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The acquisition (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?

In the case of a stock acquisition, the unrealised gains and losses remain within the company that is acquired. No step-up in basis is obtained. The price for the shares will reflect the present value of the deferred tax consequences of such hidden gains and liabilities.

In the case of an asset deal, the buyer will obtain a step-up in basis and therefore an increased depreciation base. The price will reflect the fact that the seller has to pay taxes on any net gains realised.

In the case of an asset transaction, any net operating losses related to the business transferred cannot be transferred, and they remain with the seller.

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?

A step-up in basis is not available in the case of an acquisition of shares, and this applies with respect to all assets. When assets are acquired in an asset deal, goodwill can in principle be amortised over a minimum period of 10 years. Other assets, including intangible assets, can also be amortised over their useful life with a minimum of five years.

It should be noted that amortisation of real property is limited. Real property used by the business itself (other than for renting out) cannot be amortised below 50 per cent of its base value. Property that is rented out can be amortised down to 100 per cent of its base value. The base value is an annually determined value for local property tax purposes and is supposed to reflect the fair market value. Land cannot be amortised.

3 Execution of acquisition

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

It can be beneficial to use a domestic acquisition company for the acquisition of shares, if the acquiring entity would obtain at least 95 per cent of the shares in the target. This would allow the formation of a tax consolidation (known as a fiscal unit). In this manner the interest on the acquisition debt can effectively be set-off against the results of the target.

An alternative to using a domestic acquisition company for a stock deal could be a foreign company with a Dutch branch, to which the stock would be attributed. In such cases a tax consolidation is also possible. An issue in that case would be the level of substance of the branch and securing the attribution of the acquired stock to the branch. This structure can, however, under certain circumstances lead to a double relief for acquisition debt-related interest.

In the case of an asset deal the use of an acquisition company will generally be advisable, if only for practical purposes. Under certain circumstances it might also allow for a future tax-free sale of the business by selling the acquisition company.

Even if less than 95 per cent of the shares of target are acquired, using an acquisition company in the Netherlands might be attractive, since once this entity owns 50 per cent or more in the target a tax consolidation for VAT purposes can be formed, which would allow a recapture of VAT related to the acquisition that may not always be recoverable in other cases.

It is not common to use foreign entities in the case of asset deals, and they are rarely used for stock transactions. If a foreign acquisition company is used, it will generally be for dividend planning purposes (see question 14).

4 Company mergers and share exchanges

Are company mergers or share exchanges common forms of acquisition?

Company mergers and share exchanges are not uncommon, since they reduce the need for borrowing by the acquiring party or the use of cash to complete the acquisition. Under particular circumstances – where the seller is an individual – a tax saving can be achieved through a share-for-share exchange (see question 15).

5 Tax benefits in issuing stock

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

There may be a tax benefit to the acquirer of issuing stock in the event that a cash transaction would lead to borrowings in excess of the thin capitalisation limits (see question 8).

6 Taxes payable on an acquisition

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?

There are no stamp duties or other documentary taxes in the Netherlands on the acquisition of stock or business assets, other than stock in a real property company or real property itself. The transfer tax on real property or a real property company (ie, if 70 per cent of the assets of the company are real property) amounts to 6 per cent. In certain cases this 6 per cent tax can be avoided by contributing the real property (company) in a merger transaction.

VAT will be due in the case of an asset deal, unless the deal qualifies as a going concern transaction of an (independent part) of a business. The standard VAT rate is 19 per cent and the reduced rate is 6 per cent. In most cases, when a business is acquired there will therefore not be any VAT liability.

The Netherlands also does not levy a tax on capital contributions made to a company, whether in cash or in kind.

7 Net operating losses

Do net operating losses survive a change in control of the target? If not, are there techniques for preserving them?

In principle net operating losses will survive a change of control in the target, provided the target carries on an active enterprise (not being management of investments) and provided that the activities of the target have not been reduced by 30 per cent or more in the year prior to the change of control, and such reduction of activity is not contemplated within the three years following the change of control. Net operating losses can therefore be lost in the event that the above tests are failed. A change of control is considered to take place when, directly or indirectly, 30 per cent of the interest in the company changes hands, unless the direct or indirect acquirer already owned (directly or indirectly) one-third of the stock. When in doubt as to the availability of existing losses, a ruling can be obtained from the tax administration.

If losses are forfeited, they will no longer be available as per the beginning of the year in which the transaction takes place.

The risk of forfeiture of net operating losses can be a reason to opt for an asset deal or to postpone the transaction or temporise the transaction.

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?

Subject to base-erosion and general thin capitalisation provisions, interest relief is available for borrowings to acquire the target.

Base-erosion

One specific anti-base erosion provision applies in case of related party borrowings, if the acquirer or a related party of the acquirer or a Dutch resident related individual acquires in a transaction connected with such borrowings a company that becomes a related party.

Basically, a related party is a company that owns one-third of the relevant company, a company that is one-third owned by the relevant company, or a company in which a third party (entity or individual) has an interest of at least one-third , while that third party also owns one-third of the relevant company. In the case of individuals, there are specific attribution rules regarding spouses and children.

This provision denies interest relief, unless the taxpayer can demonstrate that the transactions and the connected financing were entered into predominantly for valid business purposes or that the interest, in the hands of the related party creditor is de facto subject to a reasonable tax, according to Dutch standards. The tax is considered reasonable if the effective rate (computed in accordance with Dutch tax rules) is at least 10 per cent. If the reasonable tax rate test is applied, the tax administration can still deny interest relief if it demonstrates that there was, for example, an expectation of tax losses with the lender or that there were no predominantly valid business reasons with respect to the borrowings and the acquisition.

Thin capitalisation

If a company forms part of a group, as defined in the Dutch Civil Code, and borrows from a related party (see above), interest on excessive borrowings from related parties will not be relieved. Excessive borrowings are determined by one of two tests:

- the net average borrowings exceed more than three times the average equity increased by €500,000 (equity includes paid-up nominal capital, any capital surplus, any legal reserves and retained earnings); or
- the average borrowings exceed proportionally the average debt ratio of the group of which the borrower forms part.

The non-relieved part of the interest will be the net result of related party interest paid minus related party interest received. For purposes of this provision, interest also includes costs related to the borrowings, such as arrangement fees.

Loans that de facto have the character of equity (such as hybrid loans), and the interest thereon, are excluded from the thin capitalisation rules.

The Netherlands does not levy any withholding tax on interest.

Other than through a tax consolidation (see question 3) or a post-acquisition merger, debt pushdown cannot be achieved easily. This is partly due to the Dutch rules concerning financial assistance. It is still possible for the target to distribute its freely distributable reserves to the acquirer, which could use such funds to pay back any acquisition debt. The target could borrow for this purpose, but only to the extent of its freely distributable reserves. The target should, however, in principle, not borrow from related parties since another specific anti-base erosion provision would disallow the interest deduction for tax purposes.

9 Protections for acquisitions

What forms of protection are generally sought for stock and business asset acquisitions? How are they documented?

Warranties and indemnities will as a rule only be relevant in the case of stock transactions, since an assets acquisition the tax liabilities are in principle not transferred (with a possible exception related to wage taxes and social security charges). Taxes are not attached to assets but to the subject of the taxation, namely the entity transferred or the selling entrepreneur (individual or entity).

The acquirer will generally seek unlimited (€ for €) indemnity for any and all taxes due with respect to any transactions having occurred up to the date of closing. It should be noted in this respect that the standard statute of limitation is five years after the relevant tax year, increased by any period for which extension of filing has been granted. In the case of foreign income or expenses, the five-year period is actually increased to 12 years. Often, the buyer will seek some form of collateral or guarantee with respect to the indemnity sought. In addition, certain issues can or will be covered with specific warranties, such as a warranty that the company did not form part of a tax consolidation, that no court cases are pending and no audits are outstanding or announced, and that any rented real property is no longer subject to revision for VAT purposes.

Particular attention will have to be paid to tax issues and social security issues related to personnel (and where applicable, subcontractors). The amount per individual might not be important, but a mistaken approach to wage tax or social security purposes will generally affect all those involved. In addition, in the case of the takeover of an undertaking, that is an asset deal involving an entire enterprise, it is possible that the acquirer finds itself confronted with certain tax claims related to the pre-acquisition period. In such scenarios, therefore, warranties and indemnities will have to form part of the acquisition agreement.

The warranties or indemnities form part of the share purchase agreement, where relevant, with annexes outlining the specific issues covered.

Often this part of the agreement will also deal with issues such as which party (buyer or acquirer) will be responsible for any (court) proceedings and who will bear the costs of such proceedings.

Post-acquisition planning

10 Restructuring

What post-acquisition restructuring is typically done and why?

As mentioned above, a common post-acquisition restructuring might (where possible) be the creation of a tax consolidation or (under certain circumstances) a merger. The main tax reason is often the possibility to effectively obtain a pushdown of interest charges and other costs related to the acquisition borrowings. In view of the specific rules governing pre-tax consolidation and pre-merger loss allocations, mergers or tax consolidations will generally not allow immediate use of such pre-existing losses against the results of the business of the other party to the consolidation or merger.

Mergers can be performed tax-free, provided that certain specific conditions are met.

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?

As in the case of mergers, very detailed rules apply with respect to spin-offs. Whether a spin-off can be performed tax neutral and with conservation of losses will depend very much on the circumstances of each specific case and on the resulting percentages of ownership in the spun-off entity. The most common form of spin-off is a company split in the case of conflicting interests of the current shareholders.

12 Migration of residence

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

Under current rules the migration of a company, either the acquisition company or the target company, would lead to termination of its Dutch tax residence and would lead to taxation of all unrealised gains and losses in accordance with the normal tax rules. Migration of a pure holding company, owning solely qualifying participations, would de facto not lead to taxation, since any gains or losses on such participations would typically be tax exempt.

The only exception to this rule would be if the migrating company continues to remain a (partial) resident taxpayer by keeping a branch in the Netherlands. This can be the case if, for example, the migration happens in connection with a cross-border merger.

Dutch incorporated companies are by definition subjects for Dutch corporate income tax purposes. As a consequence, even if they have moved their residence, they will still have to continue filing Dutch corporate income tax returns, although as long as there is no Dutch-source income, the effective tax due will be nil.

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?

The Netherlands does not levy withholding tax on interest. However, if the interest is in connection with a loan that de facto acts as equity, the interest will be re-qualified as dividends. Based on case law this would, inter alia, be the case with interest on subordinated, indefinite loans with profit related interest. A term of 50 years or more is considered indefinite.

Dividends are subject to 15 per cent withholding tax. No withholding tax is due on dividends paid by a 5 per cent or more qualifying Dutch resident subsidiary to its Dutch parent company, as a consequence of the participation exemption. This exemption has been extended to dividends paid by Dutch companies to 5 per cent or more EU-resident parent companies listed in the EU Parent-Subsidiary Directive.

Most treaties will reduce the withholding tax to 5 per cent (in some cases zero per cent) in the case of qualifying foreign corporate shareholders.

An important exemption from dividend tax relates to the Dutch cooperative, which is not a tax subject under the Dividend Tax Act.

The Exempt Investment Fund, introduced in 2007, is exempt from dividend tax (and from corporate income tax).

Worth mentioning here is a special provision, which enables the Netherlands under specific circumstances to tax a foreign corporate resident in the Netherlands on its interest income, dividend income and capital gains on a 'substantial interest' in a Dutch corporate taxpayer. This will be the case if a foreign corporation owns directly or indirectly 5 per cent in a Dutch corporate taxpayer (the substantial interest) and such substantial interest is not attributable to an enterprise carried on by the foreign corporation. In most cases the relevant tax treaty will protect against such taxation or at least reduce the taxation to the lower rates of withholding tax provided for in the treaty. This specific tax is, however, not a withholding tax, but corporate income tax due by non-resident taxpayers, although it is limited by the reduced tax rates applicable to either interest or dividends under the relevant treaty.

14 Tax-efficient means for extraction of profits

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

As indicated above, a cooperative, which would, for example, in turn own a corporate taxpayer, can be used to distribute dividends free of withholding tax. The cooperative benefits from the participation exemption with respect to dividends received from the underlying taxpayer. Distributions by the cooperative are, however, tax exempt.

Another method to avoid dividend tax is the use of a Dutch branch of a foreign entity, since branch distributions are not subject to withholding tax. The branch normally benefits from the participation exemption in respect of a qualifying shareholding.

Provided that the rate is at arm's length, royalties can be an attractive method of extracting profits, since they are tax deductible and not subject to withholding taxes.

Since the Netherlands does not have specific anti-treaty shopping provisions in its domestic law, the most common method of avoiding or reducing withholding tax (if applicable) is interposing an entity, payments to which are not subject to withholding tax.

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?

The seller, if it is a Dutch resident corporate taxpayer (either a Dutch resident company or a Dutch branch of a foreign company) will generally prefer to sell the stock in the target. As a rule the corporate seller

Update and trends

Apart from slightly more interest in using cooperatives in either acquisitions or in post-acquisition reorganisations, the only new trend of the past two years is a renewed use of the takeover holdings followed by the formation of a tax consolidation. This is a consequence of a change in the law as from 2007. Prior to this amendment, these acquisition structures were much less attractive for a 10-year period since the interest relief was deferred in time.

As far as post-acquisition restructuring is concerned, there seems to be slightly more interest in cross-border mergers, especially as a consequence of changes in corporate law, which due to EU legislation now provides for the corporate law opportunities to perform such mergers.

will benefit from the participation exemption for capital gains as long as it owns at least 5 per cent in the target company.

If the seller is an individual, owning less than 5 per cent in a company, no tax will be due on the gain on the sale of shares since such passive investment income is taxed on a forfeitary basis. An exception would if the shareholding is related to, for example, income from employment. If the individual owns 5 per cent or more (a substantial interest) any gain will be taxed at a flat rate of 25 per cent (unless the ownership is employment-related).

Therefore, in the above situations the seller will generally prefer a sale of the stock.

There may be situations where a transaction is nevertheless structured as an exchange of assets and liabilities against the issuance of stock. Detailed provisions allow a tax-exempt transfer, which is in particular used in the case of transfer of smaller enterprises to successors that do not have sufficient financing capacity. The structure would involve the issuance of preferred shares to the seller and of common shares to the successor.

From a seller's point of view, a stock transaction is generally preferred.

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?

Except for the special provision concerning a non-resident corporate substantial shareholder, referred to in question 13, and assuming that the non-resident company does not have a permanent establishment in the Netherlands to which the stock is attributable, the gain on the sale of stock in a Dutch company by a non-resident company will not be subject to Dutch taxation. As far as corporate income tax is concerned, no distinction is made as to the nature of the company (ie, no special rules for real property companies, energy or natural resources companies).

Note, however, that the sale of shares in a real property company may give rise to 6 per cent transfer tax (due by the acquirer).

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?

Since the disposal of stock in a local company will in general not lead to taxation in the Netherlands, deferral techniques are not required.

As regards the sale of business assets, a limited number of exemptions or deferral techniques are available. See for instance the transfer of assets against the issuance of stock referred to in question 15. In addition, with respect to certain assets it is possible to form a re-investment reserve, provided that there is a clear intention to replace the assets sold with assets that will perform a similar function in the enterprise. The re-investment must take place within three years after the disposal of the asset to be replaced. The consequence of the re-investment reserve is that taxation of the gain is deferred. Taxation takes place at a later date, either because the three-year period lapses, or at the time that the replacement asset is disposed of. The acquisition cost of the replacement asset will have been reduced with the amount of the re-investment reserve.

As far as individuals are concerned certain tax free amounts exist, mainly in connection with gains on the sale of an enterprise at the time of cessation of the enterprise. Furthermore, some specific exemptions apply with respect to farm land, cultural heritage assets, forestry and expropriations.

When carefully planned, and when time allows, assets deals can be converted into share deals, thus reducing the effective tax rate. The assets would first have to be transferred to a company, against the issuance of shares, which subsequently must remain owned by the transferring party for at least three years, after which they can be sold. The company acquiring the assets under such scheme will, however, not benefit from a step-up.

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