary Directive. This is because the Swedish Withholding Tax Act prescribes that withholding tax is levied on outbound dividends if the shares in a Swedish company (the company distributing the dividends) are held in "such a manner that someone else thereby receives an unjust favor as concerns income tax or exemption from withholding tax". A requirement for this rule to be applicable is that the shareholder of the Swedish company must hold the shares in the company on behalf of someone else and this third party must thereby achieve a tax benefit. There is limited case law and more or less no preliminary works that describe the scope of the rule. This existing rule has nevertheless been deemed to be sufficient in relation to the general anti avoidance rule in the Parent-Subsidiary Directive.

Effective as of 1 January 2016, dividend income is not tax exempt under the participation exemption regime if the company paying the dividend is a foreign company that is entitled to deduct the amount as interest or similar expense in its home jurisdiction. Note that the provision is extended also to non-EU shareholdings.

Anti-Tax Avoidance Directive (ATAD)

See question 1 above regarding interest limitation rules and CFC taxation.

GENERAL

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

An acquisition in Sweden is more often a share purchase rather than a purchase of the company's assets, since capital gains on the sale of shares may be tax-exempt (participation exemption). However, the benefits of asset acquisitions for the purchaser should not be ignored, particularly given that purchased asset goodwill benefits from tax deduction over five years.

For VAT purposes, the acquisition of shares is not subject to VAT while an asset deal may, depending on the situation at hand, be subject to VAT.

A) Share deal

Capital gain or loss is calculated as the selling price less the tax base of the shares. The tax base equals the acquisition cost, subsequent capital contributions and sales costs. For certain Swedish shareholders (e.g. companies) capital gains are non-taxable if the participation exemption regime is applicable. For non-residents without a permanent establishment in Sweden, a share deal is a nontaxable event. The participation exemption regime may also be applicable for companies established within the EEA with a permanent establishment in Sweden.

The purchase of a target company's shares does not give rise to an increase of the tax base of that company's underlying assets. Hence, there is no step-up on the basis for tax depreciation purposes and the buyer cannot deduct the difference between the underlying net asset values and the consideration for the shares.

A sale of shares is VAT-exempt. Input VAT on costs related to share purchases may be recoverable, provided certain conditions are met. The SAC in Sweden came to the conclusion that VAT was deductible if the disposal of shares was part of an intra-group restructuring and that the purpose of the supply was to streamline the remining business by allocating funds thereto. The Court also considered that the selling company had not passed on the costs for the transaction on the purchaser of the shares. In conclusion, the Court held that the VAT on the transaction costs was deductible as an overhead cost for the seller. Following this court case, lower Swedish courts have ruled in favor of companies selling shares, but the criteria set by the Court should in our opinion always be contemplated before a company deducts VAT on transactions costs attributable to share deals.

There are no other transfer taxes (however see above on proposed rules of indirect transfer of real estate).

B) Asset deal

A purchase of business (assets) usually results in an increase of the tax base of those assets for both gains tax and depreciation purposes (i.e. step-up in value), although a corresponding income is likely to be taxable for the seller. In addition, historical tax liabilities generally remain with the company and are not transferred with the assets. If the company holding the assets (or group company) has tax loss carryforwards, a gain following the transfer of assets may be utilised against the tax losses.

There are no statutory rules on how the purchase price should be allocated among the purchased assets, although it is recommended that the total consideration be apportioned among the assets acquired to the greatest extent possible. The remaining part of the consideration that cannot be allocated is booked as goodwill for the acquirer.

Normal VAT rules apply in an asset deal. However, if all assets of the company (or an independent part of a business) are transferred the rule for transfer of a business as a going concern may apply, which has the effect that no VAT is due at all on the assets sold even if the assets would have been subject to VAT if sold separately.

Regarding the sale of real estate, stamp duty is levied on the higher of the market value and the tax assessment value (the normal stamp duty rate for legal entities is 4.25 per cent).

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?

There are no specific strategies to step up the value of the tangible and intangible assets in case of share deals. One must carry out a case by case strategy.

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

Goodwill paid for a business in an asset deal may be depreciated. The rules for depreciation of goodwill are the same as those for machinery and equipment.

The two main depreciation methods are the declining-balance method, where a maximum depreciation allowance of 30 per cent of the aggregated book value is allowed, and the straight-line method, where assets are depreciated by 20 per cent annually.

Most tangible and intangible assets may be depreciated for tax purposes under the same rules as machinery and equipment. However, land and shares etc. are non-depreciable.

Buildings are depreciated straight-line by approximately two per cent to five per cent annually, depending on the nature of the building.

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

Sweden's introduction of interest deduction limitation rules came into force as of 1 January 2009, as a reaction to an extensive use of debt push down-structures under the old, quite liberal rules. The new rules were intended to target excessive debt financing, tax base erosion and abusive arrangements through intra group restructurings. After criticism and monitoring of the 2009 rules by the STA the rules underwent amendments in 2013, making them more restrictive.

Interest payments to affiliated companies are generally not deductible even if at arm's length. Interest payments may, however, be deductible if that company can demonstrate that the corresponding interest income for the lender would have been taxed at a rate of at least 10 per cent in the hands of the beneficial owner of the interest income ("the 10 per cent rule"). Other income, losses or deductible expenses from normal activities shall not be included when assessing the taxation level.

The 10 per cent rule is not applicable and thus interest not deductible if the primary reason for the debt financing is to achieve a significant tax benefit within the affiliated group. This threshold is set at 75 per cent, meaning that a 24 per cent business motivated transaction will not be accepted.

The right of deduction also applies (regardless of the taxation level of the final recipient) provided the debt relationship is deemed mainly business motivated ("the business purpose rule"). This, however, applies only if the beneficial owner of the interest income is located within the EEA or a treaty jurisdiction.

See proposed changes under question 1 above.

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

A debt push down normally aims to transfer debt to subsidiaries in order to shelter taxable income in the subsidiary and to transfer taxable income through interest.

A debt push-down may be achieved through a dividend distribution from the target or through a transfer of assets between the target company and an affiliated company; both financed by debt provided by an affiliated company or third party.

A third alternative is to use a Swedish SPV to acquire a Swedish target in order to push down debt for the acquisition. The SPV is normally financed by debt from a foreign group company. The profit from the target company may be offset against the SPV's funding cost under the Swedish group contribution rules. Alternatively, the target may be merged with the SPV.

Since deductibility of interest paid to an affiliated party is restricted, any debt structure has to be evaluated in detail.

8. ARE THERE ANY TAX INCENTIVES FOR EQUITY FINANCING?

Individuals are allowed a 50 per cent deduction on the invested amount in a non-listed company (listing refers to listing on regulated markets). The investment deductions may be granted for up to SEK 1.3 million per year. Several requirements, on both the individual and company in question, must be met in order to be granted the deduction.

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

Losses incurred by companies are determined on a continuous basis for each tax period and are deductible from taxable profits for the following tax period. If the taxable profits are insufficient to cover the losses from the previous year, the excess loss is carried forward to the next year (loss carryforward). Losses may be carried forward indefinitely, i.e. without any time limit. However, losses must be deducted from profits as soon as a profit is available.

A company with a loss carryforward can be transferred to a third party, whereby the loss can still be utilized by the company having the loss and also within the acquiring third party group. However, a change of ownership of a company with loss carryforwards will trigger two limitations in relation to the losses, namely

1) the amount of loss carryforward that will survive (the amount limitation), and

2) the right to deduct loss carryforward against group contributions from companies within the acquiring group (“group contribution limitation)

It should be noted that the limitations only apply to tax loss carryforwards. Thus, a tax loss incurred during the year in which the change in ownership takes place is not affected by these rules.

A “change in ownership” occurs if a company acquires the decisive influence (more than 50 per cent of the votes) over a company with loss carryforwards. The same applies if a company with loss carryforwards acquires the decisive influence over another company.

The maximum loss carryforward that will survive a change of ownership is calculated as 200 per cent of the acquisition cost to receive the decisive influence of the company (less certain capital contributions received by the company with losses). In other words, loss carryforwards in excess of 200 per cent of the acquisition cost will be forfeited.

Swedish tax law contains provisions shifting taxable income between affiliated resident companies, known as group contributions. Any tax loss carryforward that survives the amount limitation is restricted for 5 years following the year in which the change of control took place. This means that during this period, the acquired company may not offset those losses against profits in any company belonging to the buyer’s group. However, where the company itself generates a profit after the change of control, the company may offset its tax losses against those profits (a merger might however restrict even this).

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

There are generally no items specific to Sweden that should be included in the scope of a tax due diligence. Hence, items that should be included in the scope follow from the scope of a due diligence in general.

It should be noted that a reassessment by the STA - to the taxpayer’s disadvantage - cannot be made after the year-end of the year after the fiscal year. The fiscal year corresponds to the financial year.

The Tax Agency can however make a reassessment to the taxpayer's disadvantage up and until the end of the sixth year after the fiscal year, provided that;

1) the taxpayer has submitted incorrect or incomplete information in his tax return

2) the taxpayer has been assessed a reduced amount of tax or no tax at all

3) the reduced taxation has been caused by the taxpayer issuing incorrect or incomplete information in the tax return; and

4) the amount of non-levied tax is substantial.

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

No.

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

Costs attributable to acquiring and retaining income are tax deductible for Swedish corporate tax purposes. In an asset deal, the transaction costs are normally tax deductible.

In case of a share deal, it must be analysed if the transaction costs are in principle related to the acquisition of shares. The costs directly related to the acquired shares are usually capitalised on the shares (and consequently not tax deductible since Sweden applies a participating holding regime meaning that profits /losses on shares are not taxable/deductible).

Acquisition costs will from a transfer pricing perspective only be deductible if the entity that incurred the costs has benefitted from the services provided.

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

For asset deals see question 3. In a share deal, no VAT is due since transactions involving shares are VAT exempt in Sweden. When a business is acquired through a share deal the scope of VAT deductibility on transaction costs for the buyer of the shares depends on whether the acquisition of the company will generate additional revenues that are subject to VAT for the buyer (normally management services or similar services). If on the other hand the acquisition of the shares is a passive investment, no VAT deduction will be given on the transactions costs for the buyer. The distinction between an "active and passive" holding company is strictly applied in Sweden.

It should also be emphasized that certain buying entities (e.g. investment funds and similar investment companies) may have difficulties to claim a full VAT deduction on operating expenses even if a management fee structure is put in place.

VAT on costs for acquiring shares in a company is generally deductible provided that the acquirer intends to actively manage the acquired company; e.g. by supplying management services that are invoiced regularly to the acquired company.

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

Permanent establishment

Acquisition of a business in Sweden may give rise to a permanent establishment (PE) in Sweden. The PE definition in Swedish domestic legislation follows the OECD model. In general, three requirements need to be met to create a PE.

1) There must be a "place of business"

2) The place must be "fixed"; and

3) The "business activities" must be carried out through the fixed place

A PE is also present if a person is acting on behalf of a foreign company and has and habitually exercises in Sweden an authority to conclude contracts in the name of the foreign company. A PE will however not be present if the business in Sweden is carried out through an "independent agent".

Dividends and capital gains attributed to a PE in Sweden may be tax exempt under the participation exemption regime (see Q.18 below).

Withholding tax

Withholding tax (WHT) at a rate of 30 per cent is generally imposed on all dividend distributions from a Swedish company to its foreign shareholders. In accordance with the EU Parent-Subsidiary Directive, Sweden does however not impose WHT on dividends distributed to a company that is covered by the directive. The exception from WHT applies provided that the shareholding of the foreign company exceeds at least 10 percent of the capital, without any time requirements. The distributing company and the shareholder should furthermore be one of the specific qualifying types of company listed in the directive.

There is an additional Swedish exemption which applies even if the requirements in the directive are not met, provided the following requirements, inter alia, are met

- The person receiving the dividend must be classified as a foreign company. A foreign company is defined as a foreign legal person that is taxed in its state of residence and the taxation in that state is similar to the taxation in Sweden, or a foreign legal person resident and subject to corporate tax in a state with which Sweden has entered into a tax treaty.
- The foreign company must be equivalent to a Swedish limited company. A foreign company qualifies if subject to income tax where it is resident and provided the shareholders have a limited responsibility for the company's liabilities and finally that the shareholders may not freely dispose of the company's assets.
- The share in the Swedish company that distributes the dividend must be a capital asset (i.e. not a trading asset). If the Swedish company is listed, the shareholder's voting rights must be at least 10 per cent for a consecutive period of 12 months prior to the distribution of dividends in order to apply the exemption.

Finally, WHT may be reduced partly or in full under tax treaties.

Limitations in deduction of interest expenses

The limitations of deduction on interest expenses paid to affiliated companies should also be considered (see Q. 6).

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

After an acquisition a group may reorganise in a tax-neutral environment. Tax neutral mergers, de-mergers and transfer of assets are commonly utilised as pre or post-acquisition measures.

In principle, Swedish tax law follows the applicable EU directive on mergers and demergers. Tax-neutral mergers are generally possible provided the transferring company was subject to tax in Sweden immediately before the merger and the acquiring company is subject to tax on the business activity on which the transferring company was subject to tax. A foreign company resident in another Member State always qualifies for a merger or a de-merger, if it fulfils the requirements of the Merger Directive. In order to qualify for tax exemption in Sweden there are however some additional criteria which have to be fulfilled.

In case law, downstream mergers (i.e. a subsidiary absorbing its parent company) have also been treated as tax-neutral.

It should be noted that completing a merger, tax-neutral or not, may trigger limitations on tax loss carryforwards, whereby the existing losses may be forfeited or ring-fenced.

It is possible to transfer assets at a price below fair market value without triggering exit tax (i.e., taxation based on a deemed fair market value transfer) if certain criteria are fulfilled. For Swedish qualifying companies (or permanent establishments in Sweden) a sale at a price below fair market value may be carried out without tax consequences provided that the following requirements are met:

- if full group contribution possibilities from the seller to the buyer are available the full fiscal year in which the transfer is made, or
- if the assets transferred constitute a "line of business" from a tax perspective.

Furthermore, a qualifying transaction cannot be made to a company with previous year's losses where the company's losses are restricted against group contributions or to a company which has group contribution possibilities with such loss company. Typically, this requirement does not restrict the possibility to make a drop-down to a newly established/acquired off the shelf company.

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

A sale of real estate is in Sweden usually made through the sale of the shares in a real estate company. There are no specific tax issues solely applying to real estate companies. An indirect sale of real estate can according to current rules under certain conditions be made without income tax (applying the participating exemption regime under the standard conditions). A sale of shares is according to current rules not subject to any indirect tax (i.e. stamp duty or transfer tax). A proposal for new rules on taxation of companies holding companies has been presented (see above),

When acquiring a real estate company, a buyer must however consider the complex rules on depreciation of real estate.

In a share deal the buyer will normally require a discount for deferred tax. There are a number of factors that affect how much the discount for deferred taxes will be in the individual case.

If the real estate is sold directly, capital gains are subject to corporate income tax at the normal income tax rate. As for capital losses, there is a restriction regarding the use of capital losses from the sale against ordinary income. Stamp duty is levied on the transfer (the stamp duty for legal entities is 4.25 per cent).

According to present legislation it is possible, under certain conditions, to transfer real estate to a company within the same group below market value without any immediate income tax consequences. Stamp duty is levied on the transfer; however there are possibilities to reduce and postpone the stamp duty.

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

Each company within a group constitutes a separate taxable entity. There is no taxation on the consolidated level of a Swedish group of companies.

However, specific rules permit the transfer of profits between companies within wholly owned domestic groups ("group contributions"), which have the effect that taxation of consolidated income is effectively achievable. Group contributions are tax-deductible for the payer and taxable for the recipient.

An important qualification requirement for group contributions is that the group holds more than 90 per cent of the shares during the entire financial year. Furthermore, the receiving company must be liable for tax in Sweden, or at least the income to which that income corresponds must be liable to tax in Sweden.

The group contribution rules admit transfer of profits between two group companies: a transfer that is deductible for the transferring company and taxable for the receiving company. Such transfers are reflected as year-end accruals in the annual accounts of both companies and are executed by a transfer of funds.

In a cross-border context the group contribution rules are not applicable, (albeit they are applicable to permanent establishments of foreign companies in some circumstances). Instead, the group relief rule (Sw. "koncernavdrag)" is applicable. This provides a way for Swedish parent companies to make use of losses that have occurred in non-resident subsidiaries from other Member States or specific listed jurisdictions. The rules do not allow deductions for losses incurred in sub-subsidiaries. The subsidiary must have been liquidated and that process must have been completed. There is also a requirement that there are no other group companies operating in the local jurisdiction. The subsidiary must also have been owned for the entirety of the tax-year until the liquidation is completed. The amount deducted may not exceed the loss incurred in the last tax-year of the subsidiary, nor the positive result of the parent company using the loss. The rules for calculating the actual loss that may be deducted are rather complicated.

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

Sweden does not have any patent box regime or other specific incentives for intangible assets. However, fixed assets, including acquired intangibles and goodwill, are depreciable for tax purposes at 30 per cent on declining balance or 20 per cent on a straight line, with correspondence to the accounts (see question 5 above).

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

There are no specific rules on transfer of intangibles. However, if intangibles are transferred out of the country for a price below fair market value, the seller would in general be subject to exit taxation as if the assets were sold for fair market value. Even if intangibles are transferred out of Sweden, income related to Swedish functions may nevertheless be taxed in Sweden.

SELL-SIDE

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

Share deals

As a general rule, capital gain from a disposal of shares is taxable. Losses may only be offset against taxable gains from sale of shares, including gains made by other group companies (assuming full right to group contributions). However, the gain is not taxable and a loss is non-deductible if the participation exemption regime is applicable.

The participation exemption regime applies if the following relevant requirements are met:

1. The shares must be held by a Swedish company. If the shares are held by a foreign company, the capital gains are not taxed in Sweden unless the foreign entity has a permanent establishment in Sweden to which the capital gain can be attributed. The participation exemption may apply in such case, but only if the foreign company is resident in an EEA jurisdiction and if the company is equivalent to a Swedish company. A foreign company qualifies if subject to income tax where it is resident and provided the shareholders have a limited responsibility for the company's liabilities and finally that the shareholders may not freely dispose of the company's assets

2. The shares must be shares in a Swedish limited company or a foreign equivalent. The participation exemption regime also applies with respect to shares in a Swedish partnership or a partnership resident within an EEA jurisdiction
3. The shares must be defined as capital assets for the shareholder, i.e. may not be trading/ current assets
4. If the shares are listed, the shareholder must hold at least 10 per cent of the voting power and the shares have to be held for a one year term

Sale of other assets

Capital gain from the disposals of other capital assets are taxable and a loss deductible for the seller. If the sale relates to real estate, the loss may in some cases only be offset against real estate gains, including such gains made by other group companies (conditional that group contributions are available). A capital gain is – simplified – calculated as the selling price less the tax base or residual value of the assets.

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

There are no such income tax rules in Sweden. Concerning VAT, please see comment under question 3 above.

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

There are generally no substance requirements for holding companies tax resident in Sweden.

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

For mergers see question 15.

Spin-offs through distribution of subsidiary shares are tax neutral, provided inter alia all shares in the subsidiary are distributed, the distribution is pro rata and the parent company is listed. In addition to income tax neutrality, no withholding tax is levied on such a distribution to foreign shareholders.

There are also rules on tax exempt mergers and de-mergers (see above).

Sweden does not presently levy transfer tax on shares, although there is a proposal to levy such a tax on transfers of companies holding real estate in Sweden (see above). It is not clear if and when the proposal will lead to legislation.

When a business is sold through a share deal, any VAT incurred for the seller on the transaction costs is, according to the STA, not recoverable as input VAT for the seller. This being the situation since the sale of shares is a VAT exempt transaction. As already mentioned, however, a recent court case from the SAC has altered this position since, according to SAC, a VAT deduction may be given for the seller in cases where the transaction costs are not included in the sales price of the shares but rather are treated as an overall expense in the hands of the seller. See further question 3 above.

If the business is sold as an asset deal, the concept of a transfer of a going concern may apply which means that any VAT incurred during the sales process by the seller will be deductible under normal VAT rules (e.g. the seller must conduct a VATable business and expenses cannot be subject to any general input VAT restrictions). If individual assets are sold, normal VAT rules apply. If immovable property is sold, the scope of the VAT deduction on the transaction costs depends on how the property has been used under the “voluntary VAT liability” scheme by the seller. If no rental income has been subject to VAT in the hands of the seller, no VAT deduction is granted.

MANAGEMENT INCENTIVES

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

The participant in a management incentive program is taxed when salary and/or benefits are deemed available. Usually the time when the income will be deemed available corresponds to the time of payment or obtaining the benefit.

A participant that, as a result of the employment, acquires an asset, for example a financial instrument, at a price below fair market value, is subject to tax on employment income equal to the difference between the fair market value and the acquisition price (if any). Social security contributions will also be imposed on the difference between the fair market value and the acquisition price. Any increase in value of the financial instrument after acquisition will be subject to capital income taxation at 30 per cent (however there are other tax brackets on holdings in closely held companies). There is no definition of a financial instrument under the Swedish Income Tax Act. As a general rule, it would be required that an instrument be freely transferable in order to qualify as a financial instrument. Instruments carrying rights according to corporate law, for example the Swedish Companies Act, such as shares, warrants and convertible notes should be deemed financial instruments. Contractual rights, such as synthetic options, would likely not automatically be deemed financial instruments. If the acquisition of a financial instrument is subject to certain restrictions, there may be a risk of a postponed date of acquisition, i.e. due to the restrictions the financial instrument is not considered to have been acquired at day one. The financial instrument would instead be considered acquired when the restrictions lapse. This means that any increase in value prior to the financial instrument being considered acquired will be taxed as employment income.

A participant that, as a result of the employment, obtains a conditional right to acquire an asset in the future will be subject to employment income when this right is exercised. In this situation, it should be noted that the fair market value of the asset at the time the right is exercised serves as the basis for the taxation.

Since 1 January 2018, smaller businesses may provide their employees with incentive programs subject to more beneficial tax rules. Under these new rules, benefits provided to employees under specific option program are not taxable, if several requirements are met.

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