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Tax on Inbound Investment

in 33 jurisdictions worldwide

2012

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Published by
Getting the Deal Through
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Tax on Inbound Investment 2012
Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 7908 1188
Fax: +44 20 7229 6910

ISSN 1753-108X

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

Law Business Research

Curaçao

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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?

In general, the advantage of an asset acquisition is that the buyer will not inherit any historic tax liabilities relating to the business acquired, those will remain with the company that has sold the business. With a stock acquisition all historic tax liabilities will remain with the target company and therefore the buyer will seek a full tax indemnification from the seller. An advantage could be that losses of the company will in most cases be available to the buyer of the stock in that company.

Transfer duties of 4 per cent could apply with regard to transfer of real estate. This tax is not due on a stock transaction. With an acquisition of business assets the buyer should be able to apply the tax depreciation regulations based on the sale price (step-up). This is not applicable on acquisition of stock.

While the turnover tax (6 per cent in 2012) applies to deliveries of goods and the providing of services in case of the acquisition of stock and/or the acquisition of an enterprise or part of an enterprise no turnover tax will be due.

Curaçao does not levy capital duties. Note, stamp duties (to cover the government's administrative fees) are applicable in certain circumstances, however these are minimal.

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?

Assets acquired by the buyer will be valued at the actual price paid. This price (step-up) will be the basis for the buyer for his depreciation/amortisation schedule. With regard to acquired goodwill from a third party, the amortisation rules will apply and the write-down period is generally allowed in five to ten years.

There exist some profit tax incentives; certain assets qualify for accelerated depreciation. Under this rule one-third of the value is allowed to be taken in one year, next to the scheduled regular depreciation. Another tax incentive is the investment deduction of 8 per cent in the year of purchase of a business asset and again in the next year. These amounts reduce the taxable profit.

In the situation that stock of a company is acquired, there will be no step-up within the target company of the base cost of its assets. Also no depreciation on assets or amortisation of intangibles/goodwill is allowed in this case with regard to the shares. Of course, the target company will be allowed to continue to apply its own regular business depreciation/amortisation schedule to its assets.

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?

First of all, it is important to note that Curaçao does not impose withholding tax on dividend distributions to local or foreign shareholders. Hence, in this respect there is no preference for an acquisition company to be established in or outside Curaçao.

With respect to an acquisition company established outside Curaçao, Curaçao does not impose profit tax on dividend distributions made to or capital gains realised by such foreign corporate shareholder, irrespective of the country of residence.

With respect to an acquisition company established in Curaçao, a favourable participation exemption regime could be applicable, under which any dividend received from or gain realised upon disposal of the shares in a Curaçao target are fully tax-exempt. The participation exemption applies if:

- the Curaçao acquisition company holds an interest of at least 5 per cent of the paid in share capital of the Curaçao target or 5 per cent of the voting rights;
- is a member of a *coöperatie* or of an *onderlinge waarborgmaatschappij*; or
- the acquisition price exceeds US$500,000.

If a shareholder would prefer to finance a Curaçao acquisition company with equity rather than debt, a capital contribution on (newly issued) shares could take place without negative Curaçao tax consequences. Curaçao tax law does not contain a stamp (or similar) duty. The repayment of capital may take place without negative tax consequences as well.

If a buyer would acquire the target company with debt an acquisition company established in Curaçao is allowed to form a so-called 'fiscal unity' with the target company. Under this status the profit of the target company can be consolidated with the finance burden of the acquisition company. Please see question 8, in which the possibilities of creating this leverage are described further in case of a Curaçao acquisition company.

4 Company mergers and share exchanges

Are company mergers or share exchanges common forms of acquisition?

The Curaçao Profit Tax Ordinance contains a so-called business merger exemption, whereby the enterprise based in Curaçao or part of such enterprise is transferred to another Curaçao-based company in exchange for shares issued by the other company to the transferring company.

Please note that the following conditions apply:

- future Curaçao taxation needs to be guaranteed and thus the acquiring company must continue with the book values used in the transferring company;

- the Curaçao company to which the enterprise or part of the enterprise is transferred may not be entitled to loss compensation;
- both companies should apply the same principles to determine profits; and
- the shares issued to the transferring company may not be alienated for a period of three years.

Upon request of a Curaçao taxpayer, the Ministry of Finance may deviate from the above-mentioned conditions, if sound business reasons are available which could justify such a deviation. The business merger exemption might be an option as an alternative to an assets and liabilities acquisition or in case the acquirer does not want to acquire the shares in the transferring company (to minimise liabilities).

The Curaçao Profit Tax Ordinance does not contain other merger or share exchange facilities specifically aimed at facilitating acquisitions. But note that the Curaçao tax authorities are in principle willing to facilitate mergers or share exchange facilities. However, these facilities are in principle not granted if aimed at a disposal of the shares. In advance clearance is therefore under all circumstances required.

5 Tax benefits in issuing stock

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

If the consideration is made in cash by a Curaçao acquisition company, it needs to be considered whether leverage can be created whereby interest payments are set off against future profits of the Curaçao target company. The fiscal unity regime is only applicable if the acquiring company acquires 100 per cent of the shares of the target company. Please see question 8.

The standard tax rules applicable in Curaçao at the level of buyer make no distinction between a consideration in stock or in cash since there is no capital tax due on the issuing of shares. (Perhaps an element to consider could be the bank licence fee. The Central Bank of Curaçao levies a bank licence fee of 1 per cent on amounts transferred abroad. Some companies are granted an exemption of this licence fee if their activities are focused on international activities.)

The valuation of the stock might give some flexibility to the taxable amount but in theory these amounts should be equal. If the seller of the company would acquire a qualifying interest (see question 3), the participation exemption would apply and any benefits from these stocks, either dividends distributed or capital gains realised, would be fully tax-exempt at the level of the seller.

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?

Curaçao does not levy capital duties. Curaçao does not have a value added tax but a turnover tax on each transaction. However, the acquisition of stock and/or the acquisition of a whole business or part of a business are exempt from turnover tax.

Stamp duties (to cover the government's administrative fees) are applicable if registration is needed. Registration is advisable to have proof of the date of the transaction as well as the content of the transaction. The stamp duties are for each A4 page a stamp of 5 Netherlands Antilles guilders, being US$2.81 and one extra stamp of 5 Netherlands Antilles guilders per total document. No stamps are due on filing of tax returns, submitting appeals and ruling requests.

With regard to an acquisition of assets, a transfer tax of 4 per cent is due with regard to acquisition of real property. This tax is not due if only the economic ownership is being transferred while the legal ownership remains with the seller.

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?

In general, losses incurred by a Curaçao target company will be carried forward for a maximum of 10 years and can be used to set off future profits of the company.

There is an anti-abuse measure; the carry-forward of losses will not be possible if the activities of the target company are 90 per cent or more liquidated or ended, unless the future profits go to the natural persons that are in majority (equal to or greater than 70 per cent shareholder) the same (in-)direct recipients as at the moment of liquidation or ending of the activities. Thus to avoid this measure the company should continue its business and sell it as a running business.

If the seller has applied the investment incentive on business assets the sale could trigger a disinvestment payment if the sale takes place within six years after the year in which the investment was made and 15 years if the investment concerned a building. The disinvestment amount is the same percentage of the investment incentive applied to the sale price and is added to the profit of the seller. Also in the next year, the same amount must be added to the profit of the seller.

Additionally, if the seller has made use of the tax-allowed replacement provision to replace a business asset, such provision will have to be added to the profit of the seller once the enterprise is sold by way of assets transaction, unless the seller continues with a business in which the replacement of the business assets will still occur.

These consequences could be avoided if the rules of the merger (business for shares) can apply. Under these rules the acquirer must continue with the book values of the seller and will become liable to the disinvestment rules as if the investment was made by the acquirer. The acquirer will also have to have the intent to use the replacement provision to acquire a replacement. The seller will thus have no profit to be subjected to profit tax because the book values continue. The merger exemption rules contains several conditions before the advantages are applicable. The acquirer has for example the obligation to hold the acquired shares for at least three years. It will be possible to discuss the exact tax consequences with the tax inspector and thus achieve a tax beneficial solution for both parties.

Acquisitions or reorganisations of bankrupt or insolvent companies are subject to the same tax rules that are being discussed in this chapter.

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?

In general, Curaçao tax laws allow for interest relief. An acquisition company will most likely be entitled to the participation exemption for the dividends and capital gains acquired from and through the target company. Since those advantages will be fully exempt from profit tax the consequence is that interest on debt with which the participation/target company in Curaçao has been acquired are deductible, but assuming the acquisition company has no other income the interest relief is not effective and will not lead to a direct tax advantage at the level of the acquisition company. In this circumstance it is therefore advisable to ask for a fiscal unity under which the results of the two companies are consolidated. In fact this will have a pushdown of debt effect.

The Curaçao profit tax does contain the general rule that interest relief is only granted where the conditions of the loan are at arm's-length. To judge whether this is the case all circumstances are relevant, including whether the recipient of the interest is subject to profit tax at a reasonable rate (10 per cent will be reasonable). The tax inspector has in the first instance the obligation to claim that the loan does not have arm's-length conditions.

In addition, the Curaçao tax law contains some anti-abuse interest deduction rules where parties are related. For example, no interest relief is applicable for borrowings that are made between related parties if those borrowings are related to a dividend payment or a repayment of capital by the Curaçao taxable entity.

However, interest relief will be granted if the Curaçao taxable entity can acceptably prove that the borrowings have a business purpose/reason, or that the creditor who receives the interest payments subject to a similar Curaçao profit tax regime with 10 per cent will be reasonable. If one of the two conditions is met, the company is permitted to take the interest deduction.

Thus debt pushdown is achievable if the interest expenses in connection with a group company are subject to tax in the hands of the recipient.

A withholding tax on interest is applicable based on the EU Saving and Interest Directive at a 35 per cent rate. This withholding tax only applies to interest paid on savings of a non-resident taxpayer and thus has a limited scope. The withholding tax is not applicable if the information is being exchanged to the country of residence of the recipient.

Further, Curaçao has no other interest withholding tax rules in effect.

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?

On a stock acquisition, the seller will generally provide a tax indemnity (in either the share purchase agreement or in a stand-alone tax deed) to the buyer in relation to the target's unexpected historic tax liabilities arising in the pre-completion period or from pre-completion events. It will also cover against the risk of tax liabilities being placed on the target company as a result of it having been a member of the seller's group. Should a seller resist in the giving of a tax indemnity or warranties, the pre-acquisition tax due diligence exercise conducted by the buyer becomes even more important. Although under Curaçao civil law the seller is also responsible for informing the buyer of the possible liabilities that the company might have.

Liability under the tax indemnity will be on a guilder-for-guilder basis; if the circumstances contemplated by the indemnity arise, the seller is liable. There are numerous exclusions and limitations from the general tax liability (including carveouts, time limits and financial limits). The tax indemnity also contains provisions dealing with the conduct of the target's tax affairs for pre-completion periods and tax claims. The indemnity for profit tax will generally last for five years, this being the time in which the Curaçao tax authorities can generally look at the tax affairs of a Curaçao company. If a company is considered to be handling in bad faith the term for profit tax assessments is extended to 10 years.

The seller will also provide tax warranties in the share purchase agreement. These do not duplicate the cover provided by the indemnity but are aimed at providing information regarding the target to help the buyer assess the target's future tax liability that may not be covered by the indemnity. Typically they cover the tax compliance position of the target, its records and documentation and its dealings with the tax authorities (eg, in Curaçao it is quite common to discuss the tax position with the tax authorities and agree to it in writing – this is a so-called tax ruling). If serious issues surface, the buyer can seek specific tax indemnities, get a price reduction or refuse to proceed with the acquisition. Breach of warranty gives rise to a damages claim against the seller for breach of contract and is subject to the normal contractual rules on limitation of damages. Consequently, if a tax liability arises a buyer will first pursue a claim under the tax indemnity as recourse could be on a guilder-for-guilder basis. The share purchase agreement will contain a prohibition on double recovery, which prevents the buyer from claiming under both the tax indemnity and tax warranties in respect of the same matter. The time limit for claims under the tax warranties will usually mirror that under the indemnity. The aggregate maximum liability under both the tax indemnity and the tax warranties is often set at the purchase price.

On an asset acquisition, the tax liabilities and tax assets do not pass to the buyer but remain in the selling company, so the seller will provide only a short set of tax warranties in the asset purchase agreement and no tax indemnity. Administrative and compliance warranties and warranties relating to the tax position of the assets themselves are usually provided. Should the parties make use of the business merger facility (reference is made to question 4) a broader range of tax indemnities will be implemented.

Post-acquisition planning

10 Restructuring

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

Any post-acquisition tax restructuring will depend upon the circumstances of both the buyer and the target company. Where a Curaçao acquisition vehicle has been debt-funded to make the acquisition, the ability to consolidate the profits through the fiscal unity regime means a request must be filed with the tax authorities and the unity will apply as of the beginning of the book year in which the shares in the target are owned. This regime would only be possible if 100 per cent of the shares in the target company are acquired and both companies apply the same accounting rules, such as the depreciation schedule on business assets.

It would also be possible for the Curaçao target company to be liquidated and its business hived off to the acquisition vehicle without any profit tax due even if the value of the enterprise thus received in the acquisition vehicle would be higher than the price paid. This results from the applicable participation exemption (see question 3 above). Of course the liquidation of the target company could result in profit tax due and this should be carefully examined.

Where a Curaçao acquisition vehicle has not been used (eg, where a foreign holding company with Curaçao subsidiaries has been the target company) it may be possible to set up a new Curaçao holding company to make an internal, debt-funded acquisition of, say, the Curaçao operating companies and form a fiscal unity.

If the buyer is an existing trade buyer then there may be scope for combining its business with that of the Curaçao target post-acquisition. This can be done either through a hive-up or hive-down of the respective business and in both cases should be capable of being undertaken in a tax-neutral manner, applying the business merger exemption mentioned in question 4 above. Care must be taken to ensure that there is no major change in the nature or conduct of the trade in the target company (eg, through combination) if it is intended to utilise existing carry-forward losses of the target company. The position is best discussed with the tax inspector and the way forward can be agreed in a tax ruling.

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?

For Curaçao profit tax purposes a spin-off of businesses can be established as tax neutral when a transfer of the business or an independent part of the business with regard to the spin-off to another taxable entity (or future taxable entity) meets certain conditions. The other entity (buyer) must be a tax resident in Curaçao or in a country with which Curaçao has a tax treaty. A spin-off is also effective if the other entity (buyer) exclusively, or almost exclusively, issued all shares or acquired similar certificates of the business/company or an independent department/section of the business. The profit realised through the transfer of assets will not be taxable at the seller's side if the following conditions are met:

- due to the change of ownership the carry-forward losses are restricted for the other entity (buyer), see question 7 above;
- the levy of future taxation is guaranteed;
- the shares issued may not be alienated for a period of three years; and
- both companies should apply the same principles to determine profits.

The other entity (buyer) starts with its assets and debts valued at the same values used by the seller prior to the spin-off. Depreciation investment deduction and replacement provision values remain in place. They switch over to the buyer. An advance tax ruling can be requested by the company (seller and/or buyer) at the Inspectorate of Taxes. Such ruling will confirm the tax status and loss position of the (prior) spin-off of businesses.

A request to the minister of finance can be submitted to transfer the carry-forward losses which are related to the spin-off businesses to the other entity (buyer). Such request must be submitted by both parties (buyer and seller). The minister of finance will provide separate conditions in this regard. These losses will subsequently be used to offset future profits, provided that the profit is made with the spin-off business only.

The transfer tax on real estate cannot be avoided.

12 Migration of residence

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

A company is deemed to be a resident in Curaçao if it is either incorporated in Curaçao or its central management and control is exercised within Curaçao. If there is a tax treaty in place the tax-residency will be determined based on the terms therein, in connection with the actual facts and circumstances. The actual place of management of the business is the leading factor.

In general upon migration there will be a profit tax exit charge applicable to the undisclosed reserves, which are valued based on the difference between the market value and the book value. These exit results are taxable at 27.5 per cent profit tax (rate in 2012) just before the moment the company migrates outside Curaçao. Should capital assets remain in Curaçao and through these assets a Curaçao trade be carried on, they will most likely be seen as a permanent establishment and in such case no exit charge will apply.

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?

Curaçao has no dividend withholding tax in force.

A withholding tax on interest is applicable to EU-individual residents receiving interest from Curaçao based on the EU Saving and Interest Directive, at a 35 per cent rate. This withholding tax is not applicable if information is being exchanged.

If there is a tax treaty in force, the interest withholding tax rate may be reduced based on the terms therein.

Update and trends

The new government has accepted changes in the tax laws to move from direct to indirect taxation. This trend has been announced to be further developed during 2012 up to 2014. Thus the profit tax rate of 27.5 per cent in 2012 is expected to be reduced further. Also the progressive income tax rates are expected to be reduced from the maximum of 49 per cent.

In addition the low profit tax rates of 2 per cent for international trade companies and export companies is expected to be extended.

The control mechanisms are announced to be used more frequently to improve the actual collecting of taxes. This could lead to a further reduction of tax rates.

The government is eager to conclude more tax treaties for the avoidance of double taxation; Brazil and Mexico are high on the wish list. Tax information exchange treaties will continue to be concluded. Curaçao is working to fulfil all recommendations of the Financial Action Task Force against money laundering and terrorism financing.

As of 2012, a transparent status can be applied resulting in consolidation even if less than 100 per cent of shares are owned.

14 Tax-efficient extraction of profits

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

The normal method for extraction of profits is by means of a dividend as this does not give rise to any obligation to pay withholding tax. Dividends can only be paid out of distributable reserves. The annual accounts of the Curaçao company would show the existence of these. It is quite easy for a Curaçao company to be able to create distributable reserves through a reduction or cancellation of share capital.

Dividends are in essence paid out of post-tax profits, whereas repatriation of money by means of interest on debt financing will be pre-tax. So, subject to application of anti-avoidance rules, Curaçao companies could be financed with debt lent by group companies. See question 8 above.

Hybrid financial instruments (the purpose of which is for the return to be treated as equity in the recipient's hands but debt in the payer's) could be used as a means of extracting profits from Curaçao. The Supreme Court ruled when to qualify a loan as equity, which is not quickly done.

The other tax-efficient way for extracting profit from a Curaçao company is to sell the company or put the company into liquidation. The proceeds from either route will not generally be subject to Curaçao tax in the hands of a non-Curaçao resident shareholder. Liquidation could trigger profit tax at the level of the company itself and would therefore be less attractive than a sale.

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?

From a tax perspective, a seller will prefer to sell stock in a Curaçao company rather than have the Curaçao company sell its business assets to a purchaser.

When a regularly taxed Curaçao company holds the shares in a qualifying participation (local or foreign), the dividends and capital gains received/realised in connection with this qualifying participation are 100 or 63 per cent exempt from the regular profit tax rate of 27.5 per cent (tax rate in 2012). Expenses incurred in connection with a qualifying participation (including capital losses) are not deductible, unless it can be demonstrated that these expenses are indirectly incurred in respect of the realisation of profit that is subject to tax in Curaçao. Please note there is an exception: the participation exemption is limited to 63 per cent exemption if dividend distributions are received from a participation that earns more than 50 per cent of the core business through dividends, interest and royalties. And the profit of that participation has not been subjected to a similar profit tax rate at a minimum rate of 10 per cent. A participation whose business exclusively or almost exclusively contains real estate qualifies under the scope of the 100 per cent participation exemption.

A qualifying participation is defined as an interest of 5 per cent of the paid-in share capital (or voting rights or profit certificates) of a company. An interest that does not meet this criterion may nevertheless be considered a qualifying participation if the acquisition price of the interest amounts to at least US$500,000.

In general the profit that arises from the sale of assets is taxable at a profit tax rate of 27.5 per cent (tax rate in 2012).

With regard to the special E-zone regime the tax consequences of the sale of goods, including assets, differ depending on the residency of the buyer. If the buyer is a resident of Curaçao, the sale has to comply with certain conditions. The profit that arises from the sale of assets to the local market of Curaçao is taxable at the profit tax rate of 27.5 per cent (tax rate in 2012). The profit on a sale of the assets will be subject to the special tax rate of 2 per cent if the buyer is another company within the E-zone of Curaçao or a foreign country.

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 non-resident company is not hit with Curaçao tax upon the sale of shares in a Curaçao-based company, unless the shares are held as an asset by a permanent establishment in Curaçao. However, the sale of shares may trigger a taxable event for the non-resident individual shareholder(s) if there has been a residency in Curaçao in the past. The following conditions apply: a shareholder must own – alone or together with his or her relatives, directly or indirectly – at least 5 per cent or more of the shares and/or profit rights and/or options on shares. And the shareholder must have been a resident of Curaçao in the past 10 years prior to the share sale transaction.

The profits from certain energy and natural resource companies are exempt from Curaçao profit tax.

With regard to disposal of stock in real property no special rules are in place. A company whose business contains exclusively or almost exclusively real estate qualifies under the scope of the 100 per cent participation exemption (see question 15 above).

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 Curaçao profit tax allows a replacement provision if a business asset is sold and the company has the intent to acquire a new similar business asset. The replacement must occur within four years after the sale.

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 ISSN 1753-108X