

Albania

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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?

A foreign purchaser may acquire an Albanian company (the target company) by purchasing either its assets or its stock.

A foreign company, when acquiring the (Albanian) assets of an Albanian company carrying on the business through an Albanian branch, will normally be regarded as having a permanent establishment in Albania; thus, it will be taxable in Albania in accordance with domestic tax legislations and any double taxation treaty entered into with the country of residence of the foreign company.

The foreign company may also purchase the assets by using a company newly established or existing in Albania.

Most tangible and intangible assets may be depreciated, except for land, securities and some other specific cases. Buildings are depreciated in straight-line basis at 5 per cent per annum; trademarks and other intangibles at 15 per cent per annum; while machinery and software are depreciated at 20 and 25 per cent per annum respectively in decline basis. Goodwill is also depreciated as an intangible asset.

Under the Income Tax Law (No. 8,438 of 1998), there are no immediate Albanian tax consequences for a foreign company when it acquires the stock of an Albanian company. Apart from the carry-forward of losses, as described below, the tax position of the acquired Albanian company remains unchanged.

With regard to the tax liability of the buyer toward the stock or business activity purchased, differences result because of the nature of the transaction and the impact of other applicable legislation. Concretely, as a result of the acquisition of stock in a company, the buyer is liable for latent tax liabilities affecting the company up to the amount of its contribution into the company (when the liability of the shareholder is limited). Meanwhile, as a result of the acquisition of business assets and liabilities (ie, activity), the buyer becomes liable for tax liabilities pertaining to the activity purchased (for details and exceptions, see question 9).

It is not possible to obtain from the tax authorities assurances that a potential target company has no tax liabilities or advice as to whether the target is involved in a tax dispute. Hence, the extent of indemnities or warranties is a matter for negotiation between the parties.

At the moment of disposal, any income resulting from a source in Albanian territory is taxable in Albania. Therefore, capital gains earned by a foreign company at the moment of disposal of the stock or business assets and liabilities will be subject to Albanian income tax (currently at 20 per cent; from 1 January

2008, the rate will be 10 per cent), except when double tax treaties providing otherwise are applicable.

For differences in VAT treatment, see question 6.

- 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?

According to the Income Tax Law and the corresponding Instruction from the Minister of Finance, goodwill paid for a business as a going concern is tax-deductible on a straight-line basis, at the rate of 15 per cent by the buyer. There are no specific regulations for the calculation of goodwill for tax purposes (hence, accounting rules are applicable). In case of purchase of stock in a company owning goodwill and other intangibles, no depreciation of such asset is allowed for tax purposes to the buyer.

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

If the acquisition of business assets is made by an acquisition company established in Albanian jurisdiction, the permanent establishment issue mentioned in question 1 will have no impact on the acquisition.

In terms of acquisition of stock, there are no tax incentives or difference at the moment of acquisition. Tax differences arise in terms of taxation of dividends distributed by the target company. In fact, in case stocks are purchased by the foreign investors through a local company, dividends distributed by the target company to the local subsidiary of the foreign investor are exempt from taxation, provided that:

- both the target company and the local subsidiary are Albanian tax residents and subject to corporate income tax; and
- the local subsidiary acquires and holds at least 25 per cent of the share capital of the target company.

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

In practice, company mergers (as defined under Albanian commercial legislation, ie, fusion-absorption or fusion-creation of a new entity) and share exchanges are not common forms of acquisition in Albania. This is because of the long procedures for realisation of mergers under Albanian commercial legislation. The most common form of acquisition is the share/stock purchase transaction.

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

There is no tax benefit to the acquirer in issuing stock as consideration rather than cash. The tax legislation does not expressly provide for the tax treatment of the vendor; in any case, it results that taxation of the entity receiving the shares in exchange for the in-kind contribution is deferred until future sale of the shares gained in exchange for the contribution.

- 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?

There are no documentary taxes payable on the acquisition of stock or business assets.

Under the VAT Law, both transactions are exempt from Albanian VAT (currently at 20 per cent). Where such exemption benefits the acquisition of stock because of the nature of the transaction (ie, share/stock transactions), the exemption of acquisition of business assets is subject to fulfilment of economic and legal conditions.

Business assets transactions will be exempted from VAT if the transaction falls under the category of 'transfer of economic activity', defined as a transaction where the taxable person transfers entirely or partially its activity to another person who is already or becomes a taxable person by continuing to conduct such activity, and when the following economic and legal conditions are fulfilled.

- The transferred activity must have economic autonomy, ie, continue to be conducted independently after the transfer. Economic autonomy requires the presence of all conditions necessary to the realisation of the activity, such as the premises, raw materials, equipment, etc. In case the transfer consists only of one of such elements (eg, raw materials only), the transfer will be considered as supply of goods and thus be subject to VAT.
- The legal requirement consists of: (i) conclusion of a written agreement before a notary public; and (ii) verification of the balance sheet of the transferor, especially the identification of the assets used for the transferred activity and income realised from the said transfer. The same verifications will occur to the balance sheet of the transferee.

If the assets constitute immovable properties, the tax for transfer of ownership title over the immovable properties is applicable. Such tax is 2,000 Albanian lekë per m² for commercial buildings. In addition, change of ownership over car implies payment of the tax on ownership amounting to 2 per cent of the transfer price.

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

Under the Income Tax Law, net operating losses do not survive where direct or indirect ownership of the share capital or voting rights of the target changes by more than 25 per cent in number or value.

According to the Instruction of the Minister of Finance, net operating losses are strictly related only to the taxpayer.

- 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?

As a general rule, interest paid on loans stipulated for acquiring the target are tax-deductible. The nationality of the lender does not imply any restrictions on the interests' tax deductibility; while the fact that it might be a related party involves consideration of the transaction under transfer-pricing rules.

Albanian fiscal legislation restricts such deductibility to compliance with the following rules:

- thin capitalisation: the loan, for which the interest is paid, is less than four times the amount of the taxpayer's net assets (this rule is not applicable for banks, insurance and leasing companies as well as for loans that are granted from banks for a duration less than one year);
- interest paid by the taxpayer during the financial year is less than the average of 12 months' credit interest rate applied by Albanian second-tier banks; and
- transfer pricing: in order to be deductible, the interest amount should be qualified as determined pursuant to the arm's-length principle.

As a general rule, the 10 per cent withholding tax applies on the interest payments made to the foreign lender by the Albanian taxpayer, unless a double tax treaty for avoidance of double taxation entered between Albania and the country of residence of the foreign lender provides for a lower rate.

When provisions of double tax treaties are applicable, the foreign lender (or Albanian taxpayer) should file with the Albanian General Tax Directorate (competent public body to implement and interpret the tax treaties) the application form for implementation of the tax treaty along with its certificate of tax residence.

Debt pushdown in the form of a merger may be achieved if the merger is approved by the shareholders representing 75 per cent of the share capital (in a joint stock company) and is not challenged by the creditors of the target. Albanian income tax legislation does not provide for special rules regarding mergers or debt pushdown. However, the tax deductibility of the interests after the companies are merged will be considered by the tax authorities under the general legal deductibility requirement, ie, incurrance of expenses in the direct interest of the taxpayer and their qualification as a normal management act.

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

The tax legislation does not indicate any specific rule with regard to the liability of the seller or acquirer over the debts affecting the stock or business assets and the protection of the acquirer in such cases. However, other law provisions may be considered for determining such liability.

In the particular case of business activity acquisition, rights and liabilities of such activity bind on the acquirer, except when the parties have agreed to restrict or exclude the liability of the acquirer over the acquired activity. If it is the case, the act where such liability restriction or exclusion is agreed should be filed with the Commercial Register.

The seller continues to be liable for the debts of the business activity assigned for a period of three years.

Therefore, the acquirer of stock and business assets may be protected by contractual warranties and representations of the

seller as well as contractual indemnities and penalties binding on the seller. Normally, such warranties and representations are indicated in the stock or business asset agreement.

Post-acquisition planning

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

The post-acquisition restructuring would depend on the business and purpose of the acquisition or restructuring by the acquirer. There is no typical practice in Albania.

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?

No tax-neutral spin-offs of business may be executed. The previous losses of the spin-off business are lost (see question 7).

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

Under commercial legislation, the migration of the residence (legal seat indicated in the by-laws or the real legal seat) of an Albanian company in another jurisdiction presents some implications. In fact, the legislation provides that the territory where the legal seat of the company is located determines the law applicable to the company. Therefore, change of the jurisdiction of the legal seat implies change of legal jurisdiction; hence, dissolution of the company.

The dissolution of the company is preceded by its liquidation, which has tax consequences in terms of taxation of income resulting from the liquidation process.

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?

Interest and dividend payments made by an Albanian tax resident to a foreign entity are subject to 10 per cent withholding tax. The Income Tax Law provides for an exemption of taxation of dividends only if conditions indicated in question 3 are fulfilled.

Further, double tax treaties may provide for lower tax rates for interests and dividend payments.

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

There are no other tax-efficient means for extracting profits from Albania.

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?

The most commonly carried out disposal in Albania is the disposal of the stock in the local company.

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?

The gains on disposal will not be exempt from taxation (such gains will be considered as having an Albanian source under the Income Tax Law), unless a double taxation treaty provides otherwise.

Under national legislation, there are no special rules dealing with the disposal of stock in real property, energy and natural resource companies. However, some double tax treaties entered into by Albania provide for such rules in case the stock represents the share capital of a real property company.

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?

The Income Tax Law does not provide for any possibility to defer or avoid taxation.

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