

Romania

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ACQUISITIONS (FROM THE BUYER'S PERSPECTIVE)

Tax treatment of different acquisitions

1 | What are the differences in tax treatment between an acquisition of stock in a company and the acquisition of business assets and liabilities?

For a corporate buyer with no presence in Romania, the acquisition of stock in a Romanian company does not have fiscal implications. Tax implications will arise only in cases where there are transactions between the buyer and the company acquired.

If business assets and liabilities are to be acquired, the buyer must fiscally register in Romania before such an acquisition takes place. The business acquired will generate a permanent establishment in Romania for the buyer, which will become a Romanian taxable entity for the activity acquired.

Step-up in basis

2 | 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?

A step-up in basis in the business assets is only permitted by using the tax depreciation of the assets scenario.

However, goodwill and similar intangibles are not recognised for tax purposes. Also, in the event of the purchase of stock in a company owning those assets, it is not permitted to alter the value of the assets for tax purposes (ie, no step-up in basis of the assets).

Domicile of acquisition company

3 | Is it preferable for an acquisition to be executed by an acquisition company established in or out of your jurisdiction?

The acquisition of a business's assets and liabilities by a non-Romanian entity will generate a permanent establishment in Romania for that entity. Therefore, for business assets and liabilities transfers, it does not matter if the acquisition company is a foreign one or not; it will become a Romanian entity by virtue of law.

In consideration of share purchase transactions, it is preferable that the buyer is established in Romania owing to numerous exemptions provided to corporate income tax computation. According to Romanian fiscal legislation, the following types of income are non-taxable:

- dividends received from a Romanian company and from foreign subsidiaries, provided that the subsidiary meets the following criteria:
 - it is subject to corporate income tax or a similar tax;
 - it is located in a state with which Romania has concluded a double taxation treaty; and

- the minimum holding is 10 per cent for an uninterrupted period of at least one year;
- income from the valuation, revaluation, sale, transfer of shares and liquidation proceeds of a Romanian or foreign entity located in states with which Romania has concluded double taxation treaties; the minimum holding must be 10 per cent for an uninterrupted period of at least one year; and
- income registered through a permanent establishment in a foreign state when the double taxation treaty provides the method of exemption for avoiding double taxation.

Company mergers and share exchanges

4 | Are company mergers or share exchanges common forms of acquisition?

Both forms of acquisition are used in Romania. However, mergers and demergers are more likely to be used in Romania than share exchanges.

From the tax point of view, mergers are tax-neutral. Therefore, the assets depreciation, interest expenses, net foreign exchange losses, net operating loss and fiscal losses subject to mergers are fully transferred to the taxpayer arising out of the merger.

Tax benefits in issuing stock

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

According to Romanian legislation, there is no tax benefit in issuing stock as consideration rather than cash.

Transaction taxes

6 | 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?

For the acquisition of shares, only Trade Registry taxes are applicable, which are not dependent on the value of the shares transferred. The cost of Trade Registry taxes is insignificant.

In cases of a business assets acquisition where real estate assets are involved, notary fees and Land Registry office taxes are applicable. Notary taxes and tariffs are usually calculated as a percentage of the actual sale value of the transferred real estate. This sale value cannot be smaller than that indicated in a notary table of real-estate value for different real-estate categories, that being approximately 0.5 per cent of the asset's value.

In addition, land book registration of real-estate transfers is subject to a tariff of roughly 0.5 per cent of the asset's value.

Net operating losses, other tax attributes and insolvency proceedings

- 7 | 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?

Changing control of the target will not affect the net operating losses, tax credits or other types of deferred tax assets of the company.

Interest relief

- 8 | Does an acquisition company get interest relief for borrowings to acquire the target? Are there restrictions on deductibility generally or where the lender is foreign, a related party, or both? In particular, are there capitalisation rules that prevent the pushdown of excessive debt?

Romanian legislation does not provide interest relief for borrowings to acquire a target.

The restriction on interest deductibility is generally applied to all companies and is related to the implementation of the Anti-Tax Avoidance Directive. There is only one exception, which is applied to independent taxpayers permitting the full deductibility of interest and net foreign exchange losses. An independent taxpayer is an entity that is not part of a consolidated group for financial accounting purposes, has no associated companies and no permanent establishment.

For non-independent taxpayers, an unlimited deductibility for interest and net foreign exchange losses is applied up to a maximum amount of €1 million.

In addition to the above threshold, a limited deductibility is applied to a limit of 30 per cent from the base, calculated as follows: gross profit plus corporate income tax payable, plus excess debt-related costs and tax depreciation, minus non-taxable income. If the above base computation is zero or negative, then the value of the interest and net foreign exchange losses that are over the above threshold is non-deductible. However, an amount that is considered non-deductible in the current year can be carried forward until it can be deductible in the fiscal year when the above criteria are met.

Protections for acquisitions

- 9 | 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? Is tax indemnity insurance common in your jurisdiction?

The most usual protection requested by buyers is a price withholding until the risk of tax liabilities diminishes because of the statute of limitation. Price withholdings are treated as conditional payments that will be released at an agreed date.

Payments made following a claim under a warranty or indemnity represent an adjustment of the price of acquisition and will follow the tax treatment of the original payment.

POST-ACQUISITION PLANNING

Restructuring

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

In principle, the restructuring plan is built up during the due diligence process, and after acquisition it is implemented accordingly. Notwithstanding this, the main post-acquisition restructuring in Romania is related to the funding of the acquired entity.

Spin-offs

- 11 | 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?

As in the case of mergers, spin-offs are tax-neutral. Therefore, asset depreciation, interest expenses, net foreign exchange losses, net operating losses and fiscal losses subject to spin-offs may be transferred to newly established taxpayers proportionally with the relevant transferred assets, equity and liabilities.

When, because of a spin-off, the real estate asset is transferred to a new taxpayer, notary and land registry taxes are applicable.

On the other hand, according to the spin-off plan, taxes and fiscal obligations owned by the company subject to the spin-off may not be transferred to the other entity resulting from the spin-off, except for VAT, which will be split proportionally with the transferred assets and liabilities.

Migration of residence

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

Changing the residence of the acquisition company or target company from Romania to another jurisdiction has fiscal implications. Hence, the profit from the transfer of assets, tax residency or the economic activity of a permanent establishment is taxed at 16 per cent. The taxable base is calculated as the difference between the market value and the tax value of transferred assets.

If the transfer generates a loss, the taxpayer can recoup it from future profits made from the same type of operations.

Interest and dividend payments

- 13 | 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 are not subject to withholding taxes if the shareholder stake is at least 10 per cent and ownership is longer than one year at the date of the dividend payment. In addition, the shareholder must present a tax residency certificate issued by a country that has a double taxation treaty with Romania.

If the shareholder does not comply with the above criteria, the withholding tax applied is 5 per cent.

Interest is subject to a withholding tax, except when the provisions of Council Directive 2003/49/EC of 3 June 2003 become applicable.

If the above-mentioned directive is not applicable, but a double taxation treaty has been concluded between the country of residence of the lender and Romania, the applicable withholding tax on interest is the one provided by the treaty. Currently, Romania has concluded 86 double taxation treaties covering the most important jurisdictions.

If no directive or double taxation treaty is applicable, the withholding tax is 16 per cent from the interest paid.

Tax-efficient extraction of profits

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

There are no further tax-efficient means other than those already mentioned (ie, distribution of dividends and interest payments).

DISPOSALS (FROM THE SELLER'S PERSPECTIVE)

Disposals

15 | 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 method of disposal depends on the actual corporate structure of the seller. If the seller is a foreign company, it is common to have a holding company and the disposal will be made at that level.

If the seller is a Romanian investor, its corporate structure does not commonly use a foreign holding and the disposal will probably be made from the local company.

In real-estate transactions, investors generally prefer an asset deal scenario, as they do not want to deal with the history of the seller company owing to potential tax liabilities.

Disposals of stock

16 | 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 non-resident company is tax exempt for capital gains resulting from the sale of shares if the minimum holding is 10 per cent for an uninterrupted period of at least one year and there is a double taxation treaty between its country of residence and Romania.

There are no special rules dealing with the disposal of stocks depending on the activity involved, such as in real property, energy or natural resources companies.

Avoiding and deferring tax

17 | 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 profit resulting from the disposal of shares is exempt if there has been a minimum participation of 10 per cent for an uninterrupted period of at least one year.

The disposal of business assets is also exempt if the seller receives shares in the buyer's company at the same fiscal value.

If the seller does not receive shares in the buyer's company, the profit from the transaction is taxable, and there are no methods for deferring or avoiding the tax.

UPDATE AND TRENDS

Key developments of the past year

18 | Are there any emerging trends or hot topics in the law of tax on inbound investment?

One of the hot topics of last year was the implementation in Romanian legislation of the Anti-Tax Avoidance Directive (ATAD).

Romania was the first country to implement the ATAD in 2018, with more drastic conditions than were provided in the Directive. This implementation created a serious disadvantage for investors compared with other European countries.

The initial unlimited deductibility of interest and net foreign exchange losses was established in 2018 at a maximum amount of €200,000, and limited deductibility over €200,000 was established at 10 per cent from the accounting adjusted base. At the beginning of 2019, the conditions were broadly modified, and the threshold became €1 million and the quota 30 per cent.

Coronavirus

19 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

Since the beginning of the covid-19 pandemic, the Romanian authorities have enacted several tax measures to prevent the business environment from collapsing. The measures already implemented are limited in duration and do not exceed the end of 2020. Nevertheless, for some of these the applicability period has been extended several times, and further extension is expected in 2021. Some of the most important measures taken are the following:

- any fiscal obligations (ie, taxes, contributions and other amounts that constitute revenues of the general consolidated budget) due from 21 March 2020 and not paid until 25 October 2020 are not considered outstanding and no late payment interest or penalties shall accrue thereon;
- enforcement measures taken by way of garnishment of budgetary debts are suspended until 25 October 2020, or they shall not be commenced before this date, provided that they do not concern criminal matters;
- debtors who are in financial difficulty and for which there is a risk of insolvency can opt for the restructuring of tax liabilities outstanding as of 31 July 2020, as well as the related accessories. The legal deadline for notifying the intention to benefit from the restructuring measures is 31 December 2020;
- natural and legal persons, natural persons carrying out independent economic activities or liberal professions, entities without legal personality and public institutions can benefit from the cancellation of interest, penalties and any accessories related to the main budgetary obligations (ie, taxes, contributions or any amount that corresponds to the general consolidated budget) that are outstanding as of 31 March 2020. To benefit from this measure, taxpayers must pay the outstanding main obligations, as well as those due after 31 March 2020, submit all tax returns and submit a request for cancellation of the accessories. All of the aforementioned must be completed by 15 December 2020;
- for the payment of corporate income tax corresponding to the first quarter of 2020 until 25 April 2020, the Romanian state offers a bonification of (i) 5 per cent of the respective tax for large taxpayers subject to profit tax and (ii) 10 per cent of the respective tax for other taxpayers, including those that are subject to turnover tax. For payment of corporate income tax corresponding to the second and third quarters of 2020 until 25 July 2020 and 25 October 2020, respectively, a 10 per cent bonification is offered to taxpayers subject to turnover tax or profit tax, regardless of the declaration and payment system; and
- charitable and philanthropic organisations may benefit from exemption from the payment of import duties and VAT on imported

goods that help in fighting the negative effects of the pandemic, provided that they obtain an authorisation from the National Fiscal Administration Agency. The exemption applies, inter alia, to medical devices, protective equipment, disinfectants, medicines and testing kits that are (i) distributed free of charge to persons contaminated or at risk of being contaminated with covid-19 or involved in fighting the covid-19 epidemic; or (ii) make available for use, free of charge, to the same category of persons, goods remaining the property of the organisation.

Most of the supporting measures regard the possibility of delaying the payment of taxes without being penalised by the Romanian authorities. However, we advise our clients to pay their taxes at their normal deadline, considering that they can benefit from bonifications and the restructuring of tax liabilities.



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