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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?

We distinguish these more common forms of acquisition:

- transfer of shares or parts in a company, namely:
  - company shares not listed on the Athens stock exchange;
  - transfer of shares that are listed on the stock exchange; and
  - transfer of company 'parts' in other types of companies.
- transfer of a business as a 'going concern'.

These forms of acquisition may be analysed as follows.

Transfer of shares or parts in a company

Company shares not listed on the stock exchange

According to the regime which is applicable until 31 December 2013, the tax burden amounts to 5 per cent of the real transfer value of the shares. By virtue of Law No. 4110/2013, the taxation will be imposed on the capital gain realised from the sale. The capital gain is calculated by deducting the acquisition from the minimum 'objective' value of the shares. The 'minimum objective value' is calculated as follows:

- the return on net worth capital of the company for the past 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 with 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) that is higher than the objective value as calculated with the above method, then that higher price is taken into account for taxation purposes.

Similarly, capital gains from the transfer of shares of a non-Greek company not listed in any recognised stock exchange are also taxed at 5 per cent. The capital gain is calculated by deducting the acquisition value of the shares from the consideration, without the aforementioned complicated method of calculation being applied.

When the profits from the above transfers are made by the following, 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 capital gain tax being offset:

- Greek SA companies (companies limited by shares);
- public, municipal and local community profit organisations;
- cooperatives and cooperative unions;
- foreign businesses and profit organisations; or
- Greek limited liability companies.

The tax obligation of individuals for such profits is fully satisfied with the payment of the capital gain tax at 5 per cent as explained above.

Shares that are listed on the stock exchange

According to Law No. 2579/1998, article 9, paragraph 2, as amended by Law No. 3296/2004, article 12, Law No. 3943/2011, article 16 and Law No. 4110/2013, article 10, transfers of shares that are listed in the Athens stock exchange are taxed at 0.2 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, individual or corporate entity, 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 No. 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 individuals residing in Greece, 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.

By virtue of article 16 of Law No. 3943/2011, article 2 of Law No. 4110/2013 and Law No. 4172/2013, article 74, paragraph 7a (which amend again article 38 of the Income Tax Code), it is stipulated that profits made by businesses or individual traders from the sale of shares listed on the stock exchange, which shares are acquired after 1 January 2013, shall be taxed according to the general provisions (as ordinary business profits).

Company 'parts' in other types of companies

A Greek limited company is not the equivalent of a 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 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 No. 2238/1994 (the Income Tax Code), article 13(1)(a)(bb), as amended by Law No. 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 and gain, the acquisition value is deducted from the minimum 'objectively' calculated value at the date of transfer. In order to calculate the '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) that 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 also applies 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.

The tax regime for all the above transfers is subject to radical changes according to Law No. 4172/2013, applicable as of 1 January 2014. According to this new regime, for all above transfers realised the taxation will be on the capital gain at a tax rate of 15 per cent. The capital gain is defined as the difference between the consideration received and the acquisition price. The new regime of Law No. 4172/2013 tends to simplify the provisions but it very doubtful how it will be implemented. The reason is that it is intended to replace the Income Tax Code in its entirety, but there are many aspects of the existing Income Tax Code that are not covered by Law No. 4172/2013. Hence it is highly likely that the above-mentioned methods of taxing all the above transfers will continue.

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 valuation of the assets of a target company may be subjective depending from whose perspective it is viewed, namely the seller, the buyer or the tax authorities, whose interests may all be at odds. Of course the tax authorities will favour higher taxation, that is, 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. 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, 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 'article 9 committee', named after the relevant article of SA Companies Law No. 2190/1920.

According to Law No. 3604/2007 article 14, which amended 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 No. 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 in Law No. 1297/1972, there is no room for appreciation of assets. Law No. 1297/1972 not only provides for the appreciation but also allows the postponement of its taxation. Despite that advantage, the procedure of Law No. 1297/1972, which requires valuation, is often abandoned because of the delays involved.

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?

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 3 No. 517/2006.

4 Company mergers and share exchanges

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 article 573 of the Civil Code, 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 No. 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 Tax benefits in issuing stock

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. Regarding tax considerations, 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 (at 1 per cent), 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 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?

According to Law No. 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 are not considered as delivery of goods and so are not subject to VAT. 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 business persons, between a business person and a commercial company or between commercial companies that relates exclusively to 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 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?

Net operating losses (NOLs) of the acquiring company (only) survive and may be set off against profits of the same, according to the provisions of the Income Tax Code (may be carried forward for five tax years). This is provided in article 2 of Law No. 2166/1993, as amended by article 322, paragraph 3 of Law No. 4072/2012.

The survival of NOLs is also dealt with by Law No. 2578/1998 article 3(5), as amended by Law No. 3517/2006, dealing with intra-community deals. This provides that a target company's NOLs of previous years that are capable of being carried forward according to the general income tax provisions may be 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 No. 2166/1993 or Law No. 2515/1997 (which sets out the procedure of mergers between banks and financial institutions).

Article 20, paragraph 2 of recent Law No. 3756/2009 states that the loss incurred by an acquiring affiliate from the cancellation of the shares it held in the target (mother) is not recognised for deduction from its taxable income (applicable for unified balance sheets after 1 January 2008).

Bankrupt companies

By virtue of article 133 of the Bankruptcy Code, 'every contract and every transaction which takes place according to articles 135–145 of this code, the transfers of property thereof, the registrations in the public registries and every other necessary act are exempt from every tax, stamp duty or other right in favour of the state or third parties, with the exception of VAT which remains payable. The above mentioned exceptions are automatic, without the need to submit any application before the competent tax office.' The provisions of articles 135–145 provide for the transfer of a bankrupt company's business 'as a going concern'.

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?

By virtue of article 11, paragraph 7 of Law No. 3842/2010, various exceptions were introduced to the general rule of deductibility of interest:
- interest for loans granted for the acquisition of shares of Greek or foreign businesses, if those acquisitions are further disposed of within two years from purchase;
- interest for loans granted for the purchase of shareholdings in offshore jurisdictions; and
- accrued interest payable or credited to related entities, to the extent that the total loans granted by that related entity exceeds by three times its own capital in average per financial year.

Loans from related entities may also trigger other tax complications, such as transfer-pricing issues. There are also 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.

Update and trends

As part of the austerity measures introduced in Greece in 2013 an unprecedented number of new tax laws have been introduced. Although the intention of the legislator is supposedly to simplify and rationalise the provisions, the administration is not ready to implement those new laws. So the government very often postpones the enforcement dates. The tax environment in Greece is at the moment very unclear. Tax professionals hope that this is only a transitional period and that the radical changes that are being introduced will be finalised soon. Investors are highly advised to be very cautious about their sources of information for these matters.

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?

Apart from conducting due diligence, 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.

Post-acquisition planning

10 Restructuring

What post-acquisition restructuring, if any, is typically carried out 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 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 are provided only by virtue of Law No. 2166/1993. However, the transfer of an 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 Migration of residence

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

Article 6 of Law No. 2190/1920 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 No. 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 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?

By virtue of article 12 of the Income Tax Code, income tax at 15 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 derived from Greek laws but are contained in tax treaties.

As far as dividend payments are concerned, article 54 of the Income Tax Code, as amended by article 6 of Law No. 4110/2013, stipulates the following:
- dividends distributed by Greek SA companies are subject to withholding tax at 10 per cent; and
- these new provisions are for distributions taking place from 1 January 2014 and afterwards, while for distributions made within 2013, the rate is 25 per cent.

14 Tax-efficient extraction of profits

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.

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

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?

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 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?

No. As far as tax on the transfer of shares is concerned, the law obliges SA companies not to recognise anyone as a 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 concern by virtue of article 13 of the Income Tax Code 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 favoured by postponement of income taxation on capital appreciation. According to article 2 of Law No. 1297/1972, 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.

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