



# Taxation of cross-border mergers and acquisitions

**Mexico**

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# Mexico

## Introduction

Foreign investment in Mexico by multinationals has substantially increased over the past decade, thanks partly to the extensive network of tax and trade agreements concluded, particularly in recent years, with Mexico's most important financial and trading partners. These include the United States (US), Canada, some Central and South American countries, the European Union (EU) and some Asian countries. The main purposes of these agreements are the elimination of double taxation on income and capital, and of custom duties in international trade.

The devaluation of the Mexican peso against the US dollar along with regulatory changes in the energy and telecommunication sectors are fuelling cross-border merger and acquisition (M&A) activity led by foreign private equity firms and multinational companies. For all these reasons, new investment by multinationals expanding their operations in Mexico is expected to continue to grow strongly over the next few years.

This report discusses the main issues that should be considered by companies seeking tax-efficient structures in Mexico.

## Recent developments

As part of a major 2016 tax reform and additional reforms for the energy sector, the following important changes were introduced.

### Thin capitalization for the electricity industry

For purposes of the thin capitalization provisions, which restrict the deduction of interest on debt with non-resident related parties, debt obtained in order to invest in infrastructure for electrical power generation is excluded from the thin capitalization calculation.

### New information tax returns for transfer pricing

In the context of base erosion and profit shifting (BEPS), there are proposals that would expand Mexico's transfer pricing disclosure requirements. In particular, a measure would require certain taxpayers (as identified pursuant to Article 32-H) that engage in transactions with related parties to submit to the tax authorities certain country-by-country information about the taxation of their business transactions. In addition to a transfer pricing study, taxpayers with income higher than 644.6 million Mexican pesos (MXN) must file informative tax statements in relation to their related parties.

### Common Reporting Standard

In order to meet its international commitments to tackle BEPS, Mexico adopted the 15 July 2014 proposal of the Organisation for Economic Co-operation and Development (OECD) that would require financial institutions to automatically report information under the Common Reporting Standard (see article 32-B of the Mexican Federal Fiscal Code — MFFC). This new article establishes, among other things, the terms and conditions that financial institutions should adopt to meet the new standard and the sanctions applicable for non-compliance.

### Specific changes related to the energy sector

Secondary legislation to the Energy Reform, which entered into force on 1 January 2015 includes a new Hydrocarbons Income Act (HIA). The main provisions of the HIA are summarized as follows:

- The objective of the legislation is to establish a regime for income from fees, royalties, bonuses and contractual contributions that the Mexican state will receive from private companies carrying out extraction and exploration activities of hydrocarbons through government contracts or through assignments. Such companies are also required to pay income tax.
- For income tax purposes, instead of applying the normal tax depreciation rates for investments in certain

depreciable fixed assets, the following tax depreciation rates are to be used:

- 100 percent for investments made for exploration, secondary recovery and improvement, and non-capitalized maintenance
- 25 percent annually for investments made for the development and exploitation of oil and natural gas deposits
- 10 percent annually for investments in storage infrastructure and essential transportation assets, such as oil and gas pipelines, terminals, storage transport and tanks.
- The OECD transfer pricing guidelines are applicable to contractors carrying out activities with related parties, such as the sale or commercialization of hydrocarbons and the procurement of materials, supplies or services.
- Assignors selling oil or natural gas to related parties or incurring costs, expenses or investments through operations with related parties must use prices or consideration that independent parties would agree to in comparable transactions, and they must apply the transfer pricing provisions of the income tax legislation. The values used for sales of oil and gas to related parties must be determined using the comparable uncontrolled price method.
- A 0 percent value added tax (VAT) rate will apply to activities established in certain contracts.
- Tax losses may be carried forward for up to 15 tax years for taxpayers carrying out activities in marine regions with a water depth of more than 500 meters.
- Non-residents carrying out any of the activities regulated by the HIA within Mexican territory or the Mexican exclusive economic zone are deemed to have a permanent establishment in Mexico when such activities are carried out for a period that exceeds 30 days in any 12-month period. Activities carried out by a related party of a non-resident are included in the determination of the 30-day period, provided the activities are identical, similar or part of the same project.
- Wages and salaries paid by non-residents (where there is no permanent establishment in Mexico or no salaries and wages connected to such permanent establishment) to non-resident employees for work related to HIA-regulated activities of contractors or assignors are subject to Mexican income tax, provided the activities are carried out within Mexican territory or the Mexican economic exclusive zone for a period that exceeds 30 days in any 12-month period.

## Asset purchase or share purchase

An acquisition in Mexico can take the form of an asset deal or a share deal.

According to the Mexican tax rules, on a business acquisition, the vendor and purchaser share jointly in liabilities incurred by the business during the 5 years leading up to the acquisition. Mexican laws do not define the term 'business'. According to the tax authorities, a sale of a business occurs when a company sells or otherwise disposes of the assets and liabilities that were used to develop the core business of a company. Another indication that a transfer of a business has occurred is the simultaneous transfer of employees to the company acquiring the assets and liabilities. This joint liability is limited to the purchase price paid for the assets.

If the acquisition of assets is properly planned and reviewed by tax and legal advisors, the transfer of a potential tax risk can be mitigated. By contrast, on a purchase of shares, the historical liabilities remain with the company acquired. Some of the tax considerations relevant to each method are discussed later in the report, and their respective advantages are summarized at the end of the report.

### Purchase of assets

An acquisition of assets increases the cost of the transaction, because the transaction is normally subject to VAT. When the purchaser is a Mexican resident, this additional cost may be refunded. In addition, tax for the transfer of real estate property may apply. From a tax perspective, however, the acquisition of assets preserves the tax basis for the purchaser and may result in a reduced tax basis for corporate income tax purposes.

### Purchase price

For tax purposes, it is necessary to apportion the total consideration among the assets acquired. It is generally advisable for the purchase agreement to specify the allocation, which is normally accepted for tax purposes provided it is commercially justifiable. The Mexican rules are very formal and, in addition to the contract, require proper invoices supporting the acquisition of assets and detailing the amount of the VAT triggered on the acquisition.

### Goodwill

Goodwill purchased from a third party is not deductible for tax purposes in Mexico. According to the criteria used by the tax authorities, goodwill is the excess paid for the assets over their real value, nominal value or fair market value.

## Depreciation

For tax purposes, depreciation of acquired tangible and intangible assets must employ the straight-line depreciation method at the maximum rates specified for each asset in the Mexican income tax law. Among others, applicable rates are as follows:

- 5 percent for buildings
- 10 percent for office furniture and equipment
- 25 percent for automobiles, buses, trucks, tractors and trailers
- 30 percent for personal desktop or portable computers, servers, printers, optic readers, digitalizers and computer networking hubs.

There are special rules for cars and certain intangible assets, such as royalties.

## Tax attributes

In the case of a sale of assets in Mexico, the tax attributes of the company (i.e. tax losses and tax credits) are not transferred to the acquirer of the assets.

## Value added tax

As previously mentioned, the purchase of assets (goods) is subject to VAT. The general VAT rate is 16 percent.

## Purchase of shares

The purchase of a target company's shares does not represent a deduction for corporate income tax. In a share deal, no VAT is applicable.

## Tax indemnities and warranties

In a share acquisition, the purchaser takes over the target company together with all related liabilities, including contingent liabilities. Therefore, the purchaser normally requires more extensive indemnities and warranties than in the case of an asset acquisition. The alternative approach, to inject the seller's business into a newly formed subsidiary, does not work in most cases because of the joint tax liability for the transfer of a business under Mexican law.

A full due diligence investigation is essential in a share deal. When significant sums are identified as potential tax contingencies as a result of the due diligence exercise, it is common for the purchaser to require the establishment of an escrow amount from which the seller can draw on an agreed schedule.

The Mexican tax authorities are entitled to examine and assess additional taxes for any year, at any time within a 5-year period commencing on the day after taxes were due or tax returns were filed, including amended returns. If the

taxpayer has deducted tax losses from taxable profits, the tax authorities are entitled to examine and assess the information relating to the losses, regardless of how they were generated, for up to 5 years after the amortization of the loss.

## Tax losses

After a change in control, the losses of an entity acquired can only be used against income from the same line of business that generated the losses. The carry forward period is 10 years.

## Crystallization of tax charges

Since tax authorities may claim joint liability of the purchaser for unpaid taxes in the last 5 years, it is essential to obtain an appropriate indemnity from the seller in addition to the escrow amount.

## Pre-sale dividend

In certain circumstances, the seller may prefer to realize part of the value of their investment as income by means of a pre-sale dividend. This is common in Mexico because such pre-sale dividends are not usually subject to corporate income tax where the company retains sufficient funds in its 'pre-2014 net after-tax profits account' (CUFIN, by its Spanish acronym). A case-by-case analysis must be carried out when the dividend payment exceeds the amount of the CUFIN. Under the 2014 tax reform, individuals residing in Mexico and non-resident persons who receive dividends or profits generated in 2014 and after must pay an additional 10 percent tax. This tax is paid through withholding by the legal entity that distributes or pays the dividends.

## Choice of acquisition vehicle

Several potential acquisition vehicles are available to a foreign purchaser, and tax factors often influence the choice. There is no capital duty in Mexico.

## Local holding company

A Mexican holding company is typically used where the purchaser wishes to carry out an asset deal. In a share deal, however, changes introduced in the 2014 tax reform have reduced the ability to push down debt to the Mexican holding vehicle.

## Foreign parent company

A foreign parent company is commonly used in a share deal. International corporations completing a stock or asset purchase through a foreign vehicle should evaluate:

- participation exemption regulations in foreign countries
- interest deduction in foreign countries
- goodwill deduction

- passive income accrual
- controlled foreign company (CFC) rules
- entity classification for foreign tax purposes
- exit strategies
- debt pushdown to Mexico.

Exit strategies that exempt Mexican corporate income tax withholding on any capital gain derived from the transfer of Mexican operations include:

- completing the transaction with a subsidiary in a country with which Mexico has signed a tax treaty providing exemption from capital gains tax on the sale of shares (e.g. France, Italy)
- setting up an intermediate holding company in a foreign country that can be sold, so that no transfer of Mexican shares occurs. In this case, the Mexican shares should not derive, directly or indirectly, more than 50 percent of their value from real property located in Mexico. If they do, the transfer is taxable in Mexico, unless the Belgium or Luxembourg treaty applies.

### Non-resident intermediate holding company

If the foreign country taxes capital gains and dividends received from overseas, an intermediate holding company resident in another territory could be used to defer this tax and perhaps take advantage of a more favorable tax treaty with Mexico. However, the purchaser should be aware that many Mexican treaties contain treaty-shopping provisions that may restrict the ability to structure a deal in a way designed solely to obtain tax benefits.

### Local branch

A branch it is not used as a vehicle of acquisition in Mexico due to several tax inefficiencies.

### Joint venture

A joint venture may be used for the acquisition. In Mexico, the joint venture is only available at the corporate level, with the joint venture partners holding shares in a Mexican company. Mexican rules do not distinguish between a joint venture vehicle and a Mexican holding company for tax purposes.

## Choice of acquisition funding

As of 2005, Mexican tax law applies thin capitalization rules such that interest paid to foreign related parties that results in indebtedness exceeding a ratio of 3:1 to their stockholders' equity is not deductible for corporate income tax purposes.

Foreign investment may be financed with debt or equity at the investor's discretion. Some issues that should be considered when evaluating the form of the investment are discussed below.

### Debt

The most important benefit of financing through debt instead of equity is the interest deductibility for corporate income tax purposes in Mexico.

Debt considerations for corporate income tax purposes include the following:

- Interest payments made on 'back-to-back loans', as defined under Mexican tax law, may be treated as dividend distributions.
- The Mexican borrower may be subject to inflationary income resulting from the loss on the purchase value or the Mexican currency.
- The Mexican borrower may deduct any foreign exchange losses on the principal and interest components.
- Transfer pricing rules apply. Any interest that exceeds arm's length interest in intercompany transactions is treated as a dividend distribution and is non-deductible.

### Deductibility of interest

Mexico's thin capitalization rules require taxpayers to maintain a debt-to-equity ratio of 3:1. The ratio includes all interest-bearing debt. The equity is determined according to Mexican generally accepted accounting principles (GAAP) and excludes the income or loss of the same year (e.g. equity is calculated as the sum of accounting capital at the beginning and end of the relevant year divided by two). Interest paid in excess of the ratio is disallowed for income tax purposes.

When such interest is paid to a lender abroad, such non-deductible interest is still subject to withholding tax (WHT).

Under Mexican domestic tax legislation, all taxpayers are required to price their transactions with related parties on an arm's length basis. When transactions are carried out with foreign-based related parties, taxpayers are also required to prepare and maintain documentation that supports the arm's length price by identifying related parties and disclosing information regarding the functions, risks and assets associated with each type of transaction performed with related parties.

## **Withholding tax on debt and methods to reduce or eliminate it**

Interest is considered to be Mexican source where the capital is placed or invested in Mexico or where the party paying the interest is a Mexican resident or a non-resident with a permanent establishment.

WHT rates applicable to interest paid vary depending on the foreign beneficiary, the borrower domiciled in Mexico and the purpose of the loan.

WHT rates are as follows:

- A 4.9 percent WHT rate may apply in the case of loans or other credit payable by Mexican financial institutions, as well as loans placed through banks in a country with which Mexico has a tax treaty.
- The WHT rate is 10 percent for finance entities owned by foreign governments and foreign banks, including foreign investment banks and non-bank banks, provided they are the effective beneficiaries of the interest and provided they submit to the Mexican tax authorities the information required under the general rules on financing granted to Mexican residents. Non-bank banks should also comply with the requirements established by the tax authorities relating to placement percentages and deposits received.
- The WHT rate is 21 percent for foreign suppliers who sell machinery and equipment forming part of the acquirer's fixed assets.
- The WHT rate is 21 percent for financing to acquire machinery and equipment and in general to supply working capital, provided these circumstances are mentioned in the agreement.
- The WHT rate is 35 percent for other interest (e.g. loans granted by foreign-related parties). This rate may increase to 40 percent as discussed below.

Payments of interest by a Mexican resident to a foreign related party subject to a preferential tax regime (tax haven) are subject to 40 percent WHT. Despite the above rates, tax treaty rates should be observed. As noted in the table at the end of this report, the highest tax treaty rates for general interest payments are 15 percent and 10 percent, depending on the terms negotiated with each country and whether the treaty includes a most-favored-nation clause.

Withholding is triggered when payment is made or when interest is due, whichever occurs first.

## **Checklist for debt funding**

- It is difficult to implement debt pushdown strategies in Mexico.
- To identify the optimal amount of debt to be allocated to Mexico, it is necessary to carry out projections for corporate income tax.
- The use of bank debt may avoid thin capitalization and transfer pricing problems, but back-to-back loan restrictions may apply.
- Maximum WHT applies on interest payments to non-Mexican entities unless a lower rate applies under a relevant tax treaty.

## **Equity**

When incorporating a new company, there is no capital duty in Mexico. However, Public Registry recording obligations may apply. According to Mexican income tax law, the income obtained by the corporation from capital increases is not taxable, but such increases of capital in Mexican or foreign currency must be reported with a detailed return filed within 15 days of the receipt of the capital. Transfers of goods to the capital of another company are taxed as sales, and corporate tax may be triggered on gains derived from the transfers.

No currency restrictions apply in Mexico, so capital contributions and repatriations can be achieved in foreign currency. However, from Mexican legal and tax standpoints, once the capital contribution in foreign currency is made, it is converted into Mexican currency. Therefore, if the Mexican currency suffers a substantial devaluation, the foreign investor may suffer a loss in foreign currency terms.

Capital repatriations in the form of share redemptions are not subject to exit capital duties and can be effected tax-free for the shareholder up to the amount of contributed capital per share. However, when a profit is determined from a capital redemption that exceeds the capital contributions account balance (CUCA by its Spanish acronym), the additional 10 percent tax applies where the profit was not generated before 1 January 2014.

In an alienation of shares or security instruments representing the ownership of property, the source of wealth is deemed to be located in Mexico where the issuing entity resides in the country or where more than half the accounting value of said shares or security instruments is derived directly or indirectly from real property located in the country. Income tax would be assessed at 25 percent on the gross amount without any deduction, or 35 percent on the gain. The latter treatment is

only applicable where certain requirements are met, such as where the non-resident (seller) has a representative in Mexico, the non-resident's income is not subject to a preferential tax regime, and the non-resident files an audit prepared by a certified public accountant (CPA) with the tax authorities. In the case of a related-party transaction, the CPA must report the market value of the alienated shares in the audit. The purchaser must make the withholding if it is a resident or a non-resident with a permanent establishment in Mexico. Otherwise, the taxpayer must submit the applicable tax by a return filed with the authorized offices within 15 days of the receipt of the income.

According to Mexican tax provisions, a domestic merger may be carried out tax-free where the following conditions are met:

- The surviving company files a notice of the merger with the tax authorities no later than 1 month following the date on which the merger is approved by the shareholders.
- Following the merger, the surviving company continues to carry out the activities that it and the merging companies carried out before the merger for a period of at least 1 year following the date on which the merger was completed.
- The surviving company files all tax and information returns on behalf of the merging companies for the fiscal year in which the merger is completed, including payment of any tax liability at the date of the merger.
- Finally, reorganizations may be carried out on a tax-free basis in certain cases; however, further analysis of the details of the reorganization is required.

## Other considerations

### Concerns of the seller

The tax position of the seller can significantly influence the results of the transaction. As discussed previously, in certain circumstances, the seller may prefer to realize part of the value of their investment as income by means of a pre-sale dividend, if the company has a sufficient balance in its pre-2014 net after-tax earnings account.

Many companies in Mexico are family businesses. The disposal of the shares of such businesses is commonly taxed at an individual rather than a corporate level. This is important because the seller generally looks to pay reduced

taxes on the transaction and may propose arrangements that could cause tax contingencies for the company being acquired. Therefore, it is advisable at the outset of the process to identify the transaction structure proposed by the seller in order to evaluate its tax implications and reduce potential delays.

### Company law and accounting

Legal entities may be organized in various forms under Mexican law:

- *Sociedad en nombre colectivo* — the usual general partnership form
- *Sociedad en comandita simple* — a limited partnership with some general partners (having unlimited liability) and some limited liability partners; its capital is represented by social interests
- *Sociedad en comandita por acciones* — a limited liability stock partnership with some general partners (having unlimited liability) and some limited liability partners; its capital is represented by shares
- *Sociedad de Responsabilidad Limitada* (S. de R.L.) — a partnership with limited liability for all its members; its capital is represented by social interests
- *Sociedad Anónima* (S.A.) — an entity similar to a US corporation in which all members have limited liability; its capital is represented by common shares
- *Sociedad Anónima Promotora de Inversión* (SAPI) — a new type of entity for investors organized in general terms as an S.A. but exempt from certain obligations, which gives shareholders additional rights; recommended for joint venture projects and entities that may become publicly listed companies.

General partnerships lack limited liability, so foreign investors do not often use them. Although an S de R.L. is treated in the same way as any other commercial entity for Mexican tax purposes, it may be treated for US tax purposes as an eligible entity for partnership status; as such, its US partners, whether corporate or individual, benefit from the pass-through taxation rules.

The S.A. is the most common entity used by foreign investors in Mexico, and discussions in the rest of this report focus on the S.A. Both an S.A. and an S. de R.L. may be incorporated on the variable capital (*de capital variable*) model, which enables the capital to be increased or

decreased by simple shareholders' or partners' resolution, without further formalities. The shareholders may extract their contributions to the variable capital without any special formalities, but they cannot withdraw their shares of the fixed capital, which must be maintained at the minimum mandatory level.

M&A in Mexico should be accounted for according to the Mexican financial reporting standards (FRS), which generally are consistent with International Financial Reporting Standards (IFRS). There are some differences, however, which include the following:

- Under IFRS, if the value of net assets acquired exceeds consideration and any retained minority interest, a gain is recognized. Mexican FRS does not allow the recognition of any gain until intangible and fixed assets values are adjusted to zero.
- Under Mexican FRS, the vendor's contingent liabilities are recognized when payment is deemed to be probable and the amount can be reasonably estimated. Under IFRS, the vendor's contingent liabilities are recognized if fair value can be reasonably estimated.
- Under IFRS, when an entity obtains control through a series of acquisitions (step acquisitions), it should revalue any previously held equity interests at its acquisition-date fair value and record any gain or loss through the operating statement. New guidance for Mexican FRS does not allow the recognition of any gain or loss when control is obtained through step acquisitions.

### **New grouping regime**

If the purchaser owns other Mexican companies, the target company can be included in the Mexican tax group if certain requirements are met. Among others, the Mexican holding company should own, directly or indirectly, more than 80 percent of the voting shares of the target company. In no case can more than 80 percent of the Mexican holding company's voting shares be held by another or other companies, unless the latter are residents of a country with which Mexico has a treaty that includes a broad information exchange clause.

The new grouping regime does not allow the inclusion of entities with non-operating losses, and the tax deferment period is reduced to 3 years (from 5 years).

### **Transfer pricing**

Mexico's income tax law requires all taxpayers that execute transactions with related parties to undertake a transfer pricing study to demonstrate that their transfer prices honor the arm's length principle.

### **Dual residency**

There are no advantages under Mexican tax law for a dual resident company.

### **Foreign investments of a local target company**

Mexico, in common with other countries, has established anti-tax haven provisions to close a loophole that both Mexican and foreign investors had used to allocate income to tax havens and so reduce their Mexican taxable income. The legislation is designed to prevent Mexican taxpayers from deferring Mexican income taxes by using preferential tax regimes or tax havens. Currently, the anti-tax haven provisions encompass all types of investments by a Mexican resident, both direct and indirect.

The definition of tax haven or preferential tax regime has been amended to include any regime where taxes paid are less than 75 percent of the amount that would be paid in Mexico. Income accrual does not apply where:

- income is derived from activities other than interest, dividends, royalties, gains on the sale of shares, real property or the temporary use or enjoyment of real property, and
- the country in which the investment is located has a current treaty for the broad exchange of information with Mexico.

Income from a foreign source that is subject to a WHT reduction or exemption under a tax treaty executed with Mexico is disregarded for income tax purposes. This treatment does not apply to legal entities incorporated abroad that are not taxpayers or that are deemed transparent for tax purposes.

Direct and indirect Mexican investors in preferential tax regimes are obliged to recognize the income on a current basis and file an annual information return on their business and their investment activities in such jurisdictions.

### **Obtaining tax treaty relief**

In the case of transactions with related parties, the tax authority is now authorized to require formal documentation from the non-resident to show that there is double taxation on the income for which a treaty benefit is being applied. The documentation must specify the applicable provisions of foreign law and include any other documentation that may be deemed necessary.

## Comparison of asset and share purchases

### Advantages of an asset purchase

- Any VAT paid may be refunded if the purchaser is a Mexican resident.
- A step-up in the tax basis of fixed assets and intangible property is allowed for income tax purposes.
- There is no transfer of seller's liabilities, except in the case of an acquisition of the overall trade or business. However, strategies are available that avoid this contingency.
- The vehicle can be properly designed from the beginning, including exit strategies.

### Disadvantages of an asset purchase

- Time required for setting up the vehicle to complete the asset purchase.
- Employees transferred typically demand seniority recognition from the new employer unless they receive a severance payment from the old employer.
- Property transfer taxes may apply.
- Goodwill paid is not tax-deductible.
- VAT may increase the cost of the transaction in certain circumstances.

### Advantages of a share purchase

- Less time-consuming process.
- Usually more attractive to the seller, both commercially and from a tax perspective (because the disposal may be exempt), so the price may be lower.
- Transfer of tax loss carry forwards and other tax credits is allowed.
- No real estate transfer tax.
- The acquisition of shares is not subject to VAT.

### Disadvantages of a share purchase

- Buyer effectively becomes liable for any claims or previous liabilities of the entity, including tax (i.e. there is a joint liability for unpaid taxes over the previous 5 years).
- No income tax deduction for the purchase price.
- Deferred tax liabilities are acquired.
- Possibly more difficult to finance tax-efficiently.



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