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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?

If the buyer is a non-resident foreign company or individual, the acquisition of stock of a Colombian company will not be subject to VAT and will not generate a taxable income for the buyer. The foreign non-resident buyer is not deemed to apply income tax withholding on this acquisition.

From a tax perspective the acquisition of business assets will be subject to VAT at a 16 per cent rate depending on the nature of such assets. Please note that the sale of fixed assets, receivables, real estate, deferred assets and other intangibles are not subject to VAT. Basically, VAT will apply to inventories. If the buyer is a foreign entity, it may be required to incorporate a branch.

For exit purposes, please note that the tax basis of the stock will be its historical cost plus a yearly inflationary step-up. The tax basis for assets will be their historical cost plus a yearly inflationary step-up, minus their accumulated depreciation or amortisations.

If the buyer is a resident company, in addition to the tax treatment described for foreign non-resident buyers, the following are the differences in tax treatment between an acquisition of stock and the acquisition of business assets.

Acquisition of stock

Colombian entities and individuals required by law to have accounting books that acquire or complete the controlling interest of a non-related entity, must record as goodwill the difference between the purchase price and the intrinsic value of the stock. For tax purposes, the deduction of the goodwill amortisation is allowed. However, such amortisation can only be deducted against taxable income derived from the line of business that originated the amortised goodwill. The amortisable tax period shall not be lower than five years. In order to protect the tax amortisation of the goodwill, buyers generally merge with the company that issued the stock.

Acquisition of assets

Taxpayers are entitled to deduct the depreciation of the assets that are used in its income-producing activity, taking as tax basis the acquisition price. The depreciation shall be based on technical methods acknowledged by the tax authorities (eg, straight-line method, balance reduction, units of production method) and the useful life of the related asset, which is provided by the law. The amortisation of acquired intangible assets (such as goodwill) is also deductible for income tax purposes.

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?

Stock deal

The most common strategy to obtain a step-up of the tax basis of the purchased stock is to capitalise the equity revaluation account or the premium for the purchase of stock account of the entity that issued the stock.

As explained in question 1, the goodwill paid in the acquisition of stock could be amortised for tax purposes.

Asset deal

The only step-up available for the tax basis of the assets is the yearly inflationary step-up.

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?

A case-by-case study of the business to be carried out in Colombia is required to recommend the domicile of the acquisition company. In those cases where the buyer could be entitled to the amortisation of the acquired goodwill it would be advisable to have a local acquisition company. For exit purposes, the most common tax-driven structure is to incorporate local acquisition company and a holding foreign company (two-tier SPV structure).

4 Company mergers and share exchanges

Are company mergers or share exchanges common forms of acquisition?

Both company mergers and share exchanges are common forms of acquisition.

Mergers

Mergers and corporate transformations are tax-free transactions unless they increase the gross equity of any taxpayer participating in the transaction. Considering that there is a wide range of mergers operations worldwide, in order for the reorganisation to be tax-free it must comply with the Colombian Corporate Laws. 'Cash for stock' reorganisations of simplified stock corporations are allowed and could be considered tax-free transactions.

International reorganisations are permitted. However, if the reorganisation results in a local entity being wound up, the new resulting or surviving foreign entity will be required to set up a branch in Colombia.

Share exchange

As a general rule, share exchanges are not tax-free transactions. Thus, if as a result of the share exchange the gross equity of any taxpayer participating in the transaction increases, the share exchange will be taxable.

While the commercial price of the shares can be freely agreed by the parties, for tax purposes the price of the shares may not differ in more than 25 per cent of their fair market value. Regarding shares held in non-listed companies, the tax authority has construed that the fair market value is determined by dividing the book equity of the company by the number of its outstanding shares (the intrinsic value criteria).

5 Tax benefits in issuing stock

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. To the extent that the transactions increase the gross equity of the acquirer, issuing stock as consideration may result in a taxable income.

A case-by-case analysis is crucial to determine whether issuing stock as consideration may result in a taxable income for the acquirer.

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?

While a case-by-case analysis is required in order to determine the taxes applicable to a specific transaction, please find below a brief description of the taxes most likely to apply on the acquisition of stock or business assets:

Value added tax (VAT)

- Taxable events: VAT is levied on the sale of corporal moveable assets, on the importation of corporal moveable assets and on the provision of services within Colombian territory. The acquisitions of stock and fixed assets are not subject to VAT.
- Tax rate: the general VAT rate is 16 per cent. However, the law provides special rates for certain goods and services.
- VAT credits: as a general rule, input VAT may be credited against output VAT, with certain limitations.

Stamp tax

- Taxable event: stamp tax is levied on written documents, securities included, executed in Colombia or abroad, but producing their effects inside Colombia, whereby obligations are created, modified, assigned, extended or terminated, provided that their value exceeds a certain threshold. It is possible that certain documents may qualify for stamp tax exemptions depending on their nature.
- Tax rate: from 2010 onwards the tax rate is zero per cent.
- Accrual and collection: stamp tax is collected via tax withholdings. If a document does not have a determined amount, stamp tax accrues on every payment that is made under the relevant contract, during the time in which such contract is in force. It is understood that a document does not have a determined amount when its value cannot be determined at the moment of its execution. If a document does not have any amount at all, no stamp tax would apply.
- Deductibility: stamp tax is not deductible for income tax purposes.

Registry tax

- Taxable event: it applies to all documents and contracts that must be registered before the Chamber of Commerce and other registry offices. Any merger or spin-off will trigger this tax. While the assignment of shares is not subject to registry tax, as it must not be registered before the Chamber of Commerce, any assignment of quotas of a limited liability company will trigger this tax.
- Tax rate: different rates apply depending on the nature of the document, contract or transferred asset. The current registry and trade tax rate is 0.7 per cent of the amount of the contract or document to be registered.

Financial transactions tax

- Taxable events: financial transactions tax is levied on the performance of financial operations that imply the disposition of funds that are deposited in banks, savings or deposit accounts (including those with the Colombian Central Bank).
- Tax rate: the tax rate is 0.4 per cent. As from fiscal year 2014, the financial taxation rate will gradually decrease as follows:
  - For 2014 and 2015: 0.2 per cent.
  - For 2016 and 2017: 0.1 per cent.
  - For 2018 and onwards: zero per cent.
- Taxable base: the taxable base is the value of each financial transaction.
- Accrual and collection: financial transactions tax accrues at the time the disposition of funds takes place as a result of the underlying transaction. The tax is collected via tax withholdings, which must be performed by the entities that are subject to the surveillance of the Financial Superintendency, in which the relevant bank, savings or deposit account is held, or in which the accounting records related to the transfer of rights to third parties or the disposition of funds occur.
- Deductibility: 25 per cent (50 per cent as from fiscal year 2013) of the financial transactions tax that is effectively paid during the given taxable year is deductible for income tax purposes.

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?

Tax losses can be carried forward in order to reduce the taxable base as follows:

- Tax losses generated until 31 December of fiscal year 2006 can be carried forward adjusted by inflation during the following eight years, with an annual cap of 25 per cent.
- Tax losses generated from fiscal year 2007 can be carried forward and their amount subject to a fiscal adjustment by applying an index as provided by the law, with no limitation term and cap.

Although tax losses are not transferred to shareholders or quota holders they may survive reorganisations, mergers and spin-offs according to the portion corresponding to their participation in the net worth of the new, surviving or resulting entities and to the extent that the corporate purposes of the new, surviving or resulting company and the company that originated the loss are the same.

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?

Local indebtedness

Legal entities and branches may incur local indebtedness with Colombian financial and non-financial institutions, in which case the interest paid in the underlying loan shall be fully deductible for income tax purposes.

Foreign indebtedness

For exchange control purposes foreign loans may only be obtained from foreign financial institutions acknowledged by the Central Bank or entities that meet the strict requirements set out by the Central Bank to be qualified as non-financial institutions eligible to lend money to residents in Colombia. Since as a general rule inter-company loans are disregarded for tax purposes, back-to-back arrangements are commonly used to structure debt planning, considering that no thin capitalisation rules are currently in force in Colombia.

The withholding income tax rate on foreign indebtedness varies as follows according to their term:

- Foreign indebtedness with a term of less than one year: 33 per cent withholding income tax.
- Foreign indebtedness with a term exceeding one year: 14 per cent withholding income tax.

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?

Warranties, indemnities and deed of tax covenants are common forms of protection included in share-purchase agreements and asset-purchase agreements. Private contracts are allowed for documentation and probatory purposes.

The payment of warranties or indemnities may be taxable for the indemnified party to the extent that such payment increases its gross equity. A case-by-case analysis must be performed in order to determine the potential tax impact in the transaction.

Post-acquisition planning

10 Restructuring

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

Considering that they are tax-free operations, the most common post-acquisition restructurings are mergers and spin-offs. They are typically carried out in order to amortise the goodwill originated on the purchase of the controlling interest of a company (see question 1) or for other commercial reasons.

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?

Spin-offs are tax-free transactions unless they increase the gross equity of any of the taxpayers participating in the transaction. As mentioned above, tax losses may survive spin-offs according to the portion corresponding to their participation in the net worth of the new or resulting entities, and to the extent the corporate purposes of the new or resulting company and the company that originated the loss are the same.

12 Migration of residence

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

The relocation of a local company is not permitted. As international reorganisations are allowed, the reorganisation may result in the winding up of the local entity. However, as mentioned above, the resulting or surviving foreign entity will be required to set up a branch in Colombia.

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?

Dividends

As a general rule, if distributed from profits that were taxed at the Colombian entity level, no dividend tax will apply, regardless of whether the shareholders are national or foreign. On the contrary, dividends paid out of profits that did not pay income tax at the Colombian entity level are generally subject to a 33 per cent income tax withholding if paid to foreign shareholders, except where treaty relief is available.

This rule is not applicable for branches, therefore all the profits remitted by the branch to its parent company will be tax-free.

Although not all of them are yet in force, Colombia has signed OECD-like double-tax treaties with Spain, Chile, Switzerland, Canada and Mexico. It is expected that at least 10 more treaties are to be signed in the near future.

Interests

See question 8.

Tax treaties relief on dividends and interests

- Andean Community Pact: dividends are only taxed in the country in which the entity that distributes them is domiciled. Dividends cannot be taxed to the shareholder in the country where the shareholder is domiciled. Subsequent distributions to shareholders domiciled in an Andean Community country are exempted. Interests are only taxed in the country of residence of the debtor.
- Other tax treaties: for fiscal year 2011, tax treaties with Spain, Chile and Switzerland are in force. In subsequent years the tax treaties with Mexico and Canada will be in force. The tax relief derived from such treaties is as follows:

Country	Withholding tax on dividends	Withholding tax on interests
Spain	General rule: 5 per cent Shareholders holding 20 per cent or more of the outstanding shares: zero per cent. Special requirements are included in the protocol.	General rule: 10 per cent Exceptions: zero per cent when debtor is the Colombian government or the lender is a bank.
Chile	General rule: 7 per cent Shareholders holding 25 per cent or more of the outstanding shares: zero per cent. Special requirements are included in the protocol.	General rule: 15 per cent Exceptions: 5 per cent if the lender is a bank or an insurance company.

Update and trends

Special permanent free trade zones or single company free trade zones (SPFTZ), are free trade zones granted only for a company that intends to develop a high impact investment project for the country fulfilling the requirements described in law. Based on unofficial drafts of the decree (Free Trade Zones Decree), the most relevant expected change is that the SPFTZ will be available only for the rendering of services (especially Business Process Outsourcing (BPO) and health services).

Switzerland	General rule: 15 per cent Shareholders holding 20 per cent or more of the outstanding shares: 0 per cent.	General rule: 10 per cent Exceptions: 0 per cent when the debtor is the Colombian government or the lender is a bank.
Canada	Dividends distributed from profits that were not taxed at corporate level in Colombia will be taxed at 15 per cent in all cases.	10 per cent
Mexico	Dividends distributed from profits that were not taxed at corporate level in Colombia will be taxed at 33 per cent in all cases.	General rule: 10 per cent Exceptions: 5 per cent if the lender is a bank or an insurance company; zero per cent if the lender is a contracting state, a public bank or an entity commonly agreed by contracting states.

14 Tax-efficient extraction of profits

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

In addition to back-to-back operations the most common tax-efficient means to extract profits from a local company are technical services, technical assistance services and consulting services, which are all subject to a 10 per cent income tax withholding regardless of whether they are rendered in Colombia or abroad. If such charges meet transfer pricing requirements, they are fully deductible for income tax purposes.

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?

The most common tax-driven structure to exit a local business is first to have the seller incorporate a holding company in a tax haven, then to transfer the shares or quotas of the company to be sold to that holding company for an amount very close to its tax basis (but within the minimum tax price mentioned in answer to question 4), and finally to sell the shares of the holding company to the buyer. Please note that if the seller is a Colombian entity or an individual taxed in Colombia for its worldwide income, this structure may not result in a tax saving.

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?

The sale of stock of a Colombian company may generate a taxable profit. The taxable profit will be the difference between the tax basis of the shares that are being transferred and the price for which they are being transferred. Depending on the time the shares were held the taxable profit is taxed as a capital gain or an ordinary income. If the shares were held for less than two years the taxable profit is taxed as an ordinary income. If the shares were held for two years or more, the taxable profit is taxed as a capital gain. Both ordinary income and capital gains are taxed at a 33 per cent rate.

The profit derived from the sale of shares listed on the Stock Exchange of Colombia is not considered a taxable income to the extent that they are owned by the same real beneficiary and the sold shares do not exceed 10 per cent of the outstanding shares of the local company in the same fiscal year.

Special rules dealing with the disposal of stock in real property, energy and natural resource companies are only included in double tax treaties executed by Colombia.

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?

There are no methods or regimes that allow for deferring or avoiding a taxable profit on the sale of shares or assets. However, since we do not have any anti-avoidance or anti-deferral rules, the most common tax-driven structure to avoid or defer taxes is the structure described in question 15.

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