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KPMG INTERNATIONAL

Taxation of Cross-Border Mergers and Acquisitions

Kuwait

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Kuwait

Introduction

Mergers and acquisitions (M&A) are less common in Kuwait than in other Gulf Cooperation Council (GCC) countries. Most expansions into Kuwait by foreign entities are achieved by establishing a limited liability company or through a sponsorship arrangement.

Recent developments

- The tax liability of foreign companies investing in Kuwait for fiscal years commencing after 3 February 2008 is set by the Tax Law No.2 of 2008 at a 15 percent flat rate on the net taxable income. This replaced a range of rates from 0 percent to 55 percent under the Amiri Decree No. 3 of 1955, which applied to fiscal years commenced before 3 February 2008.
- Gains derived by a foreign company on the disposal of assets, including conveyance of title to a third party, are taxable under the Tax Law No.2 of 2008 at a rate of 15 percent.
- Cash dividends received by any foreign entity as a result of investment in the Kuwait Stock Exchange (KSE) are subject to 15 percent tax. However, capital gains derived by a foreign company from the mere trading in shares listed on the KSE are exempt from tax. Custodians and fund managers managing portfolios for investees are required to deduct 15 percent tax on such cash dividends.
- According to the Tax Law, tax losses for a financial year can be carried forward for 3 years. Under the Amiri Decree No. 3 of 1955, it was possible to carry forward tax losses for unlimited years.

Asset purchase or share purchase

An acquisition may take the form of a purchase of assets or a purchase of shares.

Purchase of assets

Purchase price

For tax purposes, it is necessary to allocate the total consideration given for the purchases of assets. It is advisable for the purchase agreement to specify the allocation of consideration to the acquired assets, based on current market prices. Allocation of purchase consideration is needed both for claiming tax depreciation and determining goodwill.

Goodwill

Amortization of goodwill is not allowed for tax purposes, under the Tax Law No. 2 of 2008 and related circulars.

Depreciation

Depreciation is normally allowed on the cost of assets acquired at rates prescribed under Kuwaiti tax laws. When assets are transferred between related parties from abroad, the depreciable cost to the acquirer is limited to the allowable cost of the asset to the purchaser.

Tax attributes

Under the tax law, the right to adjust or carry forward tax losses ceases to exist in the following cases:

- liquidation of the incorporated body
- change of the legal status of the incorporated body or its expiry
- merger of the incorporated body with another incorporated body.

Value added tax

Currently, value added tax (VAT) is not levied in Kuwait.

Transfer taxes

Stamp duty and stamp duty land tax are not levied in Kuwait.

Purchase of shares

Tax indemnities and warranties

In negotiated acquisitions, it is usual for the purchaser to request, and for the vendor to provide, indemnities or warranties, as to any of undisclosed tax liabilities of the target. In practice, the Kuwaiti tax authorities do not deem the acquirer liable for taxes due from the vendor.

Tax losses

The acquirer does not derive any potential tax benefit from the target company's pre-acquisition losses because the target's pre-acquisition tax losses cannot be transferred.

Pre-sale dividend

Gains earned by a foreign company from trading on the Kuwait Stock Exchange (KSE) are exempt and cash dividends earned

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from investment in KSE stocks, directly or through investment trusts and managed funds, are subject to 15 percent tax. A seller may prefer to realize the gain on investment as income by means of a pre-sale dividend. However, since any pre-sale dividend earned by foreign entities is also subject to 15 percent tax, each transaction should be structured according to other considerations.

Tax clearances

While companies incorporated in Kuwait are not subject to corporate income tax, the tax authorities do not issue tax clearance in advance for Kuwaiti companies until all foreign shareholders (if any) of the Kuwaiti company have obtained their respective tax clearance certificates.

Choice of acquisition vehicle

The Commercial Companies Law of 1960, as amended, is relevant when considering a merger or acquisition in Kuwait. Mergers can take place in one of the following two ways:

- dissolving one or more companies and transferring the assets and liabilities to another existing company
- dissolving two or more companies and establishing a new company by transferring the assets and liabilities of the dissolved companies to the new company.

In Kuwait, most acquisitions are completed through the purchase of shares in the target company. The consideration given is normally cash, shares or a combination of both.

Local branch

The Commercial Companies Law of 1960, as amended, does not permit foreign companies to establish a registered branch office in Kuwait. Branch operations may be carried out by a foreign entity through the sponsorship arrangement.

Joint venture

Under the Commercial Companies Law of 1960, as amended, foreign entities can carry out business in joint ventures with Kuwaiti entities either under the trade license and sponsorship of the venture's Kuwaiti member or in a joint venture with other foreign entities by appointing a Kuwaiti sponsor/agent.

Joint ventures with limited liability companies and Kuwaiti shareholding companies (KSC) require a minimum 51 percent of Kuwaiti shareholding.

Choice of acquisition funding

Interest is a tax-deductible expense under certain circumstances, whereas dividends are not tax-deductible.

There are no thin capitalization rules in Kuwaiti tax law. Interest paid to banks on the purchase of assets generally can be capitalized as part of the asset cost. Interest incurred on share purchases is not allowed as a deductible expense. There are no foreign currency restrictions in Kuwait.

Deductibility of interest

Financial charges paid locally on bank facilities for capital expenditure can be capitalized and added to the cost of the asset. Interest paid to a local bank is deductible where the loan is used for working capital requirements. Interest paid by a foreign entity operating in Kuwait in respect of its current account with its head office is not deductible for tax purposes.

Withholding tax on debt and methods to reduce or eliminate it

There is no withholding tax in Kuwait. However, compliance with the law is enforced by the Ministry of Finance through Ministerial Order No. 44 of 1985 and article 16,37 and 39 of the executive Bylaw of Law No. 2 of 2008. Contract owners are required to retain 5 percent tax from contractor and only to release it on the provision of a tax clearance certificate. The 15 percent tax rate on the net taxable profits may be reduced to a lower rate under a tax treaty.

Other considerations

Transfer pricing

There are no specific transfer pricing regulations in Kuwait. However, the tax authorities deem certain percentages of the cost of the equipment or services rendered outside Kuwait as inadmissible. The percentage disallowance depends on the nature of relationship between the foreign company and the purchaser. Similarly, interest charged by the head office for its current account is not allowable for tax purposes.

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Kuwait – Withholding tax rates

This table sets out reduced WHT rates that may be available for various types of payments to non-residents under Kuwait's tax treaties. This table is based on information available up to 1 July 2013.

Source: *International Bureau of Fiscal Documentation, 2014*

	Dividends		Interest (%)	Royalties (%)
	Individuals, companies (%)	Qualifying companies (%)		
Domestic rates				
Companies:	0/15	0/15	N/A	N/A
Individuals:	N/A	N/A	N/A	N/A
Treaty rates				
Treaty with:				
Austria	0	0	N/A	N/A
Belarus	5	5	N/A	N/A
Belgium	10	10	N/A	N/A
Brunei	0	0	N/A	N/A
Bulgaria	5	0[1]	N/A	N/A
Canada	15	5	N/A	N/A
China (People's Rep.)	5	0[2]	N/A	N/A
Croatia	0	0	N/A	N/A
Cyprus	10	10	N/A	N/A
Czech Rep.	5	0[3]	N/A	N/A
Egypt	10	10	N/A	N/A
Ethiopia	0	0	N/A	N/A
France	0	0	N/A	N/A
Germany	15	5	N/A	N/A
Greece	5	0[4]	N/A	N/A
Hong Kong	5	0/5[5]	N/A	N/A
Hungary	0	0	N/A	N/A
India	10	0	N/A	N/A
Indonesia	10	0	N/A	N/A

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	Dividends		Interest (%)	Royalties (%)
	Individuals, companies (%)	Qualifying companies (%)		
Italy	–[6]	5	N/A	N/A
Japan	10	5	N/A	N/A
Jordan	10	5	N/A	N/A
Korea (Rep.)	5	5	N/A	N/A
Latvia	5	0	N/A	N/A
Lebanon	0	0	N/A	N/A
Malta	0	0	N/A	N/A
Malaysia	–	–	N/A	N/A
Mauritius	0	0	N/A	N/A
Mexico	0	0	N/A	N/A
Moldova	5	5[7]	N/A	N/A
Mongolia	5	5	N/A	N/A
Morocco	10	5/2.5[8]	N/A	N/A
Netherlands	10	0	N/A	N/A
Pakistan	10	10	N/A	N/A
Poland	5	0	N/A	N/A
Russia	5	0	N/A	N/A
Romania	1	1	N/A	N/A
Serbia and Montenegro	10	5	N/A	N/A
Singapore	0	0	N/A	N/A
Slovenia	5	5	N/A	N/A
South Africa	0	0	N/A	N/A
Spain	5	0	N/A	N/A
Sri Lanka	10	5[9]	N/A	N/A
Sudan	5	0/5[10]	N/A	N/A
Switzerland	15	15	N/A	N/A
Syria	0	0	N/A	N/A
Thailand	10	10	N/A	N/A
Tunisia	10	0	N/A	N/A

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	Dividends		Interest (%)	Royalties (%)
	Individuals, companies (%)	Qualifying companies (%)		
Turkey	–	–	N/A	N/A
United Kingdom	15	5	N/A	N/A
Ukraine	5	0	N/A	N/A
Uzbekistan	10	5	N/A	N/A
Venezuela	10	5	N/A	N/A

Notes:

1. The 0 percent rate applies if the beneficial owner is the government of the other contracting state or any governmental institution.
2. Dividends paid to governments or government entities including companies owned up to at least 20 percent by the government are exempt from tax.
3. Dividends paid to governments, political subdivisions, local authorities, central banks, government entities or financial institutions (as may be agreed) including companies owned up to at least 25 percent by the government or any of the other entities mentioned above are exempt from tax.
4. Dividends paid to governments, political subdivisions, local authorities, central banks, government entities or financial institutions, etc. are exempt.
5. Dividends are exempt from tax if paid to the government of a contracting state or any of its institutions or other entity wholly owned directly by the government of that state.
6. The domestic rate applies. There is no limitation under the treaty.
7. Dividends are exempt from tax if paid to the government of a contracting state or an institution or entity thereof, including entities whose capital is owned by the governments of that state and other states, and to companies whose capital is owned by the government of a contracting state and the nationals of that state who are resident therein, provided that the share of the government is at least 25 percent.
8. Dividends paid to governments or government entities are subject to 2.5 percent withholding tax.
9. The 5 percent rate applies when dividends are paid to the government or any governmental institution or to a company which is a resident of the other contracting state and is controlled by the government or governmental institutions.
10. Dividends paid to (i) governments or government entities or (ii) companies of which 49 percent or more of the capital is owned by the government or government entities, are exempt from tax.

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KPMG in Kuwait

Zubair Patel
KPMG Safi Al-Mutawa & Partners Al Hamra Tower
25th Floor
Abdulaziz Al Saqr Street P.O. Box 24
Safat 13001 Kuwait

T: +965 222 87 531
E: zpatel@kpmg.com

kpmg.com

kpmg.com/socialmedia

kpmg.com/app

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