GETTING THE DEAL THROUGH

Tax on Inbound Investment

in 33 jurisdictions worldwide

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2008

Published by
GETTING THE DEAL THROUGH
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The acquisition (from the buyer's perspective)

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

By examining the tax treatment of an acquisition per se – that is, without looking into the tax planning of the final structure post-acquisition – one may notice that the tax liability burdens the buyer.

We distinguish these more common forms of acquisition:
- transfer of shares or parts in a company, ie,
  - company shares not listed on Athens Stock Exchange;
  - transfer of shares that are listed on the Stock Exchange; and
  - transfer of company 'parts' in other types of companies; and
- transfer of a business as a 'going concern'.

The above forms of acquisition may be analysed as follows:

Transfer of shares or parts in a company

Company shares not listed on the Stock Exchange

The tax burden amounts to 5 per cent of the real transfer value of the shares. In order to calculate the transfer value there is a method of calculation of a minimum 'objective' value, which is the following:
- the return on net worth capital of the company for the last five financial years is added to the net worth capital of the company that appears in the last balance sheet before the date of transfer;
- to this result is added the difference (if any) in the value of the company's immoveable property at the date of transfer, compared to the acquisition value of that property as it appears in the company's books; and
- the resulting figure, divided by the number of shares existing at the date of transfer is the minimum real value of each share, which is taken into account for the calculation of the total value of all shares to be transferred.

Return on equity (own capital) is calculated by the ratio between the average operating results of the five most recent financial years and the average of the company's own capital for the same years. In the event that there have legally been fewer than five balance sheets, the existing balance sheets are taken into account accordingly. If the results are negative, no return on capital is taken into account.

In the event that the transfer contract, whether in the form of a notarial act or a private document, mentions a consideration (transfer price) which is higher than the objective value as calculated with the above method, then that higher price is taken into account for taxation purposes.

The transfer of shares of a non-Greek company not listed in any recognised stock exchange is similarly taxed at 5 per cent on the transfer value as declared by the contracting parties at the transfer document, without the aforementioned complicated method of calculation being applied.

When the profits from the above transfers are made by:
- Greek SA companies;
- public, municipal and local community profit organisations;
- cooperatives and cooperative unions;
- foreign businesses and profit organisations; or
- Greek limited liability companies,

then the tax liability is not fully exhausted, but the profits made out of transfer of shares are added to their total taxable income, the tax at 5 per cent being offset. The tax obligation of individuals for such profits is fully satisfied with the payment of tax at 5 per cent as explained above.

Shares that are listed on the Stock Exchange

According to Law 2759/1998, article 9, paragraph 2, as amended by Law 3296/2004, article 12, transfers of shares that are listed in the Athens Stock Exchange are taxed at 1.5 per cent. This tax is calculated on the value of the shares transferred as it appears on the tag issued by the intermediating brokerage firm. The tax burdens the buyer of the shares, natural or legal person, unions or trusts, regardless of their residence, origin or place of residence or domicile, and even if they are exempt from the payment of other taxes or duties by virtue of other provisions.

According to Law 2703/1999, article 27 paragraph 2, the same applies to transfers of shares listed in a recognised foreign stock exchange (according to lists compiled by the Ministry of Economics, all major stock exchanges are included) realised by natural persons residing in Greece, or Greek companies, or companies that have a permanent establishment in Greece. The tax due is calculated at the value of the transfer appearing in the relevant transfer documents and is payable by the seller at the tax office to which the latter is registered.

Company 'parts' in other types of companies.

For those unfamiliar with Greek company law, it should be first of all noted that a Greek limited company is not the equivalent of the common law limited company. Greek company types are copied originally from the French system. Essentially, this means that when we talk about shares under Greek law, we mean always shares in a Greek SA company, the equivalent of a

French *société anonyme*. All other companies and partnerships have company 'parts' or 'equity stakes', not shares. Greek SA companies, although more regulated than the limited companies of the Anglo-American type, play the most significant role in the Greek company world because they cover a wide range of business enterprises, from small, family-owned SA companies to the biggest Greek-listed companies. The following apply to most, if not all companies except the SA.

According to Law 2238/1994 (the Income Tax Code), article 13(1)(a)(bb), as amended by Law 3522/2006, article 11, every profit or gain resulting from the transfer of company 'parts' or the transfer of a participation in a civil professional company is taxed separately as income at 20 per cent. In order to calculate the profit/gain, the acquisition value is deducted from the minimum 'objectively' calculated value at the date of transfer. In order to calculate the so-called 'minimum' objective value the following are taken into account:

- the own capital appearing at the last balance sheet before the transfer;
- its unincorporated value;
- the value of its immoveable property to the extent that there is a difference of value at the date of transfer, compared to the acquisition value of that property as it appears in the company's books; and
- any increase or decrease in the company's own capital that may have taken place between the date of the last balance sheet and the date of transfer.

The resulting figure is increased by the total number of years of the business (aggravating factor). Again, in the event that the transfer contract, whether in the form of a notarial act or a private document, mentions a consideration (transfer price) which is higher than the objective value as calculated with the above method, then that higher price is taken into account for taxation purposes. The above-mentioned provision applies also to the transfer of company parts in foreign companies.

Transfer of a business as a 'going concern'.

The term 'transfer of business' refers to the transfer of a grid of rights and liabilities, governed by article 479 of the Greek Civil Code, as opposed to the individual transfer of specific assets of a business; the following do not apply to the latter.

According to the Income Tax Code, article 13(1)(aa), every gain or profit that arises from the transfer of a business as a whole, together with its intangible assets, such as goodwill, business name, trademark, etc, or from the transfer of a branch of a business as defined in the relevant tax provisions, is taxed at 20 per cent. A similar method of calculation of a minimum objective value is applied here too. Again, the agreed consideration will be taken into account if it is higher than the resulting 'objective' minimum value.

In conclusion, the fundamental difference in the taxation of transfer of shares on the one hand and the transfer of 'parts' or of business as a whole on the other hand is the tax base: in the first case, the tax base is the value of the transfer; in the second case, the tax base is the profit of the seller.

2 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 valuation of the assets of a target company may be subjective, depending from whose perspective it is viewed, ie, the seller, the buyer or the tax authorities, whose interests may all be at odds. Of course the tax authorities will favour higher taxation, ie, higher valuation of the assets to be transferred. The seller will wish to set a higher value (consideration) but not necessarily to pay tax for it, which unfortunately in Greece often leads to 'under the table' cash transactions. The seller, on the other hand, will usually be interested in paying less and showing more.

The most usual method of objective valuation, followed often in the most serious business transactions is valuation by neutral certified auditors. Goodwill and other intangible assets are subject to wide interpretation and looser methods of valuation because of their nature.

The case is somewhat different when, instead of cash, we deal with a contribution in kind, in consideration of shares issued after an increase in the share capital. Again the tax authorities will be interested to an increased value of the assets (tangible or intangible) contributed. But on the other side, apart from the contracting parties, there is the Supervising Authority (the Ministry of Development, formerly the Ministry of Commerce) that, being the guardian of third-party creditors of the company, has a tendency for a lower (or at least objective) valuation of the assets to be contributed. Until very recently, contribution in kind upon the formation or the increase of share capital of an SA company was only conducted by the Supervising Authority, ie, a three-member committee consisting of two employees of the Ministry of Development and one representative of the Chamber of Commerce (representing the interests of the businesses). This is the so-called 'article 9 committee', named after the relevant article of SA Companies Law 2190/1920.

Now, according to Law 3604/2007, article 14, which amended the above-mentioned article 9, the founders of SA companies, or their board of directors, can choose to appoint certified auditors instead of an article 9 committee. Another deviation exists in the case of restructuring by virtue of Law 2166/1993, which gives tax and other incentives for restructurings that lead to the formation of bigger business entities. According to that law, there is no need to evaluate the assets of companies being merged or otherwise restructured by application of that law, because the whole process of restructuring is based on the figures that appear on the balance sheets of the companies involved. The possible avoidance of valuation that law grants is considered a great advantage, and one of the most serious reasons for its adoption by companies following a restructuring process. There is, however, a disadvantage, in that, contrary to the similar tax-incentive Law 1297/1972, there is no room for appreciation of assets. The latter Law not only provides for the appreciation but also allows the postponement of its taxation. Despite that advantage, the procedure of Law 1297/1972, which requires valuation, is often abandoned because of the delays involved.

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

In principle, the domicile or residence of the acquiring entity is irrelevant for tax purposes, especially following the adaptation of Greek law to EU Directive 19/2005 by virtue of Law 3517/2006.

4 Are company mergers or share exchanges common forms of acquisition?

There is no clear trend and no form of acquisition is significantly more common than another, because the preferred method varies according to the details of each particular case. It should be remembered that the Greek capital market is still in the process of defining its identity, being based to a large extent on family-driven corporations. That said, share exchanges are not particularly popular at present. Under the Civil Code, article 573, an agreement for the exchange of goods is treated as if it were two independent sale-purchase agreements, with all the relating tax and other implications. Recently, by virtue of Law 3517/2006, article 2(3), a share exchange was statutorily defined as:

> *the act by which a company acquires participation in the share capital of another company at a percentage that it gives to the acquiring company the majority of voting rights of the other company or, having already acquired such a participation, it further acquires a subsequent participation and, in consideration for the shares acquired, it gives to the shareholders of the second company share titles to the first (acquiring) company and possibly also cash, which latter may not exceed in amount the 10 per cent of the nominal value of such shares, and in case there is no such nominal value, it may not exceed 10 per cent of the book value of such shares.*

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

It is possible that assets used in a business that are capable of being evaluated in money terms be contributed to an existing SA company, which may issue shares in consideration for those assets, to the increase of its share capital equal to their value. For the said SA company, the mere fact that it issues shares as opposed to paying cash is an advantage from a purely business perspective. Tax-wise, such a contribution will not be subject to article 13 of the Income Tax Code (see question 1) because it does not constitute a sale but an acquisition of a participation in a business. The said contribution will however be subject to tax on the accumulation of capital (TAC), in the same way as an ordinary increase of share capital with cash would be. Such a tax would not be payable if cash was the consideration for the acquisition of those business assets.

6 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?

According to Law 1642/1986 (the VAT Code), article 5(4), transfer of business assets or businesses as a whole, branches of businesses whether gratuitously or for consideration or as contribution to the share capital of an existing or newly formed legal entity is not considered as delivery of goods and so is not subject to VAT. In that case the acquirer is considered for the purposes of VAT as a successor in all rights and liabilities of the transferring person. The above do not apply if any of the contracting parties is exempt from VAT. According to article 15 of the Stamp Duty Code, every contract between businessmen, or between a businessman and a commercial company, or between commercial companies, that relates exclusively the business exercised by them is subject to stamp duty at 2.4 per cent, which is payable upon drafting of the contract. It is irrelevant whether the consideration for such a contract has been paid or not. Transfers of shares are not subject to any other duty.

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

Net operating losses (NOLs) of a company that, according to income tax provisions, survive and may be set off with profits of the same for the subsequent five tax years are so treated if the change in control of the target takes place according to the provisions of incentive Law 2166/1993 or Law 2515/1997, to the result that those losses survive in favour of the new structure. If the restructuring does not take place according to the latter provisions, they may not be carried forward. The survival of NOLs is also treated by virtue of Law 2578/1998, article 3(5), as amended by Law 3517/2006, dealing with intra-community deals. This provides that NOLs of previous years of a target company that are capable of being carried forward according to the general income tax provisions may be so carried forward and set off against future profits of an acquiring company's permanent establishment in Greece, if the acquisition meets the criteria of Law 2166/1993 or Law 2515/1997 (which sets out the procedure of mergers between banks and financial institutions). The survival of NOLs of companies being restructured by virtue of the two latter laws is possible for two years following the restructuring if the general conditions for the 'survival' of losses laid down in the Income Tax Code are met and to the extent that these losses are not set off against profits upon restructuring. The above do not apply in case of division of companies.

8 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?

Yes, because interest is a deductible expense, provided that the acquisition is within the business object of the acquiring company. Variations or restrictions relating to the location of the lending institution do not apply; similarly, whether the lender is a related party does not affect the deductibility of the expense but may trigger other tax complications, such as transfer-pricing issues. Also, there are company law-related restrictions on loans between companies and their directors, etc. Withholding taxes exist on interest for both nationals and foreign lenders. As far as foreigners are concerned, any double tax treaty provisions, if applicable, should be examined for possible exemptions or differences in tax rates. Other legal methods for avoiding tax may be available in individual cases. Debt pushdown may be achieved in the form of a transfer of loan from the target company to the acquiring company, subject to the consent of the lender and to the imposition of stamp duty at 2.4 per cent.

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

Apart from conducting a due diligence exercise, protection for the acquiring company is sought by inserting contractual clauses (guarantee clauses) to the effect that the seller will be responsible for:

- any hidden debt or liability that does not appear in the accounting books of the company;
- tax audits that may be conducted after the acquisition on tax years prior to the acquisition; and
- generally, any liability or debt that refers to the time prior to the acquisition.

Update and trends

Despite offering favourable provisions, the Greek tax system can be less than straightforward in practice. While seeking to attract foreign investment, the government is also engaged in combating tax evasion, which is unfortunately rife in the Greek economy. The main objectives of the state (and the desire of business players) are to simplify provisions and reduce the instances where taxpayers and tax authorities need to negotiate or dispute.

Efforts began recently with the codification of deductible expenses, the definition of which is always a headache for tax advisors. Corporate income tax has recently been set at 25 per cent. There is a a drive to unify taxes currently provided in various old pieces of legislation. A new tax bill, already introduced in parliament, aims to improve the relationship between taxpayers and tax authorities, give incentives to newly formed businesses, increase the objectivity of tax controls and establish a National Council for the Confrontation of Tax Evasion.

Post-acquisition planning

10 What post-acquisition restructuring is typically done and why?

Post-acquisition planning depends on the structure that has been finalised, the size of its capital and the identity and diversification of its shareholders. It also depends on whether the main aim is the reinvestment or the distribution of profits. There is no typical trend apart from the common tactic to form holding companies in low tax jurisdictions within the EU. A general tax planning tool used is the tax-free reserves that minimise the tax burden and increase the production capacity of the company.

11 Can tax-neutral spin-offs of businesses be executed and, if so, can the net operating losses of the spun-off business be preserved?

Tax-neutral spin offs are provided only by virtue of Law 2166/1993. However, the transfer of a NOL of a spun-off business is not possible, due to the fact that NOLs are treated as losses of the company as a whole, and may not be isolated to the spun off business. It is useful to note, as a minor exception to the non-divisibility of NOLs within the same company, that the NOLs of the exporting operation (branch) of a company may only be carried forward to be set off against NOLs of the same branch and not against the total profits of the company.

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

Law 2190/1920, article 6 defines a residence of a Greek SA company only as a city or municipality in Greece. The only instance where transfer of an SA company's residence is provided is by virtue of article 29(3) of the same Law. The latter sets only the increased quorum requirements for adopting a resolution for migration, but no other consequences are mentioned in the Law because, following migration, the company shall no longer be subject to Greek laws. Law 2578/1998, which adopted EC Directive 90/434 within the Greek legal system, allows transfer of seat of European companies and European cooperatives from one member state to another.

13 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?

By virtue of article 12 of the Income Tax Code, income tax at 10 per cent is imposed on any interest derived in Greece that is received by any natural or legal person regardless of its origin or place of residence or domicile. This tax is withheld by the debtor upon payment of the interest, without any other tax liability. Possible exemptions or reduced rates are not by virtue of Greek laws but are contained in tax treaties.

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

Favourable holding regimes, outsourcing of activities, know-how, licences, intellectual property rights and management fees are often adopted, as well as transactions with controlled companies. All the above can potentially be challenged by the tax authorities and there is a considerable degree of uncertainty about how they will be treated by a tax audit.

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Disposals (from the seller's perspective)

15 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 the above are applicable. The most straightforward way is the sale of a controlling majority share capital.

16 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?

Tax is applicable on the transfer of a share in a Greek company regardless of the nationality or residence of the disposing shareholder because what matters for taxation purposes is that the company is Greek. For the rates applicable for listed and non-listed shares, see question 1.

17 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?

No, there are not. As far as tax on the transfer of shares is concerned, the law obliges SA companies not to recognise one as shareholder without submission of documents proving that they acquired the shares and proof that the relevant tax has been paid. Similarly, tax on the transfer of a going business by virtue of the Income Tax Code, article 13 is payable before the transfer is concluded. Moreover, in the latter case, the law holds the contracting buyer co-liable for the payment of tax. Restructuring of businesses according to incentive Legislative Decree 1297/1972 is favored by postponement of income taxation on capital appreciation. According to Law 1297/1972, article 2, any capital appreciation that may occur on a merger or restructuring subject to the conditions of this law, is not taxed upon restructuring but is registered on special accounts of the new entity until the date of its dissolution, and only then will tax be payable.