Tax on Inbound Investment

Contributing editors
Peter Maher and Lew Steinberg

2019

GETTING THE DEAL THROUGH

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Tax on Inbound Investment 2019

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Preface

Tax on Inbound Investment 2019

Thirteenth edition

Getting the Deal Through is delighted to publish the thirteenth edition of *Tax on Inbound Investment*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Ecuador and Korea.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Peter Maher of A&L Goodbody and Lew Steinberg of Merrill Lynch, for their continued assistance with this volume.

GETTING THE
DEAL THROUGH

London
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Japan

Kei Sasaki and Nobuya Yamahashi

Anderson Mōri & Tomotsune

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?

From the perspective of corporation (income) tax, an acquisition of stock in a target company generally has no effect on the tax attributes of the target company. Thus, if the target company has net operating losses deductible from the taxable income, they may be carried forward to the years after the acquisition under the requirements provided by the law. (See question 7 as to the limitations to carrying forward net operating losses.) However, as the nature of the acquisition of stock has no effect on the target company's tax attributes, step-up of the basis of the target company's underlying assets is unavailable. Further, amortisable goodwill is not recognised even if the purchase price of the stock exceeds the aggregated value of the underlying assets of the target company.

A buyer may further benefit from acquiring the stock in the target company. For example, no consumption tax, real estate acquisition tax and registration and licence tax are imposed on the purchase of stock.

Contrary to acquisition of stock, a buyer of business assets of the target company does not inherit the tax status of the target company (ie, the seller). The buyer is generally free from the potential tax liabilities of the target company. Further, goodwill may be recognised and the basis of the assets may be stepped up, which can be, except for certain assets including lands, depreciated or amortised for tax purposes. As a flip side, no benefit of net operating losses of the target company can be enjoyed by the buyer of the business assets.

However, unlike with stock purchase, in the case of asset purchase, consumption tax may be imposed on the asset transfers. Further, real estate acquisition tax and registration and licence tax are imposed on the transfers of real estates.

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 mentioned in question 1, a buyer of stock in a target company does not achieve step-up in basis of the underlying assets. In asset purchase, assets may generally be stepped up and depreciated or amortised for tax purposes.

In the case of purchase of intangibles, including goodwill, as a part of acquisition of business, the intangibles may be amortised for certain years specifically stipulated under Japanese tax law. Goodwill is amortised over five years, 20 per cent of the basis each year. On the other hand, no goodwill or intangible is recognised in connection with purchase of stock; therefore, no amortisation is available. See also question 1.

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?

It is preferable to establish an acquisition company in Japan if the foreign investor wishes to offset financing costs for the acquisition against the target company's taxable income. This is because the offsetting can be achieved either through tax consolidation or merger between the acquisition company and target company, and a tax consolidation or merger can only be conducted between Japanese corporations. On the other hand, if the foreign purchaser wishes to offset financing costs for the acquisition against its own taxable profits, it is preferable to acquire the Japanese target company directly.

4 Company mergers and share exchanges

Are company mergers or share exchanges common forms of acquisition?

Although we see mergers and share exchanges, within the meaning of Japanese corporate law, used in M&A transactions involving foreign entities, we are unaware of merger or share exchange conducted directly between foreign entities and Japanese corporations. This is for, rather than tax-related reasons, the corporate-law-related reason that according to the dominant view among practitioners, the corporate law of Japan does not allow such mergers or share exchanges. Note that there are M&A transactions designed to achieve the effects similar to those of mergers and share exchanges between a foreign entity and a Japanese corporation.

5 Tax benefits in issuing stock

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

Paying cash as consideration in restructure transactions, such as mergers, generally disqualifies the transaction from being recognised as 'qualified' restructuring for tax purposes. This means that by paying cash, the transaction will be categorised as 'unqualified' restructuring, where the capital gains and losses of the target company's assets will be recognised; net operating losses may not be able to be carried forward; and built-in losses of the target company's assets may not be utilised. However, certain exemptions to this rule were introduced on 1 October 2017. For example, if a merging company owns two-thirds of the shares of a merged company, the merging company's payment of cash to shareholders of the merged company is allowed in the context of qualified restructuring. Another similar exemption will be available in relation to certain share exchange transactions. Paying consideration by issuing stock is not the only requirement to be treated as qualified restructuring, but the benefit of issuing stock may be fulfilling one of the requirements of qualified restructuring.

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?

The documents specified in the law are subject to stamp tax. Although agreements of acquisition of stock are not taxable, various documents that may be produced in M&A transactions, such as business transfer agreements, merger agreements, real estate agreements and 'receipts of cash other than sales price or securities', are listed as taxable documents. Note that stamp tax is imposed only on the documents physically executed, and thus, electronic copies and documents executed out of Japan are not subject to stamp tax.

The rule to determine the amount of stamp tax varies according to the type of the documents. However, the amount of stamp tax does not exceed ¥600,000. Stamp tax is owed by the person who 'prepared' a taxable document, which means that in the case of agreement, both parties are jointly subject to stamp tax thereof.

Further, if real estate is transferred, registration and licence tax at a rate of up to 2 per cent and real estate acquisition tax at a rate of up to 4 per cent of the taxable value of the transferred real estate are applicable.

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?

Although there is no provision that generally imposes limitation after a change of control, there are provisions applicable to specific types of deferred tax assets. For example, net operating losses in the target company that experienced change of control may be restricted as explained below.

In general, net operating losses of a corporation may be carried forward for the next 10 fiscal years (nine fiscal years, for the fiscal years commencing before 1 April 2018). Note that carry-forward of net operating losses is allowed only if the corporation files a 'blue return' upon an approval of a relevant tax authority.

It should be further noted that net operating losses can be utilised to offset only up to 50 per cent of the taxable income for each fiscal year, under certain conditions specified by the law. For example, this limitation may apply if the target company is a 'large company', within the meaning provided by the law, with more than ¥100 million in capital. In order for the limitation not to be applied, it may be worthwhile to consider reduction of the capital of the target company in some cases.

In M&A transactions, restrictions on the carry-forward of net operating losses may be triggered if more than 50 per cent of the ownership of a target company with the losses is acquired and any of the events specified by the law occurs within five years of the acquisition. For example, the restriction may be triggered if the target company ceases its previous business and receives a significant amount of investment or loan in comparison with the scale of the ceased business.

There is no comprehensive tax regime applicable to acquisitions or reorganisations of bankrupt or insolvent companies. However, some exceptions to the limitations to deferred tax assets are provided for the purpose of encouraging reorganisation of those companies. For instance, net operating losses of a corporation under the *kosei-tetsuzuki* revitalisation procedure are not subject to the nine-year limitation of carry-forward, which is mentioned above, if it is utilised to offset the benefit of debt relief provided by certain creditors specified by the statute.

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?

Interest is generally deductible from the taxable income of the paying corporation. Under this general rule, corporation (income) tax can be avoided in such a manner as follows.

A resident corporation can receive funding from its foreign shareholder in the form of a loan. In such an event, the resident corporation can reduce the amount of its profits (thereby reducing its corporation tax burden) by deducting the interest paid with respect to such loan under the general rule allowing such deduction as mentioned above. By contrast, dividends must be paid from the profits that are calculated after taking into account taxes. Therefore, a resident corporation may try to receive a loan from the shareholder and include the interest as a deductible expense rather than obtaining additional capital from the shareholder and distributing dividends to such shareholder.

To counter such a scheme, the thin capitalisation regime and excess interest regime may limit the deductibility of interest payable from the acquisition company to its foreign shareholders. Under the thin capitalisation regime, a resident corporation that receives a loan from its foreign parent company in the amount of more than three times the amount of capital contributed by such foreign parent into the resident corporation is not allowed to include in deductible expenses the interest corresponding to such excess. Further, the excess interest regime may be applicable to the interest payable from the acquisition company. Under the excess interest regime, 'net interest' payments to affiliated persons in excess of 50 per cent of the 'adjusted revenue' of a corporation cannot be offset against the corporation's revenues. The regime is not applicable if:

- the amount of 'net interest' paid to affiliated persons in a given fiscal year is not more than ¥10 million; or
- the total amount of interest paid to affiliated persons in a given fiscal year is not more than 50 per cent of the 'total interest payments' made by a corporation.

If both the thin capitalisation regime and excess interest regime apply to a corporation, the larger of the amounts disallowed to be deducted will be deemed to be the amount against which the revenues of the corporation in the relevant fiscal year cannot be offset.

Under the domestic statute of Japan, interest paid to a foreign lender is subject to withholding tax at the rate of 20.42 per cent, including reconstruction special income tax imposed until the end of 2037. However, the tax treaties entered into by the Japanese government basically comply with the OECD Model Tax Convention, and most of them limit the rate to zero or 10 per cent with several exceptions.

There is no rule generally prohibiting 'debt pushdown', which is allocating debts to a resident corporation by way of merger to reduce its taxable income by offsetting with interest payment of the debt.

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?

It is common for the seller of stock or business assets to provide indemnities or warranties regarding any undisclosed or potential liabilities of the target company or defect of the assets. The tax treatment of the payment made under such indemnities or warranties is fact-specific and cannot be determined without looking into facts in detail. However, the payment generally has the nature of compensation for the damage suffered by the recipient (ie, buyer or target company). If the payment is characterised as such, it is not subject to the withholding tax and is included in the taxable revenue of the recipient. Whether or not the damage is deductible is a separate issue that is determined by the character of the damage. If the damage is deductible, it will be offset with the revenue accrued by receiving the payment under indemnities or warranties.

Post-acquisition planning

10 Restructuring

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

It is common to conduct post-acquisition restructuring, such as consolidating the acquired company and existing subsidiary in Japan. However, the forms and reasons of such restructurings vary depending on the situation.

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?

Japanese tax law recognises qualified reorganisation where assets are transferred at book value and the realisation of gains and losses are thus deferred for tax purposes. The reorganisation that may be recognised as qualified includes the one conducted in the form of company split, which can be regarded as spin-off of business in substance.

In the case of company split, the net operating losses of the spun-off business are preserved only upon the strict conditions, including being recognised as qualified company split, provided by the statute. The conditions become especially strict in the case of a company split taking place within five years of the parties entering into a parent–subsidiary relationship. In such a case, the conditions include the requirement of 'joint business operation', which can be broken down and summarised as follows:

- the business to be split off and that of the receiving company are related;
- the amount of sales, number of employees, capital amount and other such variables representing the size of the business of a party does not exceed approximately quintuple that of the other party;
- the size of the business to be split off does not exceed approximately double what it was at the time when the parties entered into the parent–subsidiary relationship; and
- the size of the business of the receiving company does not exceed approximately double what it was at the time when the parties entered into the parent–subsidiary relationship.

Alternatively, the conditions in the case above can be satisfied if:

- the business to be split off and that of the receiving company are related; and
- one or more persons of each party, who are in the managing positions specified by the statute (eg, CEO), are planned to be in the managing position of the receiving company.

Further, a new qualified tax spin-off, which allows a company (splitting company) to incorporate a new company (new company) with the splitting company's existing business (split business) and distribute shares of the new company to the shareholders of the splitting company (split company), became available on 1 October 2017. The new tax qualified spin-off is for companies that are not owned by a controlling shareholder (typically, listed companies). The conditions for the qualification are as follows:

- only the shares of the new company are distributed to each of the shareholders of the splitting company in proportion to the number of the shares of the splitting company owned by such shareholder;
- no controlling shareholder of the splitting company exists immediately before the split and no controlling shareholder of the new company is expected to exist immediately after the split;
- any one or more directors or other executives of the splitting company immediately before the split are expected to become executives of the new company after the split;
- essential assets and liabilities of the split business have been transferred by the splitting company to the new company by the split;
- around 80 per cent or more of the splitting company's employees engaging in the split business are expected to engage in the split business operated by the new company after the split; and
- the split business is expected to be operated continuously by the new company after the split.

In addition, another new qualified tax spin-off became available on 1 April 2018. A certain spin-off transaction, where a company (parent company) transfers a part of its business to its subsidiary with a 100 per cent control relationship and then distributes its shares of the subsidiary to shareholders of the parent company, was not tax-qualified. However, such spin-off transaction is now a recognised tax qualified reorganisation on the condition that the relationship between the parent company and the subsidiary is expected to continue immediately before the distribution of shares.

No consumption tax is imposed if the spin-off of business is achieved by a company split under Japanese corporate law. Real estate acquisition tax is potentially levied if real estate is involved, but may be exempt subject to the requirements provided by statute, including the requirement that approximately 80 per cent of the employees having engaged in the spun-off business are to be transferred to the company inheriting the business. Further, registration and licence tax at a rate of up to 2 per cent is levied.

Update and trends

From the viewpoint of inbound investment by foreign investors, it should be noted that certain requirements for tax-qualified corporate reorganisation are relaxed. Continuity of the business is the key concept for a tax-qualified corporate transaction in Japan and requirements to maintain employees and business in relation to the target business in the corporate reorganisation discouraged the restructuring. After the tax reform of April 2018, a company that succeeded the business through a reorganisation is allowed to transfer employees and businesses to its group company with a 100 per cent control relationship after the reorganisation without affecting the tax-qualified status.

Another major reform encouraging inbound investment is that a shareholder's capital gains derived from the exchange of shares of a target company with newly issued or treasury shares of a purchaser company (including but not limited to takeover bids using treasury shares) will be deferred when the exchange is made, in accordance with a plan approved by the government under the Act on Strengthening Industrial Competitiveness after the reform effective as of 9 July 2018.

These may facilitate company reorganisation in collaboration with continuous economic growth in Japan under 'Abenomics'.

12 Migration of residence

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

Tax law defines a non-resident corporation, in substance, as a corporation not having 'its head office or main office in Japan'. This definition may appear to allow a corporation established under Japanese corporate law (eg, *kabushiki-kaisha* (or *KK*) and *godo-kaisha* (or *GK*)) to become a non-resident corporation for tax purposes by moving its head or main office to a jurisdiction out of Japan. However, Japanese corporate law requires that a corporation established under Japanese corporate law register its head or main office in a registration office of Japanese government. In practice, there is thus no method to migrate a corporation established under Japanese corporate law to another jurisdiction.

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 payable by a resident corporation to a non-resident corporation without a permanent establishment in Japan are subject to the withholding income tax. The rate for both interest on a loan other than bonds and dividends under the domestic law is generally 20.42 per cent, including reconstruction special income tax, while the rate for interest on bonds of the resident corporation is generally 15.315 per cent. The rate can be relieved depending on the applicable tax treaty.

14 Tax-efficient extraction of profits

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

In addition to dividends and interest, it is common to extract the profit as service fees, which are not subject to withholding tax, if some service is actually rendered by the non-resident corporation. Further, royalties are utilised to extract the profit. Royalties are subject to withholding tax at the rate of 20.42 per cent (including reconstruction special income tax) under domestic law, which may be relieved by tax treaties to zero to 15 per cent.

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 methods of disposals vary from case to case.

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?

If a non-resident corporation has a permanent establishment in Japan and disposes stock in a resident corporation, the capital gains that arise from that disposal and are attributable to the permanent establishment will be subject to substantially the same corporation (income) tax that applies to resident corporations. The standard rate of corporation tax was reduced to 23.2 per cent from 1 April 2018.

On the other hand, a non-resident corporation that does not have a permanent establishment in Japan will not, in principle, be subject to corporation tax upon the capital gains arising from the disposal of stock in a resident corporation. This also applies to the case where the capital gains are not attributable to the permanent establishment in Japan of a non-resident corporation. This rule is subject to various exceptions, including that applicable if:

- the non-resident corporation, together with related person or persons, owns or has owned 25 per cent or more of the shares of the resident corporation at any time during a period of three years on or before the end of the fiscal year in which the shares are disposed; and
- the disposed shares are 5 per cent or more of the shares of the resident corporation.

Another exception is that Japanese corporation tax to capital gains will apply to disposal of shares in a real estate holding corporation, which is, roughly speaking, a corporation where at least 50 per cent of the assets consist of real estate located in Japan or shares of other corporations holding real estate located in Japan. If a non-resident corporation owns more than 2 per cent (in the case where the real estate holding corporation is not listed) or 5 per cent (in the case where the real estate holding corporation is listed) of the shares in the real estate holding corporation, then the non-resident corporation is subject to taxation to capital gains arising from the disposal of any of those shares.

Regardless of the exceptional rule above, however, the capital gains may be exempt from tax if the applicable tax treaty grants the exemption.

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?

As mentioned in question 16, a non-resident corporation is in general not subject to corporation tax on capital gains deriving from shares in a resident corporation if it does not have a permanent establishment in Japan or the gains are not attributable to the permanent establishment. It should be noted, however, that the exception to this general rule, as mentioned in question 16, is applicable. Gains accrued from disposal of the business assets by the local company are taxable. There is no general rule by which the local company can avoid or defer the tax.

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