Poland

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Acquisitions (from the buyer's perspective)

1 Tax treatment of different acquisitions

What are the differences in tax treatment between an acquisition of stock in a company and the acquisition of business assets and liabilities?

There are significant differences in tax treatment between an acquisition of stock in a company and the acquisition of business assets and liabilities. The acquisition of stock triggers a 1 per cent tax (called tax on civil law actions (CLAT)), payable by the acquirer. The purchase price of stock cannot be depreciated after the acquisition, but becomes deductible in the event of the disposition of stock. The acquisition of business assets and liabilities in form of an 'enterprise' (a going concern or a running business) triggers a 1 per cent CLAT (2 per cent CLAT in the case of real estate), while an acquisition of individual assets, including fixed assets, as a rule, triggers a 23 per cent VAT. Such assets may be depreciated. In the case the acquisition of business assets and liabilities takes the form of an 'enterprise', as defined above, the resulting goodwill may be depreciated over a period of five consecutive years.

2 Step-up in basis

In what circumstances does a purchaser get a step-up in basis in the business assets of the target company? Can goodwill and other intangibles be depreciated for tax purposes in the event of the purchase of those assets, and the purchase of stock in a company owning those assets?

The purchaser gets a step-up only in the event of acquisition of individual assets. In the event of stock purchase there is no-step or depreciation for tax purposes available for the buyer. The purchase price of stock cannot be depreciated after the acquisition, but becomes deductible upon the disposition of stock. No goodwill is recognised for stock acquisition. For the acquisition of business assets and liabilities, which takes form of an 'enterprise', the resulting goodwill may be depreciated over a period of five consecutive years.

3 Domicile of acquisition company

Is it preferable for an acquisition to be executed by an acquisition company established in or out of your jurisdiction?

It is preferable for an acquisition to be executed by a special-purpose acquisition company established outside of Poland, preferably in a jurisdiction with which Poland has concluded a double tax treaty. In the case of sale of such company, the resulting capital gain would be (as a general rule) subject to tax only in such jurisdiction (based upon the relevant double tax treaty), and not in Poland. Absent such structure, the capital gain on disposition of shares in a Polish company might be subject to 19 per cent tax in Poland.

4 Company mergers and share exchanges

Are company mergers or share exchanges common forms of acquisition?

Company mergers or share exchanges became common forms of acquisition in Poland after the accession to the EU (1 May 2004), due to the application of the EU Merger Directive, which makes such acquisition, in general, tax-neutral.

5 Tax benefits in issuing stock

Is there a tax benefit to the acquirer in issuing stock as consideration rather than cash?

There is a tax benefit to the acquirer in issuing stock as consideration rather than cash due to the fact that a cash acquisition triggers a 1 per cent tax (CLAT), payable by the acquirer while new stock issue triggers only a 0.5 per cent CLAT, payable by the target company. In order to eliminate the CLAT entirely the seller may contribute, in a tax-free share-for-share exchange transaction, the shares or stock of the target company to a company located in a tax-friendly jurisdiction, and subsequently sell such holding company to a third-party buyer.

6 Transaction taxes

Are documentary taxes payable on the acquisition of stock or business assets and, if so, what are the rates and who is accountable? Are any other transaction taxes payable?

The acquisition of stock triggers a 1 per cent tax (CLAT), payable by the acquirer. The acquisition of business assets and liabilities in the form of an 'enterprise' (going concern) triggers a 1 per cent CLAT (2 per cent CLAT in the case of real estate), while an acquisition of individual assets, including fixed assets, as a rule, triggers a 23 per cent VAT. Such purchased assets may be depreciated.

7 Net operating losses, other tax attributes and insolvency proceedings

Are net operating losses, tax credits or other types of deferred tax asset subject to any limitations after a change of control of the target or in any other circumstances? If not, are there techniques for preserving them? Are acquisitions or reorganisations of bankrupt or insolvent companies subject to any special rules or tax regimes?

The net operating losses, tax credits or other types of deferred tax asset are, in general, not subject to any limitations after a change of control of the target. Acquisitions or reorganisations of bankrupt or insolvent companies are not subject to any special rules or tax regimes.

8 Interest relief

Does an acquisition company get interest relief for borrowings to acquire the target? Are there restrictions on deductibility where the lender is foreign, a related party, or both? Can withholding taxes on interest payments be easily avoided? Is debt pushdown easily achieved? In particular, are there capitalisation rules that prevent the pushdown of excessive debt?

Although it is not directly provided for in the tax laws, there are tax rulings based upon which an acquisition company gets interest relief for borrowings to acquire the target. The most popular method of achieving a relief

Update and trends

The interesting trends are to be seen in an international context. Poland has currently 89 double tax treaties (DTTs) effectively in force, The Polish DTTs are generally based upon the OECD Model Convention, with some important modifications, including:

- a wide, pre-1992 definition of royalties to include payments for 'the use or the right to use, of an industrial, commercial or scientific equipment' (thus applicable to cross-border leasing payments);
- withholding tax on cross-border payment of royalties;
- increased use of a 'switch-over clause';
- consistent use of the aforementioned 'real estate-rich company clause' (article 13.4);
- consistent use of the very broad 'exchange of tax information clause';
- increased extension of the credit method instead of exemption method for avoidance of double taxation to include business profits, capital gains and directors' fees; and
- increased use of an anti-avoidance clause.

In addition to the DTTs, Poland has expanded its network of tax information exchange treaties. These currently comprise 14 such agreements (Andorra, Bahamas, Belize, Bermuda, British Virgin Islands, Cayman Islands, Dominica, Gibraltar, Grenada, Guernsey, Isle of Man, Jersey, Liberia and San Marino).

Spółka komandytowo-akcyjna (SKA) entities (partnership limited by stock), previously tax-transparent and previously frequently used as a tax-planning vehicle, became taxable as a corporation, effective from 1 January 2014.

Furthermore, a Controlled Foreign Corporation regulations have been adopted by Poland, effective 1 January 2015. The Controlled Foreign Corporation (CFC) regulations have been introduced as amendments to the 1991 Personal Income Tax Law and the 1992 Corporate Income Tax Law, respectively. The CFC relations provide for taxation of passive income obtained by foreign subsidiaries of Polish residents, both individuals and corporate bodies, which hold 25 per cent or more in such foreign subsidiaries, even if such income is not distributed to the Polish shareholders.

for borrowings to acquire the target is debt pushdown (ie, the merger of the acquiring company into the acquired target). There are detailed thin-capitalisation rules limiting the tax-deductibility of interest payable between the related companies. The withholding taxes on interest could be avoided if the interest payments qualify for the exemption based upon the EU Interest and Royalty Directive or, alternatively, in certain jurisdictions, if such interest payments are made on a bank loan or credit. Some double tax treaties provide for exemption from the withholding tax for interest payable on a bank loan or credit.

9 Protections for acquisitions

What forms of protection are generally sought for stock and business asset acquisitions? How are they documented? How are any payments made following a claim under a warranty or indemnity treated from a tax perspective? Are they subject to withholding taxes or taxable in the hands of the recipient?

Standard representations and warranties are generally sought and given for stock and business asset acquisitions, in particular in a cross-border context. Such representations and warranties are documented in great detail in the share purchase agreements. Binding tax-clearance certificates may be obtained from local tax authorities in the case of an acquisition of an 'enterprise' or asset. From a tax perspective, in general, any payments made following a claim under a warranty or indemnity are treated as tax-deductible for the seller and as taxable income for the buyer.

Post-acquisition planning

10 Restructuring

What post-acquisition restructuring, if any, is typically carried out and why?

Typically, a post-acquisition restructuring would involve a debt pushdown, or a merger of a profit-making company from the acquirer's group into the loss-making company in order to utilise the loss-carry-forward mechanism provided for in the 1992 Corporate Income Tax Law. A loss-carry-forward is available for five consecutive fiscal years, with the only limitation that in any given fiscal year a loss deduction may not exceed 50 per cent of the total loss amount.

11 Spin-offs

Can tax neutral spin-offs of businesses be executed and, if so, can the net operating losses of the spun-off business be preserved? Is it possible to achieve a spin-off without triggering transfer taxes?

Tax neutral spin-offs of businesses can be executed; however, the net operating losses of the spun-off business cannot be preserved. It is possible to achieve a spin-off without triggering transfer taxes (eg, without the CLAT tax) as such an action does not fall under the CLAT obligation. No other transfer tax would apply to such spin-off.

12 Migration of residence

Is it possible to migrate the residence of the acquisition company or target company from your jurisdiction without tax consequences?

It is possible to migrate the residence of the acquisition company or target company from Poland without tax consequences, as there is no exit tax in force in Poland for companies or individuals.

13 Interest and dividend payments

Are interest and dividend payments made out of your jurisdiction subject to withholding taxes and, if so, at what rates? Are there domestic exemptions from these withholdings or are they treaty-dependent?

Dividend, interest and royalty payments made out of Poland are subject to withholding taxes: dividends are subject to 19 per cent tax, while cross-border interest and royalty payments are subject to 20 per cent tax. There are exemptions or significant reductions available based upon double tax treaties, the EU Parent-Subsidiary Directive and the EU Interest & Royalty Directive. The exemption from withholding tax on dividends under the EU Parent-Subsidiary Directive is also applicable with respect to domestic dividend payments taking place between two Polish companies. With respect to the withholding tax on cross-border interest payments, a few of the older double tax treaties still provide for full exemption of such payments in the source country, for example, treaties with the United States (1974), Spain (1979), France (1975) and Sweden (2004).

14 Tax-efficient extraction of profits

What other tax-efficient means are adopted for extracting profits from your jurisdiction?

The most efficient means for profit repatriation from Poland is the application of the EU Parent-Subsidiary Directive and the EU Interest and Royalty Directive. Therefore it is advisable that the acquisition of a Polish target company is made in such a manner that the acquiring company may enjoy the full benefits of the above-mentioned two EU Directives, thus making a future dividend, interest and royalty payment free from withholding tax. Partial redemption of the stock or shares is also available and qualifies for tax exemption under the EU Parent-Subsidiary Directive.

Disposals (from the seller's perspective)

15 Disposals

How are disposals most commonly carried out – a disposal of the business assets, the stock in the local company or stock in the foreign holding company?

All three methods are applied, the most common being a disposal of the stock in the local company by an offshore holding company, located in a jurisdiction with which Poland has concluded a double tax treaty. In the case of sale of such company, the resulting capital gain would be (as a general rule) subject to tax in such jurisdiction (based upon the relevant double tax treaty), and not in Poland. The least common method is a disposal of the business assets.

16 Disposals of stock

Where the disposal is of stock in the local company by a non-resident company, will gains on disposal be exempt from tax? Are there special rules dealing with the disposal of stock in real property, energy and natural resource companies?

A disposal is of stock in the local company by a non-resident company will be exempt from income tax under the applicable double tax treaties concluded by Poland. There are special tax rules dealing with the disposal of stock in real property companies, but only resulting from the wording of article 13.4 of certain recently concluded double tax treaties concluded by Poland, and not directly from the Polish tax law. The 'real estate-rich company clause' in article 13.4 of a typical double tax treaty provides that the capital gains resulting from the alienation of shares deriving more than 50 per cent of their value directly or indirectly from immovable property situated in the given state may be taxed in that state. Some older double tax treaties with, for example, Cyprus (1992) or the Netherlands (2002), do not include such 'real estate-rich company clause'.

17 Avoiding and deferring tax

If a gain is taxable on the disposal either of the shares in the local company or of the business assets by the local company, are there any methods for deferring or avoiding the tax?

There are no particular methods for deferring or avoiding the income tax due on the disposal either of the shares in the local company or of the business assets by the local company. As mentioned above, the most popular way of avoiding the income tax due on the disposal of the shares in the local company is to make the disposal not by a local shareholder but by a holding company, located in a jurisdiction with which Poland has concluded a double tax treaty, as in the event of the sale of such company, the resulting capital gain would be (as a general rule) subject to tax in such jurisdiction (based upon the relevant double tax treaty), and not in Poland.

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