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Contributing editors:
Peter Maher, A&L Goodbody
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Marketing managers
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Sarah Walsh
Alice Hazard

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Business development manager (subscriptions)
Nadine Radcliffe
Subscriptions@
GettingTheDealThrough.com

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Sarah Morgan

Editor-in-chief
Callum Campbell

Publisher
Richard Davey

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Japan

Yushi Hegawa

Nagashima Ohno & Tsunematsu

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 the case of an acquisition of shares of the target company, the buyer is treated as having acquired the shares, rather than the individual assets and liabilities of the target company, and would book such shares at the then fair market value (which will usually equal the purchase price in unrelated third-party deals), which constitutes the tax basis of such shares together with other acquisition costs.

In the case of an acquisition of business assets and liabilities of the target company, the buyer is treated as having acquired the individual business assets and liabilities of the target company, and would book such individual assets at the then fair market value, which constitutes the tax basis of such individual assets together with other acquisition costs.

However, if such acquisition is structured as a tax-qualified reorganisation (which should be rare, as discussed below), the tax basis is carried forward from the seller in the hands of the buyer.

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?

In the case of an acquisition of shares of the target company, no step-up in the tax basis of the assets of the target company takes place (ie, there is no section 338 or section 338(h)(10) election under Japanese tax law), and the tax basis of the business assets of the target company remains intact in the hands of the target company. Furthermore, no goodwill is recognised in the case of an acquisition of shares of the target company either. This means that the acquisition cost of the shares cannot be expensed in a tax deductible manner until the final disposition of the shares.

On the other hand, in the case of an acquisition of business assets and liabilities of the target company, unless such acquisition is a tax-qualified company split transaction, the tax basis of the business assets so acquired is stepped up to the then fair market value. In this case the positive difference, if any, between the purchase price paid and the fair market value of the net assets acquired is treated as goodwill (technically referred to as an 'asset adjustment account') in the hands of the buyer (provided that the buyer is subject to full Japanese income taxation), and will be amortised over a period of five years on a straight-line basis and the amortisation expenses will be tax-deductible.

As such, generally speaking, an acquisition of business assets is more advantageous to the buyer (provided that the buyer is

subject to full Japanese income taxation) solely from a Japanese tax viewpoint.

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?

In the case of an acquisition of shares of the target company, it depends. It is often the case that, if the applicable tax treaty between Japan and a given foreign jurisdiction allows for a favourable tax treatment in respect of Japanese source taxation on dividends to be paid by the Japanese target company (ie, exemption or low withholding tax rate) and/or capital gains arising from the sale of the shares of the Japanese target company (ie, total exemption), an acquisition vehicle will be established in that offshore jurisdiction in view of such tax benefits.

However, it is important to take into consideration whether the applicable tax treaty contains 'limitation on benefits' provisions as well as their impact on the structuring, and potential 'treaty shopping' allegations that may be made by the Japanese tax authority.

On the other hand, if the buyer intends to implement post-acquisition restructurings utilising Japanese statutory reorganisation transactions (eg, mergers, company splits, etc), the acquisition vehicle will usually be established as a Japanese corporation because of limitations under Japanese corporate law (ie, only Japanese corporations can be a party to such statutory reorganisations).

In the case of an acquisition of business assets of the target company, the acquisition vehicle will usually be established as a Japanese corporation that is a subsidiary of the ultimate buyer. This is due to, among other reasons, permanent establishment concerns (ie, if an offshore company acquired tangible business assets, it would be deemed as carrying on business within Japan and as such would be found to have a permanent establishment in Japan) and consumption tax reasons (ie, so that the buyer can claim input tax credit to recover the consumption taxes paid to the seller by making an appropriate election).

4 Company mergers and share exchanges

Are company mergers or share exchanges common forms of acquisition?

These are not very popular as a structure for an acquisition between unrelated third parties (rather than a business combination or integration).

Popular forms are share purchases for cash and asset purchases for cash (either by way of sale and purchase or company split for cash consideration). This may be partly because of various limitations on triangular mergers and triangular share exchanges under Japanese law.

Such limitations include the fact that:

- no reverse triangular merger is available under Japanese law and it would cause difficulties if the target company had to be the dissolving company;

- only shares of the direct parent company of the acquisition vehicle can be used for tax-qualified triangular mergers and triangular share exchanges, and shares of the indirect ultimate parent company of the acquisition vehicle will not qualify;
- even the acquisition vehicle must have some business substance to do tax-qualified triangular mergers and triangular share exchanges and must not be a mere shell; and
- there are technical Japanese corporate law issues to be resolved, for the acquisition company to acquire shares of its direct parent company.

Exchange offers (ie, the purchase of target shares in exchange for shares of the buyer; a transaction technically different from a share exchange which is a statutory reorganisation transaction) are not popular either, partly because no tax-free (or deferral) treatment is available under Japanese tax law. While special legislation has recently been enacted to facilitate exchange offers, this mainly relates to corporate laws and financial regulations, and as such, tax-free (or deferral) treatment has not yet been made available.

5 Tax benefits in issuing stock

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

Not likely. If the parties intend to structure the acquisition as a tax-qualified reorganisation transaction (merger, company split, etc), then the consideration must solely consist in stock of the acquiring company. However, in the case of typical acquisitions between unrelated third parties (rather than a business combination or integration), it is rare that the requirements for a tax-qualified reorganisation are met.

That is, where there is no shareholding relationship between the acquiring company and the target company prior to the acquisition, the acquisition will not qualify as a tax-qualified reorganisation, unless such acquisition satisfies the requirements so that there will be formed a joint business operation between the parties (ie, (i) the businesses of the parties are related to each other; (ii) 80 per cent or more of the employees continue to be engaged in the business concerned and the primary businesses are continued; (iii) the ratio of the size of the businesses of the parties is within a range of 1:5 or the key management members remain the same; and (iv) with certain exceptions, where the ownership structure resulting from the transaction is expected to continue within the applicable parameters).

As such, in the context of typical acquisitions between unrelated third parties, there would unlikely be benefits for the buyer to issue stock rather than paying cash (and other) consideration.

In addition, because no tax-free (or deferral) treatment is available for exchange offers under Japanese tax law, as discussed above, from a tax viewpoint, we see no material benefit in issuing stock.

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?

No stamp duty or other documentary taxes will be payable in the case of an acquisition of stock, either by way of sale and purchase of the shares or by way of share exchange. Furthermore, no consumption taxes or Japanese VAT will be payable.

In the case of an acquisition of business assets, (i) if the acquisition is by way of sale and purchase of business assets, stamp duty will apply on a progressive basis (up to 600,000 yen) according to the amount of the consideration, and consumption taxes will be payable by the seller (and added onto the purchase price for the buyer to bear) at the rate of 5 per cent of the gross consideration allocated to each taxable asset acquired; and (ii) if the acquisition is by way of company split with cash (and other) consideration,

stamp duty of 40,000 yen will apply but no consumption taxes will be payable.

It should also be noted that, in the case of an acquisition of business assets, other transaction taxes such as real property acquisition tax and registration and licence tax may be payable depending upon the circumstances of the acquisition.

In addition, if the buyer of the business assets had to bear consumption taxes, the buyer will be entitled to claim input tax credit against its own consumption tax liability, subject to certain statutory requirements being met.

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?

If a change of control (ie, transfer of a majority of the shares of the target company, either directly or indirectly via its parent company) occurs as a result of the (direct or indirect) acquisition of the shares of the target company, subject to certain triggering events, as explained below, taking place following the acquisition, the net operating loss carry-forwards and unrealised built-in losses of the target company will be subject to certain limitation.

The triggering events that arise frequently in practice include, among others:

- the target company, which was dormant when so acquired, resuming business following the acquisition;
- the target company ceasing all business that was operated when so acquired, and then introducing new funds and assets that exceed five times the scale of the previous business; and
- all of the senior officials as well as 20 per cent or more of the employees of the target company resigning from the target company, followed by the target company developing certain new business that exceeds five times the scale of the previous business.

In addition, even if the rule mentioned above is not triggered, there is another rule of limitation on the net operating loss carry-forwards in the event of an acquisition; ie, if the buyer acquires a majority of the shares of the target company and, within five years from such acquisition, merges the target company into the buyer, then the net operating loss carry-forwards of the target company or of the buyer will be subject to certain limitation as a result of the merger, unless the merger satisfies certain conditions indicating that the target company and the buyer are forming a joint business operation. Similar limitation will apply to unrealised built-in losses.

Other tax attributes of the target company will, in principle, remain intact.

There are no special rules specifically applicable to acquisitions of bankrupt or insolvent companies; however, bankrupt or insolvent companies may use expired net operating loss carry-forwards in order to shelter discharge of debt income that may arise in the course of the insolvency proceeding.

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 payable by an acquisition company upon the acquisition debt will generally be deductible as an expense for its Japanese corporate income tax purposes.

However, if the acquisition debt is owed to a foreign corporation, which is a controlling shareholder (owning directly or indirectly 50 per cent or more of the total shares) of the acquisition company, the 'thin capitalisation' rules apply, and, generally speaking, interest payable upon the portion of the acquisition debt exceeding three times the shareholders' equity of the acquisition company will be non-deductible. The 'thin capitalisation' rules apply not only in the case of direct financing by the controlling shareholder, but also in other similar cases such as financing by third parties with a guarantee provided by the controlling shareholder.

Transfer pricing rules also apply to interest payable to affiliated foreign corporations of the acquisition company in order to require that the interest rate be arm's-length (ie, the portion of the interest exceeding the arm's-length rate will be denied deduction). One Japanese court precedent indicates that the arm's-length interest rate generally refers to the rate available in the market for similar finance transactions.

Debt pushdown is frequently employed in the Japanese practice, but it must be made within the limitations outlined above.

It is not easy to avoid withholding tax on interest payable to foreign creditors unless the applicable tax treaty provides for exemption (see question 13 below for details).

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?

For both stock and business asset acquisitions, it is very common that representations and warranties on certain tax matters and other factual matters are agreed upon by the seller for the benefit of the buyer, together with an indemnification obligation in the event of breach of such representations and warranties by the seller.

In the case of acquisition of shares, tax matters that are typically subject to the representations and warranties include, among other items, the due and correct filing of all tax returns and the due payment of all taxes payable by the target company.

These are typically documented in the definitive agreement relating to the acquisition.

The tax treatment of an indemnification payment by the seller to the buyer is not necessarily clear; however, one tax tribunal precedent indicates that an indemnification payment under a share purchase agreement may be treated as a downward adjustment to the purchase price of the shares (or to the tax basis of the shares in the hands of the buyer) if it is clearly indicated so on the agreement, rather than as separate taxable income in the hands of the buyer.

No withholding tax will apply to an indemnification payment.

Post-acquisition planning

10 Restructuring

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

Typically conducted post-acquisition reorganisations include a merger of the target company with the acquisition company, such that the acquisition debt can be repaid by the cash flow generated by the target company's business and to offset the interest expenses on the acquisition debt against the business income of the target company.

Consolidation election is sometimes made in lieu of the merger, so that the interest expenses incurred by the acquisition company (which is the head of the consolidated group) will be offset against the business income of the target company (which is the consolidated subsidiary). However, it must be noted that making a consolidation election generally entails that substantially all the assets (including

goodwill) of the target company be marked to market and the appreciations and gains, if any, will be taxed.

In addition, if the buyer had existing Japanese businesses prior to the acquisition, it is typical that the Japanese business so acquired will be integrated with such existing businesses by way of merger, company splits, etc.

It is very common that these post-acquisition reorganisations be made as a tax-qualified reorganisation and it is generally easy to structure them as so given that there is already a majority shareholding relationship among the parties.

Broadly speaking, the requirements for 'tax-qualified reorganisation' are met if no consideration other than the shares of the party taking over the business (including the shares of the direct parent company in the case of triangular mergers) is paid out, and:

- it is implemented between a parent and a wholly owned (direct or indirect) subsidiary or between wholly owned (direct or indirect) subsidiaries;
- it is implemented between a parent and a (direct or indirect) subsidiary or between (direct or indirect) subsidiaries, where 80 per cent or more of the employees continue to be engaged in the business concerned and the primary businesses are continued; or
- it is implemented for a 'joint business operation,' where:
 - the businesses of the parties are related to each other;
 - 80 per cent or more of the employees continue to be engaged in the business concerned and the primary businesses are continued;
 - the ratio of the size of the businesses of the parties is within a range of 1:5 or the key management members remain the same; and
 - with certain exceptions, where the ownership structure resulting from the transaction is expected to continue within the applicable parameters.

In the case of a 'tax-qualified reorganisation' business combination, neither the seller company nor the target company is subject to income taxation at the time of the transaction and their tax bases for the relevant shares or assets remain intact after the transaction (thus, tax deferral) and in general the shareholders of the parties are not subject to income taxation (also, tax deferral).

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?

Spin-offs of businesses can be made tax-free, if the transaction is structured as a tax-qualified company split or a tax-qualified in-kind distribution. If it so qualifies, there will be no immediate taxation at the company level (eg, deferral of capital gains taxation on the transfer) or at the shareholder level.

Note that a tax-qualified company split must be structured in order to satisfy the requirements mentioned in question 10, and a tax-qualified in-kind distribution is construed as not usable for distribution of 'business' (which includes liabilities) and is typically used to distribute shares of the subsidiary of the distributing company to the shareholders of the distributing company.

Net operating losses of the spun-off business will not be preserved but instead will remain with the original company.

12 Migration of residence

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

No, so far as Japanese taxation is concerned.

There is no concept of migration or domestication of taxpayers' residence under Japanese tax law. So long as the acquisition company

Update and trends

Practitioners recognise that the Japanese Tax Authority has recently been closely scrutinising M&A and reorganisation transactions, and challenging the tax position taken by the taxpayers if the Japanese Tax Authority finds that they are avoiding Japanese taxation.

Public reports indicate that there are some cases where assessments of huge tax amounts were issued to disallow the taxpayers' position in large M&A and reorganisation transactions. One appears to relate to takeover of the net operating loss carry-forwards of the target company by the buyer, in the context of acquisition of shares of the target company and subsequent tax-qualified merger of the target company into the buyer. Another appears to relate to utilisation of net operating loss carry-forwards of a Japanese holding company of a multinational company group within the Japanese consolidation taxation regime, where such losses had arisen as a

result of share repurchases conducted between the Japanese holding company and its Japanese subsidiaries in lieu of making dividend distributions.

It is particularly noteworthy that the legal basis of the challenges by the Japanese Tax Authority is no longer limited to technical interpretation of individual tax rules, but they have come to rely on comprehensive general anti-avoidance provisions embedded in the tax statutes, which were not invoked in the past to challenge sophisticated M&A and reorganisation transactions.

It is crucial that taxpayers exercise the utmost care in structuring the transaction by performing thoughtful legal analysis, bearing in mind all possible challenges and allegations that could be made by the Japanese Tax Authority.

or target company is a Japanese corporation, it remains a resident taxpayer of Japan subject to full Japanese income taxation. This is regardless of any migration or domestication measures implemented under foreign law.

However, as a separate but relevant matter, it is technically possible to do a so-called 'corporate inversion' transaction, whereby a Japanese-owned Japanese corporation will become effectively foreign-owned, by interposing a foreign holding company (which is usually established in low-tax or tax-favourable jurisdiction).

These 'corporate inversion' transactions are, however, subject to certain special taxation rules to prevent avoidance of Japanese taxation.

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?

Yes. The withholding tax rate under Japanese domestic law is 20 per cent on either: (i) interest on the acquisition debt (in the form of a loan) payable by the Japanese target company to the foreign creditor or (ii) dividends payable by the Japanese target company (not publicly listed) to its foreign parent company.

No exemption is available under Japanese domestic law for these withholding taxes.

So-called tax-qualified eurobonds (ie, bonds issued outside Japan and whose interest is paid outside Japan) are generally free from interest withholding tax if certain formalities are met and it is technically possible to procure the acquisition debt by way of these tax-qualified Eurobonds. However, withholding tax does apply (at 15 per cent) if interest on tax-qualified Eurobonds is paid to certain 'specially related parties' of the issuer of the Eurobonds (eg, the issuer's parent company).

As such, exemption from these withholding taxes is not available under Japanese domestic law, and generally depends upon tax treaties.

14 Tax-efficient extraction of profits

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

There is virtually no practically feasible way to repatriate profits out of Japan completely tax-free.

There is a *tokumei kumiai* (TK) arrangement, which is a contractual arrangement under Japanese commercial law between a TK operator and a TK investor, where the TK operator will distribute a certain portion of the profits earned by it to the TK investor in accordance with the profit-distribution ratio agreed upon under the TK agreement.

Where the TK investor is a foreign company, the profit distribution by the Japanese TK operator is deductible for its Japanese corporate income tax purposes, and while the profit distribution is subject to 20 per cent withholding tax, some tax treaties (eg, one with Ireland) exempt such withholding tax by virtue of the 'other income' provision.

As such, technically, it is possible to repatriate profits out of Japan on a completely tax-free basis, by entering into the TK agreement between the target company (as the TK operator) and the foreign financier (as the TK investor).

However, the TK arrangement has been subject to close scrutiny and challenge by the Japanese Tax Authority (eg, by way of denying the deduction of the Japanese TK operator, or finding a permanent establishment of the foreign TK investor), and practitioners are generally hesitant to use that structure because of the risk of disallowance.

Other structures included using tax-qualified Eurobonds (as mentioned in question 13) where the amount of interest was to be calculated by reference to the profits of the issuer (by doing so, the profit-linked interest was deductible and no withholding tax applied to the interest). However, this structure was virtually eliminated by a recent tax law reform that imposed withholding tax on interest on such profit-linked Eurobonds (although the interest deduction was not expressly denied).

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?

Sale of shares of the target company and sale of the business assets of the target company are both common. The structure is in many cases determined by legal considerations depending on the circumstances of the individual deals.

In either case, the seller that is a Japanese corporation will be subject to Japanese income taxation at the effective rate of 40 to 41 per cent (national and local taxes) upon the net gains arising from the sale.

However, if such disposal is structured as a tax-qualified reorganisation (which should be rare, as discussed above), there would be no immediate taxation upon the seller and the taxation would be deferred.

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?

In general, a foreign shareholder of the Japanese target company having no PE in Japan will not be subject to Japanese taxation on the capital gains arising from the sale of shares of the Japanese target company.

However, the foreign shareholder is subject to Japanese taxation on the capital gains, if the foreign shareholder, together with related persons (its affiliates and related parties etc) as defined in Japanese tax laws and partnerships in which the foreign shareholder is directly or indirectly a certain partner: (i) owns or owned 25 per cent or more of the total shares of the Japanese target company at any time during a period of three years on or before the end of the fiscal period of the foreign shareholder in which the sale of the target shares took place; and (ii) sells 5 per cent or more of the total shares of the Japanese target company in that fiscal period. This exceptional rule is commonly referred to as the '25/5 rule' in practice.

It is common in practice to structure the offshore ownership to avoid this '25/5 rule' so as to avoid capital gains taxation in Japan in the event of the exit from the investment.

In addition, in the case where the Japanese target company is a so-called real estate holding company (ie, if, in general, at least 50 per cent of the total assets of that company consist in real estate located in Japan), special rules apply so that more than 2 per cent (if that company is not publicly listed) or more than 5 per cent (if that company is publicly listed) ownership by the foreign shareholder will trigger Japanese capital gains taxation. A typical example of this includes a Japanese REIT.

In each case, the tax rate is in general 30 per cent on the net capital gains.

These domestic tax law consequences, however, may be amended by the capital gains clause of the applicable tax treaty.

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?

Tax-free or deferral treatment is available if the disposal is structured as a tax-qualified reorganisation.

However, in the case of a disposal or acquisition (rather than a business combination or integration) between unrelated third parties, it is generally difficult to satisfy the requirements for a tax-qualified reorganisation.

NAGASHIMA OHNO & TSUNEMATSU

Yushi Hegawa

yushi_hegawa@noandt.com

Kioicho Bldg, 3-12 Kioicho
Chiyoda-ku
Tokyo 102-0094
Japan

Tel: +81 3 3511 6184
Fax: +81 3 5213 2284
www.noandt.com/en



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