GETTING THE DEAL THROUGH®

Tax on Inbound Investment

in 33 jurisdictions worldwide

2012

Contributing editors: Peter Maher and Lew Steinberg

Published by
Getting the Deal Through
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Tax on Inbound Investment 2012

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Tax on Inbound Investment 2012
Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 7908 1188
Fax: +44 20 7229 6910
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ISSN 1753-108X

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Printed and distributed by Encompass Print Solutions
Tel: 0844 2480 112

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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?

Under Swedish tax law there is a fundamental difference between asset deals and share deals.

When acquiring shares in a corporation, the book values of the single business assets and liabilities in the accounts of the target company remain unchanged for income tax purposes.

When business assets and liabilities are transferred, the purchase price paid by the buying company is allocated to the transferred assets, which constitutes the new tax base value. The buying company can make depreciations on the assets based on the new tax base value.

When acquired as an asset in connection with an asset and transfer deal, goodwill may be depreciated according to specific tax rules for depreciation of machinery and equipment (see question 2).

Goodwill acquired in connection with a share deal cannot be depreciated according to the specific tax rules.

Another important difference is that, when transferring real property as an asset, stamp duty of 4.25 per cent (after 1 January 2011; prior to this, 3 per cent) of the transfer price is levied. If shares are sold in a company that owns a real property, no stamp duty is levied on the transfer.

The buyer cannot take over losses brought forward from previous years when an asset and liabilities transfer takes place.

Upon a share acquisition, the target company may, as a starting point, utilise its old losses going forward, and the acquirer may, after a five-year quarantine period, consolidate its profits with the remaining 'old losses' of the target company. However, old losses are generally subject to restrictions if there is a change of ownership and the companies involved were not part of the same company group prior to the ownership change and therefore could not consolidate their taxable income by giving group contributions to one another (see question 7).

A share transaction is exempt from VAT, whereas a transfer of assets and liabilities is only VAT-exempt under certain conditions (see question 6).

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?

As mentioned in question 1, goodwill purchased in connection with a transfer of business assets and liabilities can be depreciated in accordance with the tax depreciation rules for machinery and equipment (ie, depreciations are allowed over five years, with an option to make a 30 per cent depreciation in the first year and a 21 per cent depreciation in the second year). As such, there could be a step-up in basis of the tax base value in the hands of the buying company.

When a share transfer takes place, no step-up for tax purposes is achieved, either for goodwill or tangible assets. In order to get a step-up in basis of other intangible assets (except for goodwill) one alternative may be to transfer the intangible assets separately from the transfer of the shares.

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?

From a Swedish tax point of view it makes no difference for the taxation of the purchase whether the buying company is Swedish or foreign. However, there are some differences with respect to the post-acquisition tax treatment (for example, possibilities to deduct financing costs and consolidate the taxable income between group companies).

From a general tax perspective, the question of whether execution should be by a Swedish or a foreign company depends on where the acquirer would like to have its financing costs deducted. Most inbound investors tend to utilise a Swedish acquisition vehicle to which the loan financing is allocated. However, it is also possible to allocate debt to Sweden if a foreign company establishes a branch or permanent establishment to which the financing is allocated.

Companies within the same company group may equalise their tax burden via group contributions. A company generally belongs to the same group of companies as another company if one of the companies holds more than 90 per cent of the shares in the other company, or if the companies have a common parent company (over 90 per cent ownership). The group contribution is essentially a capital contribution (if downstream) or a dividend distribution (if upstream), which is treated as a deductible cost for the contributing company and a taxable income for the receiving company.

Both Swedish and foreign companies may give and receive group contributions presuming that they are liable to tax (eg, due to a permanent establishment) in Sweden.

As of 1 July 2010, new tax rules allow a Swedish parent company to make a deduction for a (fictive or real) contribution to a wholly owned subsidiary located within the European Economic Area (EEA) if there is a final loss in the subsidiary and the liquidation of the subsidiary is completed. The possibilities to achieve a deduction under these rules are very narrow and the Swedish government has been criticised for being stricter than what is allowed under EU law.

If a foreign company acquires business assets and liabilities from a Swedish company it will be directly held by the foreign company. The business performed in Sweden will most likely constitute a permanent establishment in Sweden for the foreign company. Income attributable to the business activity performed in Sweden will be

subject to tax in Sweden. Depending on the local tax rules in the country where the foreign company is resident, the tax paid in Sweden may be credited against tax paid in the country of residence. Furthermore, the Swedish operations will most likely constitute a fixed establishment in Sweden for the foreign company from a Swedish VAT point of view.

4 Company mergers and share exchanges

Are company mergers or share exchanges common forms of acquisition?

Company mergers and share exchanges are used now and then in Sweden, and the Council Directive of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different member states (90/4347/EEC) is implemented in Swedish tax law. The reorganisation tax rules in general apply if both companies were founded under the laws of a member state of the EU or the EEA and have their residence and place of business in one of those states. In addition, it is generally required that the transferred assets or corporation shares remain subject to Swedish taxation after the transaction.

A transfer of shares can be paid with shares in the buying company, which gives the seller the possibility to postpone payment of capital gains tax (if the shares don't qualify as business-related shares and the capital gain therefore is taxable). The share exchange should take place at market value and a capital gain is calculated upon this. The tax is postponed on the part of the capital gain that is paid in shares. Tax is due on the part of the capital gain that is cash. The consideration shares are treated as acquired at the fair market value.

In connection with a transfer of business assets and liabilities it is also possible to pay with shares in the buying company. It is important that the value of shares given is equivalent to the fair market value (but not less than the tax base value) of the assets transferred. Presuming that the assets transferred are capital assets, no capital gain occurs for the selling company upon the transfer of assets. The buying company takes over the tax base value of the assets from the buying company. The seller's acquisition value of the received shares in the buying company is equivalent to a net value (the tax base value less the debts).

5 Tax benefits in issuing stock

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

For the buying company, issuing shares as consideration avoids the need to raise money from banks and other sources. However, for tax purposes there could be a disadvantage for the buying company to pay with shares in connection with a business assets and liabilities deal (according to the Council Directive of 23 July 1990), since the buyer inherits the deferred tax liabilities.

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?

VAT

Stock transactions are exempt from VAT (ie, no VAT should be charged on a sale of shares).

The Swedish VAT Act further includes a VAT exemption for the sale of an entire business, or of a well-defined part of a business, provided that the purchaser would have been entitled to a refund or deduction of VAT, had it been charged. The exemption is also applicable in such cases in which the purchaser becomes liable for VAT due to the acquisition of the business.

For the exemption to apply, it is vital that all assets attributable to the business or well-defined part of the business are included in the transfer. Furthermore, the transfer should concern an ongoing business that will be continued after the transfer. The business should also continue to be conducted in Sweden in order for the exemption to apply.

Examples of situations in which there is a risk that the VAT exemption is not applicable include:
- transfers of such businesses that are not fully VAT-taxable;
- transfers that do not include all assets used in the business by the seller;
- transfers that take place in steps over time; or
- transfers that are made to more than one buyer or within chain transactions, etc.

If a transfer does not qualify under the VAT exemption for business transfers, the transfer is in principle VAT-taxable. If so, each asset transferred must be taxed for VAT purposes in accordance with the VAT regulations applicable for each kind of asset. This means that different VAT rates may apply for different kinds of assets and that VAT exemptions may apply for some assets (not further described here).

It is not always easy to foresee whether or not the Swedish Tax Agency will regard a certain business transfer as qualifying as VAT exempt, and there is a risk of penalties if VAT deductions are deemed to be incorrect. The buyer's risk for such penalties for incorrect VAT deductions can be avoided by disclosing full information on the circumstances of the transfer and the VAT deduction to the Swedish Tax Agency.

As stated above, the VAT exemption for business transfers in the Swedish VAT Act is not applicable if the business assets acquired will not remain in Sweden after the acquisition. However, such a transaction should still not be subject to any VAT charges if the transfer concerns an entire business or a well-defined part of a business. In such a case, the right to exclude the transaction from VAT is instead based on the regulations in the EU VAT Directive, which deem business transfers to be out of the scope of VAT. If, on the other hand, the assets transferred do not constitute an entire business or well-defined part of a business, the transaction is in principle VAT-taxable. The matter of whether any Swedish VAT is due on the transaction or parts thereof must in that case be determined based on the general VAT regulations for international supplies of goods and services (not further described here).

Stamp duty

As mentioned above, special attention must be paid to stamp duty on real property (4.25 per cent as of 1 January 2011) when transferring real property as an asset. However when real property is indirectly transferred (ie, by means of selling shares in the property owning entity) no stamp duty is triggered. Stamp duty of 2 per cent is levied on property mortgages.

7 Net operating losses, other tax attributes and insolvency proceedings

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

The Swedish tax regime permits losses to be carried forward indefinitely. In the case of a change in ownership of a company carrying old losses, restrictions apply with respect to the extent to which the loss company may use losses being carried forward or may set off the losses against group contributions received.

The restrictions limit the use of losses in two different ways:
- tax losses exceeding twice the purchase price (any capital contribution given to the loss-making company in the year of the acquisition (before the acquisition) and the two preceding years should reduce the purchase price) cannot normally be used; and

- maintained losses cannot be used to offset profits in the purchasing company or its affiliates during a time frame of five years following the financial year in which the change of ownership took place. The restrictions do, however, generally not apply to changes of ownership where the companies involved have been part of the same company group before the restructuring.

The restrictions in general do not apply to losses accrued during the financial year in which the change of ownership took place.

In connection with a merger, a new owner can, in general, take over old losses from the merged company if the conditions for making group contributions, without any limitations in setting off old losses carry forward against such contributions, between the companies were fulfilled prior to the merger. However, if the conditions for making group contributions were not fulfilled there are restrictions to old losses for a period of five years following the merger. If there are old losses in the merged company that are already restricted due to a previous change of ownership, these restrictions are taken over by the new owner.

Current year tax losses are not subject to any limitations upon change of ownership, whether or not the loss making company continues its business operations. However it is important to make the correct post acquisition steps in order not to restrict even current year losses.

If there is an agreement of composition reached with an insolvent company, it is important to keep in mind that losses brought forward from previous years should be reduced with the amount of the composition.

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?

For external acquisitions there are generally no limitations on interest deductibility on loans other than that the arm's-length principle must be adhered to (please note, however, that some forms of financing may provide for restrictions, for example, profit participation loans in some situations).

For internal acquisitions and debt pushdowns the situation is more complex. If the buying company takes up an external loan to finance an internal acquisition there are in general no restrictions, unless there is a 'back-to-back' situation where the lender or an affiliated company (ie, one company with a controlling influence in the other company, or where both companies are under the same control) has a loan from the external debtor.

However, if the acquiring company takes up a loan from an affiliated company (or from an external lender in the back-to-back situation) to finance the acquisition, the interest expense is deductible only if the interest charged on the loan is taxed at a minimum level of 10 per cent by the lender. When deciding whether there is a 10 per cent taxation, the interest should be considered to be the only income of the lender; the income or costs attributable to the ordinary business of the lender should not be taken into consideration.

Even if the minimum threshold of 10 per cent is not met, it may still be possible to achieve deductibility if it can be proved that there are mainly sound business reasons for both the internal acquisition and the form of internal financing.

If the lender is entitled to deduct dividend distributions to its owners, deductions for interest payments are not allowed regardless of what tax rate the lender is subject to.

The rules limiting deductions for interest payments are applicable on interest payments made after 31 December 2008. A number of cases are pending for a ruling in the Supreme Administrative Court, which will give further clarifications on the rules. This is much needed, since it is unclear from the legislation, inter alia, what components should be considered when calculating whether the lender is subject to 10 per cent tax or not, and also what circumstances may constitute sound business reasons.

Please note that from a civil law perspective it is not allowable for a company to give a loan in order to finance an acquisition of its own shares.

There are no thin capitalisation rules in Swedish tax law. However, it is important that the interest charged is set at an arm's-length rate. If there is an internal loan between two Swedish affiliated companies, with no possibility to consolidate their income through group contributions, it is important to make sure that the interest rate is set at the rate that should have been agreed between independent parties.

There is no withholding tax on interest payments from Sweden to a foreign company.

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?

Usually the selling company guarantees that all tax obligations have been fulfilled in the past and that the tax liabilities as presented in the accounts and the documents provided (for instance, during a due diligence) has given the purchaser the complete and correct picture of the situation. If tax liabilities should occur that refer to the period prior to the acquisition, it is generally agreed that the selling company is responsible for taxes that refer to this period and that are booked in the accounts. If this should occur, it is generally agreed that the amount of the additional tax due should reduce the purchase price.

In connection with an asset and liabilities transfer it is important that the allocation of the purchase price to each single asset is correct based on a valuation of the assets. This is not only of importance in order to determine a correct basis for depreciation on the acquired assets, but can also be of importance in order to determine a correct basis for the potential VAT taxation of each asset if the deal does not qualify as a VAT-exempt business transfer.

If real estate is transferred, it can also be mentioned that the buyer may receive a VAT-related document that lists investments in the form of the erection of buildings, the reconstruction of buildings or additions to buildings, and that includes information relating to the VAT incurred and the VAT deducted on such investments. By receiving such a document, all rights and obligations relating to the future adjustment of VAT on such investments are transferred to the buyer ('capital goods scheme', not further described here).

Post-acquisition planning

10 Restructuring

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

Post-acquisition restructuring will depend on the particular circumstances. Apart from operationally motivated restructurings, synergies and so forth, the most common form is the reallocation of the new level of debt among the group companies.

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?

A full demerger is one way to spin off a business line of the company. All assets and debts are taken over by two or more companies and

the demerged company is dissolved. The new owners then take over the situation of the demerged company. There is no capital gains tax for the selling company. Untaxed reserves and losses brought forward from previous years should be divided between the companies based on the net value of the assets and debt that each company takes over. Old losses in the demerged company from previous years are taken over by the new companies in connection with a demerger, but could however be subject to restrictions, as well as the new companies' own losses from previous years.

A partial demerger, where one or several different business lines are transferred to another company or companies, and the company retains at least one business line, is another way to spin off a business without triggering any capital gains tax. The business line should be transferred at fair market value in exchange for shares in the buying company or a cash payment.

A spin-off can take place as a transfer of all business assets and liabilities or a specific business line in a company. If the transfer takes place at fair market value in exchange for shares in the buying company, the spin-off will not trigger any direct tax consequences for the selling company. The shares that the seller receives in exchange are considered to be acquired at the net value (the tax base value of the assets less the debts transferred), and as such any potential capital gains tax is postponed.

Old losses cannot be transferred to a new owner when transferring business or single assets from a company to a new owner. Instead, restrictions could, under certain circumstances, apply to the new owner to utilise its own losses from previous years as well.

In terms of stamp duty, transfers of real estate through a full demerger are exempt from stamp duty, while all other spin-offs of real estate trigger stamp duty.

From a VAT point of view, a demerger or a partial demerger may qualify as a VAT-exempt business transfer. The conditions for applying the VAT exemption for business transfers are described in question 6 and are applicable also for demergers and partial demergers.

12 Migration of residence

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

Migration is possible under Swedish law. If the residence of the acquisition company is migrated from Sweden, or if the tax liability in Sweden ceases due to the fact that a permanent establishment in Sweden no longer exists or because income generated from assets are no longer taxed in Sweden due to a double tax treaty, this will trigger an exit tax. The assets or shares are deemed to be transferred at fair market value. Untaxed reserves should also be taxed in connection with an exit tax situation, not at the time of the exit but at the time it should have been taxable according to Swedish rules.

A respite for payment of Swedish final tax due to an exit is admitted if the assets are transferred to another EEA country and there is a tax liability. The respite with exit tax must be applied for and the application has to be renewed each year. Respite will, however, not be admitted if the assets have been transferred to a new owner after the exit. In respect of machinery and equipment that has been depreciated according to Swedish rules, the amount of respite with exit tax should be reduced with 20 per cent each year, and for intangible assets 10 per cent each year.

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?

Interest payments are not subject to withholding taxes when paid out of Sweden.

Under Swedish tax laws there is a withholding tax of 30 per cent on dividends payments. Dividend distributions to Swedish limited liability (AB) companies or foreign companies considered to be equivalent to Swedish AB companies are, however, exempt from tax in Sweden under the presumption that the shares in the Swedish entity are defined as business-related shares under Swedish law. As regards unlisted shares, generally all shares in Swedish AB companies or corporate entities resident and liable to tax in treaty countries are considered as business-related unless certain specific conditions apply. For holdings of listed shares, there is a general minimum holding requirement of 10 per cent of the voting rights, and a minimum holding period of one year.

If Swedish shares are allocated to a Swedish permanent establishment of a foreign company, the foreign company is in principle liable to Swedish tax on gains or dividends on those shares. However, the Swedish participation exemption rules apply to the disposal of Swedish companies owned by a foreign company located within the EEA, presuming that the shares fulfil the criteria for being considered as business-related.

If the exemption would not be applicable, an exemption or a lower tax rate may still be applied under a double tax treaty. Normally, the rate is reduced to zero or 5 per cent if the shareholder is a corporate entity that holds at least 25 per cent (sometimes 10 per cent) or more of the distributing company. Otherwise, the rate will normally be reduced to 15 per cent

14 Tax-efficient extraction of profits

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

The main method of extracting profits in a tax-efficient way is by means of high leverage and outbound interest payments.

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?

As in many other jurisdictions, if there are no commercial reasons pointing to another direction, a selling company in general prefers a sale of shares because it can transfer to the buyer all the 'inherent' taxation. There is no capital gains tax on the sale of shares if the shares are considered as business-related shares. On the other hand, the acquirer would generally prefer asset deals, since this would generate a step-up in depreciable basis. The most common transaction is a share transaction, where the price may sometimes be discounted due to the deferred tax liability pertaining to the difference in tax basis and market value.

In terms of share transactions, the most common structure is selling the shares in the local company.

As discussed above, it is common for a foreign purchaser to establish a local Swedish holding company for a share transaction. For asset deals, it is common for the acquirer to set up a local Swedish company rather than establishing a branch to the foreign company.

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?

Capital gains on sales of shares by foreign companies are generally outside the scope of Swedish taxation, unless the shares are allocated to a Swedish permanent establishment.

If allocated to a permanent establishment, gains on shares that are capital assets are in most cases covered by the participation

Update and trends

The main hot topic is that despite the introduction in 2008 of rules limiting interest deductions (see question 8) the Swedish regulations are still considered generous to taxpayers.

Even if the rules for interest relief are basically the same for all taxpayers, there has in particular been a debate on whether private equity funds are paying too little Swedish tax on their Swedish investments, due to high leverage.

The Swedish Tax Agency has issued a report proposing stronger restrictions on interest deductibility. In addition, a special committee has been appointed by the Swedish government to investigate the need for and, if applicable, propose changes in the system of taxation of interest costs; the mandate for this committee is quite open (ie, not restricted to proposing changes within the current framework of rules).

Also, in the area of interest relief, Swedish tax courts have started to question the arm's-length analyses made in connection with certain high-leverage transactions. The general point here would be that it is not possible to fully compare a shareholder who is also a lender to a totally external lender. This potentially presents problems to high-yield shareholder loans.

Finally the Swedish Tax Agency generally continues to try to redefine its role, and is increasingly involved in making moral statements, against the traditional role of purely advocating its view on the law.

exemption rules mentioned above, under the same conditions as dividends.

However, shares in a company can be considered to be inventories if the company is considered (based on a number of criteria) to be trading in real estate or securities, or to be a building construction company. Shares that are considered as inventories cannot qualify for participation exemption rules, and capital gain referring to such shares is taxed as ordinary business income.

Aside from the situations where shares may be considered inventory, there are no special rules dealing with shares in real estate, energy or natural resource companies.

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?

It is possible to transfer assets to a price below fair market value without triggering exit tax (ie, taxation based on a deemed fair market value transfer) if certain criteria are fulfilled. If the assets are sold at a purchase price equivalent to the tax base value of the assets, there will be no taxable gain for the selling company. It is important that the buying company immediately after the acquisition is tax-liable in Sweden in respect of income from business that the assets belong to. Furthermore, the entire assets or a business line need to be transferred, unless the selling company can give a group contribution to the buyer. In this case it is also important to make sure that there is no loss brought forward from previous years in the buying company.

In order to avoid capital gains tax and to lower the stamp tax on transfer of real property, it is common that a real property is transferred at tax base value to a new company and that the shares in the company thereafter are transferred. In this case it is, however, important to make sure that the transferred company is not considered to be a shell company according to Swedish law. If the company (included the real estate) is disposed of in close connection to the initial transfer of the company, a risk occurs of being considered as a shell company. In order to avoid this, a shell tax return should be filed. Because the Swedish Tax Agency has had a harsh attitude in some cases where the seller has repeatedly performed transactions like this, further professional advice should be sought prior to making any transactions.

As described above, another way to postpone tax is to transfer business assets and liabilities at fair market value in exchange for shares in the buying company.

When a company is merged into another company there is a postponement of tax insofar as the new owner inherits the tax base values and other tax due of the company merged.

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 ISSN 1753-108X