



Tax on Inbound Investment

in 30 jurisdictions worldwide

2013

Contributing editors: Peter Maher and Lew Steinberg



Published by *Getting the Deal Through*
in association with:

- A&L Goodbody
- Anzola Robles & Associates
- Berwin Leighton Paisner LLP
- BLP Abogados
- BMR Legal | BMR Advisors
- Boga & Associates
- Borden Ladner Gervais LLP
- Çağa and Çağa
- Carey
- Certa Legal Tax
- CMS Hasche Sigle
- CMS Reich-Rohrwig Hainz
- Doria, Jacobina, Rosado e Gondinho Advogados Associados
- Hoet Pelaez Castillo & Duque
- Iason Skouzos & Partners Law Firm
- Juridicon Law Firm
- King & Wood Mallesons
- KPMG LLP
- Mayora & Mayora, SC
- Molitor Avocats à la Cour
- Nagashima Ohno & Tsunematsu
- Poledna Boss Kurer AG
- Posse Herrera & Ruiz
- Salans
- Skeppsbron Skatt AB
- Spigt Dutch Caribbean
- Tron Abogados, SC
- Vieira de Almeida & Associados
- Weber Rechtsanwälte GmbH

Tax on Inbound Investment 2013

Contributing editors

Peter Maher, A&L Goodbody
Lew Steinberg, Credit Suisse

Business development managers

Alan Lee
George Ingledew
Robyn Horsefield
Dan White

Marketing manager

Rachel Nurse

Marketing assistants

Megan Friedman
Zosia Demkowicz
Cady Atkinson
Robin Synnot

Admin assistants

Parween Bains
Sophie Hickey

Marketing manager (subscriptions)

Rachel Nurse
Subscriptions@
GettingTheDealThrough.com

Assistant editor

Adam Myers

Editorial assistant

Lydia Geroges

Senior production editor

Jonathan Cowie

Chief subeditor

Jonathan Allen

Senior subeditor

Caroline Rawson

Subeditor

Anna Andreoli

Editor-in-chief

Callum Campbell

Publisher

Richard Davey

Tax on Inbound Investment 2013

Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 7908 1188
Fax: +44 20 7229 6910
© Law Business Research Ltd 2012

No photocopying: copyright licences
do not apply.

ISSN 1753-108X

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as of October 2012, be advised that this is a developing area.

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

Law

Business

Research

Albania Alketa Uruçi and Jonida Skendaj <i>Boga & Associates</i>	3
Australia Richard Snowden and Cory Hillier <i>King & Wood Mallesons</i>	7
Austria Michaela Petritz-Klar <i>Weber Rechtsanwälte GmbH</i>	14
Brazil Rodrigo Jacobina <i>Doria, Jacobina, Rosado e Gondinho Advogados Associados</i>	20
Canada Stephanie Wong and Richard Eisenbraun <i>Borden Ladner Gervais LLP</i>	25
Chile Jaime Carey and Manuel José Alcalde <i>Carey</i>	32
Colombia Juan Guillermo Ruiz <i>Posse Herrera & Ruiz</i>	36
Costa Rica Alonso Arroyo and Vittoria Di Gioacchino <i>BLP Abogados</i>	40
Croatia Wolfgang Auf and Tamara Stručić <i>CMS Reich-Rohrwig Hainz</i>	44
Curaçao Xandra M Kleine-van Dijk and Jeroen Starreveld <i>Spigt Dutch Caribbean</i>	49
Germany Wolf-Georg von Rechenberg <i>CMS Hasche Sigle</i>	54
Greece Theodoros Skouzos <i>Iason Skouzos & Partners Law Firm</i>	59
Guatemala Eduardo A Mayora and Juan Carlos Casellas <i>Mayora & Mayora, SC</i>	64
India Mukesh Butani and Shefali Goradia <i>BMR Legal BMR Advisors</i>	67
Ireland Peter Maher and Philip McQueston <i>A&L Goodbody</i>	74
Japan Yushi Hegawa <i>Nagashima Ohno & Tsunematsu</i>	78
Lithuania Laimonas Marcinkevičius and Ingrida Steponavičienė <i>Juridicon Law Firm</i>	83
Luxembourg Aurélie Budzin-Dang <i>Molitor Avocats à la Cour</i>	89
Mexico Manuel E Tron and Elías Adam Bitar <i>Tron Abogados, SC</i>	94
Netherlands Friggo Kraaijeveld and Cerial Coppus <i>Certa Legal Tax</i>	99
Panama Ramón Anzola and Maricarmen Plata <i>Anzola Robles & Associates</i>	104
Portugal Tiago Marreiros Moreira, Conceição Gamito and Frederico Antas <i>Vieira de Almeida & Associados</i>	112
Russia Boris Bruk <i>Salans</i>	119
Slovenia Wolfgang Auf <i>CMS Reich-Rohrwig Hainz</i>	124
Sweden Niklas Bång, Maria Norlin and Carin Gerding <i>Skeppsbron Skatt AB</i>	128
Switzerland Walter H Boss and Stefanie M Monge <i>Poledna Boss Kurer AG</i>	134
Turkey Ömer Yiğit Aykan <i>Çağa and Çağa</i>	138
United Kingdom Gary Richards and Aude Delechat <i>Berwin Leighton Paisner LLP</i>	143
United States Christian J Athanasoulas, Jason R Connery and Jennifer Blasdel-Marinescu <i>KPMG LLP</i>	148
Venezuela Elina Pou Ruan and Nathalie Rodríguez <i>Hoet Pelaez Castillo & Duque</i>	154

Albania

Alketa Uruçi and Jonida Skendaj

Boga & Associates

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?

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

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

The foreign company may also purchase the assets of the target company through a third company newly established in Albania by the foreign company, or through an existing Albanian company, shares in which have been previously purchased by the foreign company.

Most tangible and intangible assets may be depreciated, except for land, securities and some other specific assets. On a decline basis, buildings are depreciated at 5 per cent per annum, software at 25 per cent per annum, and all other assets at 20 per cent per annum. Trademarks and other intangibles are depreciated at 15 per cent per annum on a straight-line basis.

Under the Income Tax Law (No. 8438 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 towards the stock or business activity purchased, differences result because of the nature of the transaction and the impact of other applicable legislation. Consequently, as a result of the acquisition of stock in a company, the buyer is liable for latent tax liabilities affecting the company. (The Tax Procedures Law (No. 9920 of 2008) has the effect of piercing the corporate veil; therefore, even a shareholder of a company where the legal form imposes limitation of its liability up to its contribution into the company is liable for the tax liabilities of the company). As a result of the acquisition of business assets and liabilities (ie, activity), the buyer may also become liable for tax liabilities pertaining to the activity purchased before its acquisition (for details and exceptions, see question 9).

It is not possible to obtain assurances from the tax authorities that a potential target company has no tax liabilities or advice on 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 10 per cent), except when double tax treaties providing otherwise are applicable.

For differences in VAT treatment, 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 per the Albanian National Accounting Standards and International Financial Reporting Standards, applicable in Albania from 1 January 2008, goodwill is subject to impairment and not to depreciation.

In a purchase of stock in a company owning goodwill and other intangibles, no depreciation of such assets is allowed for tax purposes to the buyer.

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?

If the acquisition of business assets is made by an acquisition company established in Albania, 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 differences at the moment of acquisition. Tax differences arise in terms of taxation of dividends distributed by the target company. In fact, if 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.

4 Company mergers and share exchanges

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 lengthy procedures for realisation of mergers under Albanian commercial legislation. The most common form of acquisition is the share or stock purchase transaction.

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. The tax legislation does not expressly provide for the tax treatment of the vendor; in any case, it results in taxation of the entity receiving the shares in exchange for the in-kind contribution being deferred until future sale of the shares gained in exchange for the contribution.

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?

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 or 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 its activity entirely or partially 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; that is, it must continue to be conducted independently after the transfer. Economic autonomy requires the presence of all conditions necessary for the realisation of the activity (such as the premises, raw materials, equipment, etc). If the transfer consists only of one of these 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 the conclusion of a written agreement before a notary public and 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 apply to the balance sheet of the transferee.

The acquisition of business assets (transfer of economic activity) will trigger application of national and local taxes depending on the nature of the assets acquired. If the assets constitute immoveable properties, a tax for transfer of ownership title over the immoveable properties shall apply (such tax is 2,000 leke per square metre for commercial buildings located in Tirana, the capital city (the tax is lower in other districts); furthermore, the tax is 2 per cent of the sale price for all immoveable properties other than buildings).

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?

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.

No other special rules or tax regimes are applicable to acquisitions or reorganisations of bankrupt or insolvent companies. Therefore, after the change of control of the target, the latest shall benefit all its tax credits and other types of deferred tax asset.

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?

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 interest's 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 to banks, insurance and leasing companies, or for loans that are granted from banks for a duration of 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: 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 to the interest payments made to the foreign lender by the Albanian taxpayer, unless a double tax treaty for avoidance of double taxation entered into 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 (the 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, namely incurrence of expenses in the direct interest of the taxpayer and their qualification as a normal management act.

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?

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 legal provisions may be considered for determining such liability.

In the particular case of business activity acquisition, rights and liabilities of such activity are binding on the acquirer provided that the trademark or the registered name of the business activity are also acquired by the acquirer, except when the parties have agreed to restrict or exclude the liability of the acquirer over the acquired activity. Such agreement may not be opposed to third parties, even if disclosed to the public (ie, through filing with the Commercial Register), except when the third parties' acknowledgement of the agreement is proved; or it is proved that, given the circumstances, the third party should have acknowledged such agreement.

In any case, 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.

Payments made following a claim under a warranty or indemnity are taxable in the hands of the recipient and non-deductible for the payer. No withholding taxes apply on such payments.

Post-acquisition planning

10 Restructuring

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

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

12 Migration of residence

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 into another jurisdiction has 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 the taxation of income resulting from the liquidation process.

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 and dividend payments made by an Albanian tax resident to a foreign entity are subject to a 10 per cent withholding tax. Double tax treaties may provide for lower tax rates.

No withholding tax applies to interest and dividend payments made to an Albanian tax-registered entity. For the recipient, interest is subject to corporate income tax (as ordinary income) while dividends are free from it.

14 Tax-efficient extraction of profits

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 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 commonly carried out disposal in Albania is disposal of the stock in the local 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?

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. Some double tax treaties entered into by Albania, however, provide for such rules if the stock represents the share capital of a real property company.

BOGA & ASSOCIATES

LEGAL · TAX · ACCOUNTING

Alketa Uruçi
Jonida Skendaj

auruci@bogalaw.com
jskendaj@bogalaw.com

Ibrahim Rugova Street
PO Box 8264
Tirana
Albania

Tel: +355 4 225 1050
Fax: +355 4 225 1055
www.bogalaw.com

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?

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

GETTING THE DEAL THROUGH

Annual volumes published on:

Air Transport	Licensing
Anti-Corruption Regulation	Life Sciences
Anti-Money Laundering	Merger Control
Arbitration	Mergers & Acquisition
Banking Regulation	Mining
Cartel Regulation	Oil Regulation
Climate Regulation	Patents
Construction	Pharmaceutical Antitrust
Copyright	Private Antitrust Litigation
Corporate Governance	Private Equity
Corporate Immigration	Product Liability
Data Protection	Product Recall
Dispute Resolution	Project Finance
Dominance	Public Procurement
e-Commerce	Real Estate
Electricity Regulation	Restructuring & Insolvency
Enforcement of Foreign Judgments	Right of Publicity
Environment	Securities Finance
Foreign Investment Review	Shipbuilding
Franchise	Shipping
Gas Regulation	Tax on Inbound Investment
Insurance & Reinsurance	Telecoms and Media
Intellectual Property & Antitrust	Trade & Customs
Labour & Employment	Trademarks
	Vertical Agreements



For more information or to purchase books, please visit:
www.GettingTheDealThrough.com



Strategic research partners of the ABA International section



THE QUEEN'S AWARDS
FOR ENTERPRISE:
2012



The Official Research Partner of the International Bar Association