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WTS Mergers & Acquisitions Newsletter

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Austria

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Reserved dividends in the case of share deals

Key issues from the Austrian tax perspective

In the case of a share deal, a regular focus point is the economic treatment of the distributable profits of the target company. As such, it is often subject to debate whether these retained earnings should be transferred to the buyer or whether the seller should distribute the profits before the share transfer and then sell the shares at a lower purchase price (to the extent permissible under company law). In M&A practice, a so-called dividend reservation is frequently agreed, according to which the seller is still entitled to receive the retained earnings.

From an Austrian tax perspective, if the seller is a corporation, it is crucial to determine whether such a reserved dividend is to be regarded either as (i) a distribution of profits, or (ii) a purchase price component. This is due to the Austrian participation exemption regime, according to which a profit distribution falls under the participation exemption (Sec. 10 öKStG), whereas a capital gain from the sale of shares in an Austrian corporation – in contrast to, for example, German tax law – is fully subject to the 25% corporate income tax (CIT).

Recent case law

The Austrian Federal Fiscal Court (BFG) had to assess the following case:

- Signing date of the share purchase agreement ("SPA"): 19 March
- Closing date: 1 April. Closing is subject to several conditions
- Sellers must ensure that the Company does not take any action outside the ordinary course of business between signing and closing without the consent of the buyers
- Dividend reservation of EURk 1,000. The profit distribution to the seller was agreed with the shareholder resolution of 28 March (i.e. between signing and closing)

The BFG solved the case by referring to the matter of beneficial ownership of the shares at the time of the dividend resolution. If the seller remains the beneficial owner of the shares at that time, the seller generally is also entitled to the profit distributions. On the other hand, if the agreed distributions can no longer be attributed to the seller for tax purposes (e.g. if the buyer can already fully exercise voting rights), dividend payments to the seller are not to be qualified as (tax-free) dividends, but rather as part of the purchase price. The time of the actual dividend payment, however, is irrelevant.

In the case at hand, the transfer of beneficial ownership over the shares took place at closing (1 April). At this date, the dividend resolution was already passed. Thus, the dividend may rightfully be attributed to the seller and the reserved dividend qualifies as a tax-free profit distribution for the seller (i.e. not a purchase price component).

From an Austrian tax perspective, a crucial distinction must be made if reserved dividends within the context of a share deal qualify as a tax-exempt profit distribution (Sec. 10 öKStG) or as a taxable capital gain subject to 25% CIT. This must be carefully analysed when drafting the SPA in terms of an M&A share deal transaction.

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Belgium

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Leveraged distributions challenged by the tax authorities

A common challenge in M&A transactions is to achieve a tax-effective interest deduction with regard to the acquisition funding. One potential strategy for the target company is to make a dividend distribution from retained earnings (or a reimbursement of share capital), and to take out a (bank) loan in order to have sufficient cash to pay out the dividend distribution (or capital reimbursement). The cash received by the acquiring entity can be used to reimburse its acquisition funding. As the target company is often an operational/profitable company, a tax-effective interest deduction can in principle be realised at that level.

However, the Belgian tax authorities (and in particular the Special Tax Inspectorate, focusing on major allegedly 'abusive' cases) increasingly challenge the tax deductibility of interest charges that are linked to such 'leveraged distributions'. The tax authorities take the stance that such interest charges are not *'borne to acquire or maintain taxable income'* for the distributing company, which is a key condition for costs to qualify as deductible business expenses for corporate income tax purposes.

In two landmark cases, the courts (including the Belgian Supreme Court) have ruled in favour of the tax authorities. The taxpayers' key argument was that the company had to take out a loan (and, hence, pay interest) to be able to pay off the liability resulting from the dividend distribution (or capital reimbursement) without having to sell certain income-generating assets (and to satisfy the liability with the sales proceeds). Therefore, the company argued, the objective of the loan is to keep the income-generating assets, i.e. to *'maintain taxable income'*.

In the first case, the courts accepted in principle that interest borne in the framework of a leveraged distribution can meet the above condition for tax-deductibility *provided* that the *demonstrated* objective of the loan is indeed to avoid having to sell income-generating assets. However, the courts finally disallowed the interest deduction because they considered that this objective was not/insufficiently documented in the corporate documents established within the framework of the distribution.

In the second case, the underlying justification/documentation for the loan was submitted, but the interest deductibility was nevertheless denied. The court of appeal argued that the main objective of the loan was (not to allow the distributing company to keep its income-generating assets, but) to allow its corporate shareholders to reimburse the bridge loans that were granted to them to fund the prior delisting of the distributing company. The taxpayer lodged an appeal with the Supreme Court, but the judgement is currently still pending.

The outcome will obviously be crucial for the success of leveraged distributions (whether or not decided in an M&A context). Irrespective of this outcome, one important lesson learnt is that increased attention must be paid to the justification of the loan in the underlying corporate documentation.

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Brazil

MACHADO ASSOCIADOS

Impact of contingent consideration on tax amortisation of goodwill

In the context of M&A transactions in Brazil, the tax amortisation of the goodwill paid for the acquisition of equity stake in a Brazilian company stands out not only as one of the most discussed "tax incentives", but also as the source of the most numerous tax assessments and involving the highest amounts under discussion in administrative courts.

One of the relevant topics is the tax treatment of contingent considerations and any other type of price adjustments and their effects on the tax amortisation of goodwill.

Law 12973/14, which intended to adapt the tax rules to the IFRS, introduced significant changes to the rules on the tax amortisation of goodwill in a manner to align them with IFRS 3 on business combinations.

According to current Brazilian tax rules, the goodwill paid by Brazilian companies for the acquisition of equity stake in other Brazilian companies (i) is generally part of the acquisition costs for the purposes of ascertaining the taxable capital gain upon a future sale of the investment, or (ii) may be deducted from the corporate income tax (IRPJ) and contribution on net profit (CSLL) calculation after the merger of the Brazilian investor into the target company, or vice versa, at a monthly ratio of 1/60 (i.e. a 5-year period).

Although IFRS 3 sets outs that the goodwill must be determined within a year of the business combination, M&A transactions regularly result in price adjustments for the following years, arising from earn-out payments or contingencies. Brazilian tax rules generally establish that tax effects of contingent considerations should be considered in the calculation of IRPJ and CSLL when the event that leads to the price adjustment occurs, regardless of the accounting procedures. However, such rules do not expressly regulate how these price adjustments should affect the tax amortisation of goodwill in different scenarios, i.e. if the merger has already been implemented and the goodwill is still being amortised for tax purposes (within the 5-year period after the merger) or when the goodwill has already been fully amortised for tax purposes.

In a ruling issued in 2016, Brazilian tax authorities analysed a case involving the tax legislation previously in force and concluded that a reduction in the price of the transaction arising from a breach of representation affects the consideration paid for the investment, and thus should impact the goodwill to be amortised for tax purposes. In this case, considering the goodwill was still being amortised by the surviving company of the merger, the tax authorities understood the amortisation expenses to be excluded from the IRPJ/CSLL calculation should be accordingly reduced as of that date, with no need to adjust the calculation of the taxes paid in the past. We are not aware of any other administrative or judicial decisions on the matter.

The same rationale could, in principle, be applied to the rules currently in force. However, questions remain open for several situations. What should be done if the goodwill has already been amortised? Could an increase in price be considered as a deductible expense immediately upon payment? How should the price reduction be reflected in the tax calculation?

These are common questions that may arise in the aftermath of M&A transactions in Brazil that require a careful analysis of the details, including timing of the payment and status of amortisation, to identify alternatives of tax treatment and the grounds to support them.

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China

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Case study – indirect share transfer

Chinese entities are often indirectly transferred in M&A cases. Such an indirect share transfer of a Chinese company could also trigger capital gains taxation issues in China. The Chinese tax authority would assess local taxes if the indirect share transfer has commercial reasonableness or is arranged for the reason of tax benefit shopping.

The indirect share transfer without a reasonable commercial purpose can be re-characterised as a direct share transfer and taxed in China. We illustrate here an indirect share transfer case which has triggered the capital gains tax in China.

In 2022, a German company purchased 100% of the shares in a Hong Kong company (company A). Company B, the Chinese subsidiary wholly owned by company A, was indirectly transferred in the acquisition. Neither the buyer nor the seller paid the corresponding withholding tax for the share deal to the Chinese tax authorities.

Whether the share transfer had the reasonable business purpose became the most controversial point between the tax authorities and the seller. The tax authorities deemed that this share transfer did not have a reasonable business purpose by considering the following facts:

- The main equity value of company A (around 85%) was derived from company B.
- Company A's long-term equity investment in company B accounted for more than 90% of its total assets.
- Company A was only a shell company to hold the shares in company B. Company A did not conduct any active business in Hong Kong. There was no recruitment of employees, office, operating expense or income of any kind in Hong Kong.
- The share transfer was nominally a transfer of equity interests in company A, but in essence, it was carried out to transfer the equity interests in company B.

Finally, based on the tax notice issued by the tax authority, 10% withholding tax was imposed on the capital gain derived from the share deal. The German buyer was also punished because it failed to withhold the corresponding taxes arising from the deal.

When an overseas acquisition results in a transfer of a Chinese entity indirectly, the deal parties are advised to check whether there are any tax implications in China and assess the deal on the following factors:

1) If the overseas enterprise has economic substance.
2) If the main value of the equity of the overseas enterprise is from taxable assets in China.
3) If the overseas enterprise's income is mainly from China.
4) Existence of shareholders, business model and the relevant organisation.
5) Taxation in the country of the overseas enterprise on the deal.
6) Exchangeability between the indirect transfer of the Chinese enterprise and direct transfer.
7) Applicability of related tax treaties or arrangement applicable for the indirect transfer.

Furthermore, relevant parties (the seller, the buyer and the Chinese entity) of the transaction of indirect share transfer could report to the tax authorities beforehand as a good practice standard to eliminate the tax uncertainty in the share deal.

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France

FIDAL

Management package: back to reality?

During the past 18 months, the French Supreme Administrative Court (Conseil d'Etat) has rendered several decisions requalifying capital gains realised by managers of companies, in the context of M&A transactions, as salary income.

While gross salaries would be subject to social security levies of approx. 45% for the employer's part and 20% for the employee's part, and the net salary would then be taxed up to 45% under the progressive personal income tax regime, capital gains would "benefit" from a flat taxation of 30% (including personal income tax and social contributions).

It goes without saying that practitioners have gradually developed management packages, including incentives for managers taking the form of capital gains, through a variety of legal instruments.

In three decisions on 13 July 2021, the Supreme Administrative Court stated, regarding the tax treatment of gains realised by managers, the (i) option to purchase shares exercised at a price of EUR 1 followed by the immediate resale of the shares at EUR 3; (ii) purchase of warrants at a preferential price, followed by their sale two years later to a third party; and (iii) acquisition of warrants and cross-promises to purchase and sell these warrants at terms guaranteeing the director the realisation of a gain.

The Supreme Administrative Court analysed both the gain realised on the acquisition and the gain realised on the sale as follows:

› The acquisition or subscription of stock options or warrants at a preferential price (compared with their actual value) may reveal the existence of an advantage up to the difference between the price thus paid and the value, which, when sourced essentially in the person concerned exercising their functions as a director or employee, is taxable with regard to the year of acquisition or subscription in the category of wages and salaries.

› As a principle, the net gains realised by a natural person from the sale of shares or stock warrants are taxable according to the regime of capital gains. However, if, whilst considering the conditions for realising such a gain, this gain must be regarded as acquired, not because of the transferor's status as an investor, but in return for their functions as an employee or manager, this gain is taxable as a salary in the year of the sale of the warrants or the shares.

In other decisions rendered in 2022, the Supreme Administrative Court confirmed its analytical grid and stated that:

› the subscription of a ManCo's shares was intended to involve the manager, due to their managerial functions within the group, in the sharing of the capital gain generated by the subsequent sale of the group (28 January 2022);

› the fact that the advantage in question had been granted not by the parent company of the group but by one of its subsidiaries, and one of its reference shareholders did not deprive it of the character of an incentive payment intended to reward the actual exercise of managerial functions (19 July 2022).

These decisions from the French Supreme Administrative Court generate significant risks for the existing management packages and considerable doubts when implementing new ones. A possible safe area can be found in "legally qualified" schemes (i.e. stock options, free allocation of shares (AGA) and warrants for shares of business creators (BSPCE)), but with their own limits, costs and constraints.

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It goes without saying that this is not the end of the story.

Poland

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Latest amendments to the Polish restructuring law

Recent months have seen Polish tax regulations regarding restructurings significantly amended and further changes are also expected.

1. Restrictive tax neutrality conditions for M&A transactions as of 1 January 2022
Based on the Council Directive 2009/133/EC, general mergers and acquisitions are supposed to be tax-neutral as long as, in particular, one of the primary purposes of the merger is not to avoid taxation and the transaction is made between EU or EEA entities.

As of 1 January 2022, the existing tax-neutrality rules have significantly changed in Poland. The legislator has introduced additional requirements. Failure to comply with them leads to an obligation to recognise revenue already at the time of the transaction. These additional requirements are in particular:

- obligation to continue the tax valuation of the assets acquired,
- limitation of neutrality to such transactions in which the shares have not previously been the subject of other M&A transaction (thus in practice, only "first restructuring" is tax-neutral).

The above amendment means that review and a careful approach are needed regarding restructurings in Poland.

2. Limitation of deductible debt financing costs with respect to the equity transactions
Also as of 1 January 2022, Polish regulations provide for exclusion from tax-deductible costs of debt financing expenses, if the financing is granted by the related entity and earmarked for "capital transactions", in particular:

- purchase or acquisition of shares (stock),
- acquisition of all rights and obligations in a partnership without legal personality,
- payment of additional contributions,
- increase of share capital or
- purchase of own shares for redemption.

In the current legal framework, the exclusion from tax-deductible costs does not apply only if the financing is aimed at the acquisition of shares (stock) in the unrelated parties or the financing is granted by the related bank or similar institution domiciled in the EU or EEA.

In practice, the open nature of the catalogue of "capital transactions" may trigger challenges in the application of the new law.

3. Implementation of the Directive 2019/2121 and other changes

Finally, a number of amendments to the Polish Commercial Companies Code and other acts are planned as part of the draft that is currently being compiled to implement the provisions of Directive 2019/2121 of cross-border conversions, mergers and divisions.

Some of the more significant expected changes include introducing:

- new types of cross-border company reorganisation,
- domestic division by separation (not considered in the Polish law system so far),
- additional measures to protect the creditors of reorganised companies, incl. initiating proceedings against the company (in the jurisdiction of the company) within two years from the date of the cross-border operation,
- obligation to submit an application for a certificate of legality of a given reorganisation operation to the national court register together with a request for an opinion of the competent tax authority,
- right to obtain information and challenge the reorganisation operation by employees of companies.

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The legislation process is in progress. The precise wording of the law and date of its implementation are still to be confirmed.

Romania

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Consolidation for corporate income tax purposes

The fiscal group for CIT purposes consists of at least two of the following entities:

- a Romanian legal person and another Romanian legal person/persons in which the first holds, directly or indirectly, at least 75% of the value/number of participation titles/voting rights;
- at least two Romanian legal entities in which a Romanian natural person holds, directly or indirectly, at least 75% of the value/number of participation titles or voting rights;
- at least two Romanian legal persons held, directly or indirectly, in proportion of at least 75% of the value/number of participation titles or voting rights, by a legal/natural person, resident in a state with which Romania has concluded a double tax treaty or in a state with which an agreement on the exchange of information has been concluded;
- at least one Romanian legal person held, directly or indirectly, in proportion of at least 75% of the value/number of participation titles or voting rights, by a legal person resident in a state with which Romania has concluded a double tax treaty or in a state with which an agreement was concluded regarding the exchange of information and the permanent establishment in Romania of this foreign legal entity.

The consolidation system can be applied for a period of five fiscal years, starting with the next fiscal year following the one when the request is submitted. The system is optional, and the application must be submitted at least 60 days before the start of the fiscal consolidation period.

Certain cumulative conditions must be met when the request application is submitted, such as:

- 75% shareholding condition must be fulfilled for an uninterrupted period of one year, prior to the start of the fiscal consolidation period
- the members are all CIT payers, under the same CIT regime
- the members have the same fiscal year
- the members do not belong to another CIT group
- the members are not in liquidation

Each member of the fiscal group determines the fiscal result individually, whereas the consolidated fiscal result of the group is determined quarterly/annually by totalling the fiscal results determined individually by each member of the fiscal group.

CIT due by the group is computed by applying the CIT tax rate of 16% on its taxable profits, namely the positive consolidated fiscal result.

A group leader will be responsible for computing the consolidated fiscal result of the group and it will submit CIT returns/pay the due CIT on behalf of the group.

The individual fiscal credits (e.g. sponsorships), the exempted profits (e.g. for reinvested profits) determined by each member of the group will be communicated to the leader of the group in order to be deducted from the overall CIT. Similarly, the fiscal losses incurred by a group member during the consolidation period are deducted from the consolidated fiscal result of the group.

Special rules are provided both for entering/leaving the fiscal group (including use of fiscal losses before the group consolidation) and for cases in which the members of the group no longer meet the mandatory conditions during the five-year mandatory period of the group.

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Nevertheless, each member of the fiscal group is still compelled to prepare the transfer pricing file regarding the transactions with the members of the fiscal group and with other related entities outside the fiscal group.

Switzerland

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Rechtsanwälte

Substance requirements for international investments or group structures

Introduction

The Swiss tax practice already applied strict substance requirements for the acceptance of international investments or group structures. In particular, the discussion around substance requirements became even more important within the framework of BEPS. In this context, the Swiss tax practice also increased the substance requirements. Therefore, before any investment or group is set up, it should be considered whether the substance requirements can be fulfilled.

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Issue

In order to benefit from a double tax treaty, the Swiss tax authorities review whether both parties – i.e. the Swiss entity as well as the foreign counterparty – are entitled to make use of the double tax treaty. Such a review is based on specific substance criteria. If, in this process, the foreign entity is unable to show evidence that sufficient substance is available, then any double tax treaty benefits are denied by the Swiss tax authorities. Given that the Swiss tax practice applies a withholding tax of 35% on open but also hidden dividend payments, it is particularly crucial that a foreign parent entity of a Swiss subsidiary is able to claim double tax treaty benefits.

Substance requirements

The Swiss tax authorities measure whether the level of substance is sufficient as follows:

- Personal substance: this is given if the entity employs (its own) employees in its own premises in the country of residence. The employees may also be employed by an associated company resident in the same country as the entity.
- Functional substance: functional substance is given by an operative business. Alternatively, also the function as a holding company can qualify as functional substance. This is given if the foreign entity holds – in addition to the Swiss company – at least one other substantial participation in a company domiciled in another state. In this context, the affiliates generally must be actively engaged in business activities.
- Financial substance: this is given if the holding company shows an equity ratio of at least 30%. This 30% ratio is determined based on book values of the stand-alone statutory financial statements (i.e. not consolidated financial statements).

For a foreign parent entity of an operational group, at least one of the aforementioned criteria must be fulfilled. In the case of a personal holding company of an individual, financial substance alone is not sufficient under specific circumstances. In the case of a private equity investment structure, at least two of these criteria must be fulfilled. In summary, depending on the company structure, the Swiss tax authorities expect the fulfilment of at least one or two criteria.

Application of double tax treaty

Beside the substance requirements, a foreign parent entity must additionally have the right of use of a dividend payment by the Swiss entity in order to make use of a double tax treaty (i.e. beneficial ownership). This would not be the case if the foreign parent entity would have to pass the dividend contractually or de facto to another party.

To summarise, the Swiss tax practice applies strict requirements, in particular with regard to foreign parent companies, that a double tax treaty can be applied in connection with a Swiss subsidiary. Therefore, it is crucial that a certain extent of substance is available at the level of the foreign entity.

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General

Deals news

The below provides a list of some of the most relevant M&A-related deals that have been carried out during the preceding months:

Country/ Lead Partner	Other countries involved	Client Name	Target Name	Industry	Services rendered	Trans-action size	Description
UK (FTI – Paul Pritchard	Germany (WTS – Roland Holz)	Sovereign wealth fund	German group active in the pharma sector with minor foreign investments	Specialty Pharma	Tax DD/ Tax Structuring /Review of Agree-ments	> € 500m	FTI and WTS assisted one of the world's largest sovereign wealth funds with mezzanine investment in Germany.
Germany (WTS – Roland Holz)	Denmark (Lundgrens – Malene Overgaard)	German company in the specialty pharma sector	Not disclosed	Danish company in the specialty pharma sector	Tax Structuring /Tax DD/ Contract review	Not disclosed	WTS Germany assisted its client with tax structuring, tax due diligence and contract review in the business combination with the target company. Lundgrens assisted with the tax due diligence on the Danish target entities.
Germany (WTS – Dirk Spalthoff FDD and Roland Holz TDD)	n/a	German based telecom-munica-tion service provider	Telecommu-nication service provider	Telecom	Financial DD/ Tax DD/ Contract review	Not disclosed	WTS Germany assisted its client with financial and tax due dili-gence as well as contract review upon the acquisition of the target company.
US (FTI – Melissa Wichmann)	Germany (WTS– Roland Holz)	US Private Equity Fund	Industrial manu-facturing	Manu-facturing	Tax DD	Not disclosed	Buy-side tax due diligence on the acquisition of a leading supplier of specialized precision machinery for lapping, grinding, cutting, and polishing substrates used in the manufacture of precision parts in semiconductor, aerospace, and general industrial market. Turnover of the target group of > € 250m.
Germany (WTS – Dirk Spalthoff FDD and Patrick Satish TDD)	Greece (Accounting Solutions S.A.)	German based Private Equity Fund	Not disclosed	Telecomu-nication	Financial and Tax DD /Structur-ing/SPA Tax Advice	> € 50m	Financial and tax support on buy-side acquisition of the target company.
Germany (WTS – Axel Wagner)	The Nether-lands (Atlas – Gerben Markink, Frank Schwarte)	German listed real estate company	Real estate company	Real estate	Structuring /SPA Tax Advice	Not disclosed	WTS Global assisted its client on the acquisition structuring of a Dutch real estate portfolio and supported with SPA tax advisory services.
Germany (WTS – Axel Wagner TDD, Structuring, SPA and Dirk Spalthoff FDD)	Luxembourg (Tiberghien – Michiel Boeren)	German Private Equity Fund	Food delivery service	Food	Financial and Tax DD /Structur-ing/SPA Tax Advice	Not disclosed	WTS Global assisted German Private Equity funds on their majority investment in a Luxem-bourg food delivery service group with financial due diligence, tax due diligence, acquisition structuring and SPA advice.

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About WTS Global

With a representation in over 100 countries, WTS Global is one of the leading global tax practices offering the full range of tax services without the constraints of a global audit firm. WTS Global deliberately refrains from conducting annual audits in order to avoid any conflicts of interest and to be the long-term trusted advisor for its international clients. Clients of WTS Global include multinational companies, international mid-size companies as well as private clients and family offices.

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