

Tax on Inbound Investment

In 31 jurisdictions worldwide

Contributing editors

Peter Maher and Lew Steinberg



2015

GETTING THE
DEAL THROUGH

GETTING THE
DEAL THROUGH 

Tax on Inbound Investment 2015

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Albania

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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?

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 of 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 due to 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 might be 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 may become 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 of 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 15 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 payable documentary taxes 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?

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 50 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.

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 is 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.

Update and trends

The Albanian Ministry of Finance is drafting new laws on corporate income tax and personal income tax, which are expected to be effective from 1 January 2015. As a result, the tax treatment of acquisitions in Albania might be affected.

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.

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.

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