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CROSS-BORDER ACQUISITION TECHNIQUES
BELGIUM
GENERAL INTRODUCTION

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PRINCIPAL TAX CONSIDERATIONS FOR
MAKING AN INBOUND ACQUISITION

1. Belgian corporate tax environment
2. Seller considerations
3. Purchaser considerations
4. Examples of tax efficient acquisition structures

1. Belgian income tax environment

- Basic corporate income tax rate: 39 %
Crisis tax: 3 %
Effective corporate income tax rate: 40.17 %
- No tax consolidation
- Taxable base: income - capital gains
- Special features
 - * Depreciation
 - * Dividends received deduction
 - * Capital gains exemption
 - * Transfer pricing and abnormal and gratuitous advantages
 - * Rules on interest deduction
 - * Investment allowances
 - * Tax loss carry forward
 - * Merger rules

- Foreign source income: exemption system / treaty network
- Anti-abuse provisions and advance rulings
- Special tax regimes
 - * Coordination centers
 - * Distribution centers
 - * Service centers
- Other taxes: VAT/REGISTRATION TAXES

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2. Seller Considerations

- In general clear preference to sell shares rather than assets when upon the sale a capital gain will be realized

- Resident individual

* Asset sale: capital gains are in principle fully taxable but

- capital gains on fixed tangible or financial assets older than 5 years are taxed at 16,995 % unless option for deferred taxation has been made (reinvestment condition)
- capital gains on immaterial fixed assets e.g. goodwill (with maximum equal to net profit of last 4 years) are taxed at 16, 995 %

* Share sale: exempt if considered normal disposal of portfolio investment. However, taxable at 33,99 % if speculative.

One exception to exemption: capital gain realized upon direct or indirect sale of 25 % or more of the shares of a domestic company to a foreign company is taxable at 16,955 %

Possible solution: intermediary Belgian holding company

■ Resident company / branch

- * Asset sale: capital gains are fully taxable but possibility for deferred taxation in case of reinvestment of proceeds
- * Share sale: capital gains are fully exempt in case the participation exemption conditions are met. (See further - no minimum participation of 5 % or participation value of at least 50 million BEF required)
(Article 192 ITC)

3. Purchaser Considerations

- Home country tax treatment of financing cost acquisition and Belgian source income / capital gains
 - * Tax credit / Exemption system ?
 - * Subpart F type or similar anti-avoidance legislation
- Existence of tax treaty
- Choice of acquisition vehicle
 - * Most likely route: establishment of Belgian (holding) company or use of existing Belgian (holding) company to acquire either assets or shares of target company

* In case of a share sale, subsequent merger (see below)

* Discussion on use of a foreign company: possible seller objections, deductibility of interest on financing acquisition cost, transfer pricing considerations, existence of tax treaty, availability of participation exemption and tax consolidation.

■ **Assets versus shares**

* **Asset sale**

- capital gain considerations of seller (see above)
- stepped-up depreciation basis
- depreciation of goodwill included in the purchase price: 5 years
- VAT exemption (Article 11)
- Registration tax considerations e.g. in case of real estate

* Share sale

- No stepped-up basis for the assets acquired
- No depreciation of goodwill
- Continued use of loss carry forward provided that change of control of the target company meets the "financially and economically justified test"
- Possibility for subsequent merger with acquisition vehicle (see below)
- No VAT considerations
- No registration tax considerations (! Real estate companies)

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*** Subsequent merger to optimize the deductibility of the acquisition cost: acquiring company absorbs target company**

- Three conditions for tax exempt merger:
 - Acquiring company must be a domestic company;
 - The merger must be realized in compliance with Belgian corporate law; and
 - The merger must meet legitimate financial and economic needs

- Positives

- **Financing cost can be offset against operational income of absorbed company**
- **Does away any need for transfer pricing concerns between the acquiring company and the target company Article 79 and 207 ITC**

- Negatives

- **Untaxed reserves of the target company become taxable**
- **Loss carry forward limitation**
$$\frac{L(A) \times FV(A)}{FV(A+B)}$$
- **No stepped up basis / Continuity of all existing tax features of the absorbed company**

- **Other loan financing aspects**
 - **Deductibility interest by acquiring holding company;**
 - **Debt / Equity ratio concerns - thin capitalisation rules**
- **Transfer pricing issues**
- **Repatriation of earnings**
 - **Dividends**
 - **Interest**
 - **Royalties**
 - **Management fees**

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- Anti abuse provisions
- Advance rulings
- VAT concerns
- Registration Tax concerns

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4. Examples of tax efficient structures

- Use of a Belgian coordination center/Irish IFSC company as the intragroup lender of funds needed for the acquisition;
- Use of hybrid financial instruments to finance the acquisition