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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?

Leaving aside non-tax considerations, the differences lie in the ability to achieve a step-up in basis in the acquired assets, in the availability of the tax losses of the seller and in the rate of the transfer tax. If an asset deal allows a tax-free step-up, tax losses of the French corporate seller (if any) are not available to the buyer but may be offset against the seller's capital gain and the transaction will generally trigger a 5 per cent transfer tax (see question 6). With a stock deal, the asset basis is not stepped up but tax losses of the target company may be transferred to the buyer (see question 7) and the transfer tax is generally capped at €5,000 (unless the target company qualifies as a real estate holding entity – see question 16).

Moreover, a French corporate seller is likely to privilege a stock deal, since it may benefit from the participation exemption regime on substantial shareholdings, which does not prevent the deduction of the financing costs (interest).

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?

Asset deals only allow a step-up in basis in the business assets of the target company.

Intangibles could be depreciated in specific circumstances. Intangibles may be depreciated only if their contribution to the business is expected to phase out after a certain period. For instance, patents, designs and know-how are depreciable, owing to the limited duration of their legal protection. Trademarks, which usually benefit from an indefinite protection, cannot be depreciated, unless it can be determined that the positive impact of the trademark on the company's business is limited in time (eg, in the pharmaceutical industry). Depending on the industry, specific rules can apply. Depreciation of the goodwill is furthermore subject to restrictive conditions. Only items inherent to the goodwill, which are distinct from the clientele, may be depreciated, if they can be itemised and if their contribution to the business is expected to lapse after a certain period.

Under a stock deal, there is generally no opportunity for additional depreciation on intangibles with an increased basis. In real estate deals, however, where the purchase of the real estate is realised via a flow-through entity (such as a real estate partnership), the buyer may step up the tax basis of the underlying property tax free in certain cases.

Substantial shareholdings eligible for the participation exemption on capital gains may not be depreciated.

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?

If the acquisition is debt-financed and leveraged in France, a French holding company is generally necessary. For a French holding company to credit its interest expenses against the operating profits of the target company, the two companies should file a consolidated tax return. Tax grouping requires a minimum, direct or indirect (ie, via other members of the tax group), ownership of 95 per cent of the target company. Such minimum shareholding can be achieved via one or several EU subsidiaries, which are themselves controlled up to at least 95 per cent. Distributions between group companies are generally tax free.

An anti-debt pushdown rule restricts, for a nine-year period, the deduction of interest incurred in connection with the acquisition from a controlling shareholder or a company controlled by this shareholder of a target company, which will become a member of the buyer's tax group or which will be merged into a buyer's tax group member. Some limited exceptions exist. For instance, the limitation may not apply regarding shares of a target company acquired from a third party by controlling shareholders of the French tax group prior to being sold to a French consolidated company. This may be the case where a public offer is launched by the controlling shareholders. The period from the initial acquisition to the transfer to the French consolidated company should not be longer than what is necessary to complete the two transactions.

Tax, financial and legal consolidation may be achieved through a merger between the holding company and the target company. Mergers qualify as tax-free reorganisations. However, such a merger should be implemented with caution since the French tax authorities may disallow interest, should they consider the timing of the merger as abusive.

Besides, as regards LBO acquisitions, the French tax authorities have extended the scope of thin capitalisation rules to such operations (see question 8).

Aside from the consolidation rules, the French holding company's regime is attractive, given its 95 per cent exemption of dividends and capital gains realised in connection with substantial shareholdings, either French or foreign (subject to a 5 per cent ownership or more, for at least two years).

4 Company mergers and share exchanges

Are company mergers or share exchanges common forms of acquisition?

Generally, mergers are not a usual route for structuring an acquisition, despite the tax deferral they may allow. The lack of flexibility of applicable corporate and tax regulation and the participation exemption on substantial shareholdings are the main cause thereof. For instance, reverse triangular mergers are not possible under French corporate law. Indeed, the former shareholders of the target company, which merged into the subsidiary of the acquiring company, may not receive stock of the acquiring company as consideration for the merger. Only stock of its subsidiary can be issued and remitted. The same rule applies in the case of partial transfer of assets. Moreover, in this latter case, the newly issued shares in the company recipient of the assets must be held for at least three years to achieve tax neutrality. In any event, the tax value of the assets is carried over.

Share-for-share exchanges may be carried out on a tax-neutral basis for the French seller (either corporate or individual). The value of the stock of the target company is carried over. Generally, share-for-share exchanges occur most often with publicly traded companies.

For French corporate sellers, share-for-share exchange transactions as a result of a public tender offer on a French or European stock exchange do not give rise to capital gains tax (CGT). The non-recognition treatment is automatic and non-elective. The tax value of the shares exchanged by the seller is carried over at its level only. The statute provides no guidelines on the nationality of the companies that issued the shares. It only requires that the transaction be carried out on a French or European stock exchange. Therefore, foreign companies should be eligible. There is no need for the shares to qualify as a substantial shareholding. In other situations, participation-exemption on substantial shareholdings may apply.

For French individual sellers, contribution of the shares to another company in exchange for newly issued shares by the recipient company does not trigger the taxation of the gain. The tax value of the contributed shares is carried over and taxation should arise (subject to the exclusion below) upon transfer of the shares received in exchange. The basis in the shares contributed to the recipient company is stepped-up and there is no holding requirement. An immediate sale of such shares by the recipient company could be challenged under the abuse of law theory, unless the proceeds are reinvested by the selling company. The recipient company may be established outside France, in Europe or in the US (among other jurisdictions). More generally, contributions to companies established in the EU or in a jurisdiction that has signed a double tax treaty with France providing for qualifying exchange of information, are tax neutral.

5 Tax benefits in issuing stock

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

There is no special tax benefit attached to a share-for-share deal between a foreign buyer and a French seller, other than the tax attributes of a stock deal (see question 1). The attributes of a debt financed acquisition do not apply at the level of the purchaser. Benefits are generally on the side of the French seller, which may claim rollover relief where exemption could not be achieved (see questions 4 and 17).

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?

Transfer tax is payable by the buyer, unless the parties agree otherwise. In case of non-payment, all parties are jointly and severably liable for the payment of the transfer tax.

Sale of assets, which generally characterises a transfer of goodwill as a whole (including customer lists, trademarks, licences and other intangibles), typically in an asset deal, triggers a 5 per cent transfer tax on the fraction of the purchase price, which exceeds €200,000 (and 3 per cent of the fraction from €23,000 to €200,000). Liabilities of the seller, which are assumed by the buyer, are also subject to the transfer tax. The same transfer tax applies to the transfer of isolated intangibles in the case of associated covert or overt transfer of clientele. To the extent that the assets constitute a business as a going concern, no VAT applies to the transfer and the VAT rights and the obligations of the seller are passed on to the buyer.

Sale of real estate is subject to a 5.09 per cent transfer tax or may give rise to VAT if the building was erected less than five years prior to the first sale.

Sale of stock triggers a 3 per cent transfer tax, capped at €5,000 per transaction. The transfer tax does not apply to sale of stock of listed companies where the transaction is not documented. With the sale of shares of partnerships, the cap does not apply.

Sale of stock in a real estate holding company, that is, an entity the assets of which consist, directly or indirectly, in more than 50 per cent of French real property, or rights relating thereto, is subject to a 5 per cent tax with no cap, regardless of whether the real property is used within the course of the trade or business of the company. French transfer duties are due even if the shares sold are those of a foreign company and are enacted by a deed executed abroad.

Finally, a remote tax on the acquisition and sale of securities on the French stock exchange gives rise to a stamp duty capped at €610 per transaction. Non-resident buyers are exempt.

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?

A change in control of the target company does not limit the availability of the tax losses. This is good news for the buyer, especially since tax losses may be carried forward indefinitely and backward over three years. For fiscal years from 2011, the carry-back of the NOLs shall be limited to one year and the carry-over shall be limited in amount (see 'Update and trends').

However, the activity generating the losses must be the same as that at the time the losses are used. Therefore, tax losses may no longer be available if the company goes through a significant change in its activity or changes its purpose. This could, for instance, occur if a new line of business is started and the existing one is dropped or if the nature of the activity is changed (for instance, from a manufacturing to a selling activity).

However, having the pre-existing and main activity becoming ancillary or ceasing temporarily may not automatically result in the 'extinction' of the tax losses.

Under the French tax consolidation regime (which requires an interest of 95 per cent or more), anti-debt pushdown provisions limit the use of net operating losses (NOLs) if they are incurred for the acquisition from a controlling shareholder (or from a seller controlled by the controlling shareholder) of an entity to be part of the tax group directly or indirectly (the limitation would also apply should the acquired entity collapse into a member of the tax group) (see question 3). Also, the exiting entity of a tax group cannot recover the tax losses it incurred during the tax grouping. An indemnity may be considered based on the tax consolidation agreement. In an acquisition of 95 per cent or more of a company that is a consolidating parent, its tax group would terminate and exit charges might be due unless they are neutralised by existing NOLs at the level of the consolidating parent. The excess NOLs would be available against the profit of pre-listed members of the newly formed tax group in proportion to the amount of these surviving losses of the total losses suffered by the tax group on a yearly basis. A seamless transition from one consolidation to the new consolidation occurs with no interruption despite the termination of the former group (on the closing of the financial year during which the event triggering the termination occurs). Comparable rules apply if the consolidating company is merged into a new one or is demerged (partially or totally). NOLs could be transferred in certain proportions and a prior ruling from the authorities may be necessary.

If some member companies are sold pursuant to the liquidation of the consolidating company within the course of insolvency proceedings, the exiting member of the group may recover its NOLs and capital losses incurred during the consolidation period. The recovering of the tax losses also applies if the company exits the group because it itself is subject to insolvency proceedings. As another incentive to promote the takeover of these distressed companies, they may set up a tax group as of the opening of the fiscal year during which they were sold, which increases the value of their NOLs.

In case all consolidated companies are merged into the consolidating entity, the NOLs of the group are transferred to the consolidating entity. If the later changes its activity, only the fraction of NOLs realised by the consolidating entity will become non-offsettable.

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?

An acquisition company may get relief for borrowings to acquire the target company (whether French or foreign) subject to the thin capitalisation rules – under the French Tax Code (FTC), section 212.

The limitation is extended to financing granted by affiliates; whether the affiliate is French or established abroad is immaterial.

It has recently been extended to loans granted by non-affiliates, the reimbursement of which is guaranteed by an affiliate. Certain exceptions exist however: loans granted under form of bonds issued within the framework of a public offer and loans granted in order to reimburse a previous loan, where such reimbursement becomes mandatory (inter alia under contractual provisions) due to the change of control of the debtor. Loans granted by non-affiliate and guaranteed exclusively by pledge of shares or receivables of the debtor are not aimed at by the thin-capitalisation limitation. Some exceptions may suit private equity structures, but not all, especially those involving the use of two entities established in Luxembourg.

Interest paid to third parties on a loan that is guaranteed by an affiliate does not come within the scope of the limitation.

First, the related-party interest may be disallowed if the agreed interest rate is higher than the average interest rate charged by French credit institutions on two-year or longer loans to corporations (3.82 per cent for the financial year ending 30 December 2010), unless the French indebted company can demonstrate that the terms of the related-party financing are arm's-length (ie, the same interest rate would have been charged by a bank in similar circumstances).

Once it successfully meets the first test (even partially), the French indebted company should survive a second filter.

Interest might be disqualified if it exceeds three thresholds: the interest multiplied by debt-to-equity ratio of 1.5:1, computed by reference to the net equity of the company and the amount of related party debt; 25 per cent of a pre-tax adjusted operating profit; and the interest received from related parties. The disqualified interest may be disallowed up to the amount of the interest in excess of the highest of one these three thresholds and only to the extent that it exceeds €150,000.

The disallowed interest can be carried forward within certain limits until used, with a reduction of 5 per cent each year applicable as from the second year of carry-forward.

The rule provides for another safe harbour aside from 1.5:1 debt equity safe harbour: the limitation does not apply if the French indebted company can demonstrate that the excess interest is attributed to debt, which does not represent leverage in excess of the level of third-party indebtedness of the worldwide group.

Banks and certain financial institutions are excluded from the scope of new thin capitalisation rules.

Excessive interest paid to a related or non-related party established in a low tax jurisdiction may be disallowed and treated as a deemed distribution, giving rise to a withholding tax (WHT) depending on the state of establishment.

Withholding tax on outbound interest is generally not an issue in France. Under domestic law, interest is generally paid free of WHT, except where paid in the newly introduced black list of non-cooperative states and territories, in which case a 50 per cent WHT applies (see question 13). In such case, restrictive conditions apply for the interest to be allowed.

Debt pushdown may be achieved in France subject to the thin capitalisation rules, limitation applicable to tax groups (see question 3) and general anti-abuse provisions.

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?

The documentation of the protections depends generally on the buyer. US buyers generally favour representations, warranties and indemnification, whereas UK buyers may prefer deeds of tax covenant. In any event, whether stock or assets are acquired, the protection intends to hold the buyer harmless against any tax and social tax liability relating to the period ending on and before the closing date. Should the target company be formerly part of a French tax group of the seller and have incurred NOLs, indemnification from the seller may be sought for the lost carry-forwards that are no longer available to the target company. Under the tax consolidation rules, NOLs incurred by the subsidiaries are automatically and irrevocably transferred to the consolidating company.

It results from case law that payments made by the seller under warranties or claims subsequent to the sale usually do not affect the capital gain previously computed (or the acquisition cost for the purchaser) but can be offset by the seller against taxable benefits of the financial year during which such payments occur. They will have to be added to the taxable profits of the purchaser. In cases where the clause in application of which a payment is made can be analysed as a clause allowing the reduction of the purchase price (the distinction with a warranty may not be simple), parties concerned can, by claim, inform the tax authorities of the price reduction and claim that the capital gain be reduced for the seller and the acquisition price be modified for the buyer.

Post-acquisition planning

10 Restructuring

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

Typical restructurings include debt pushdown. Also, post-acquisition restructuring may aim at optimising tax attributes of French companies that are part of the French group acquired. A careful conversion of the business into a supply chain type of business model, with limited functions and risks entities in France, may also, depending on the circumstances, significantly reduce the French tax bill.

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?

Tax free spin-offs could be carried out in France with and without the survival of the spun-off company. NOLs of the spun-off business may remain available against the profits of the recipient company subject to a ruling from the tax authorities and the application of the rollover relief regime.

A line of business or qualifying shareholdings of an existing company could be rolled down to a new company or an existing company and the shares issued to the contributing company by the recipient company could be distributed tax free to the shareholder of the French contributing company (FTC 115.2 spin-off). Shares must be distributed within one year of the hive-down and a prior ruling from the authorities is required. Shareholders should commit to hold the existing shares in the French distributing company and the distributed shares for at least three years.

A tax-free spin-off or division could also be carried out with no survival of the divided company (division). The lines of business (at least two) are contributed to (at least two) existing or newly incorporated companies in exchange for shares issued by the recipient companies to the former shareholders of the divided company. The tax-free treatment applies even if there is no exchange of shares, for example, where the recipient companies already own shares in the divided company. In the case of an exchange of shares, the former shareholders should receive shares in the recipient companies in the proportion of the shares formerly held in the divided company. The shareholders that took part in the decision-making process for the division must hold the shares received for at least three years. The holding requirement should cover at least 20 per cent of the shares. Divisions of holding companies are not eligible for tax-free treatment (contrary to an FTC 115.2 spin-off). A ruling from the authorities may be sought, should the transaction fail to meet the requisite test above (for example, pertaining to qualifying lines of business, holding requirements, etc).

In both cases, NOLs of the spun-off business may be available to the recipient companies subject to a prior ruling from the authorities. This ruling is automatically granted if the transaction is subject to the tax-free treatment; the transaction is not tax-driven; and the business that has generated the losses is carried on by the recipient company for at least three years. The use of the NOLs by the recipient company is subject to the activity test (see question 7). Spin-off may generally be carried out with minimal transfer tax.

12 Migration of residence

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

A transfer of the statutory seat of a French company to another jurisdiction is treated as a liquidation triggering CGT and WHT, unless the host country is an EU member state and the unrealised built-in and deferred gains mainly on assets remain taxable in France (with the attribution of the related assets to a French permanent establishment, for instance). If the transferred company is a holding, the shareholdings should be attributed to a French permanent establishment.

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?

Dividends from a French company to a foreign shareholder are subject to a 25 per cent WHT under domestic law, unless the distribution is made to a qualifying shareholder established within an EU member state (15 per cent or 19 per cent, depending on the beneficiary) or a double tax agreement applies. With a corporate shareholder established in an EU member state, the dividends may be paid gross:

- if it is exempt at the level of the EU (or EEA) corporate shareholder, which holds 5 per cent or more of the French distributing company for at least two years (the 95 per cent exemption) to the extent that the recipient shareholder would not have been in a position to recover the WHT, had it applied; otherwise
- if the EU corporate shareholder holds at least 10 per cent (percentage applicable as from 1 January 2009) of the French distributing company for at least two years.

Anti-abuse provisions apply to both exemptions.

Distributions to non-EU companies are generally subject to a reduced withholding tax (from zero per cent to 15 per cent) based on the provisions of the applicable tax treaty (France has entered into more than 120 tax treaties). Where no tax treaty is applicable, a domestic 25 per cent withholding tax applies. It goes up to 50 per cent for dividends paid to residents of non-cooperating states or territories.

French domestic law provides for a branch tax of 25 per cent of the after-tax French-source profit derived by a foreign company that is established outside the European Union from business carried out in France. The branch tax is refunded if the foreign company does not declare any distribution or declare a distribution whose amount is lower than the after-tax profit of the foreign company within 12 months from the closing of the financial year of the foreign company or prove that distributions benefited to French tax residents. Such branch tax may be limited or cancelled by application of tax treaties.

Interest is generally paid gross under domestic law, except where the beneficiary is a resident of a non-cooperating state or territory (50 per cent WHT) unless it can be justified that the debt does not intend and result mainly in the location of interest income in the non-cooperative state or territory. The 50 per cent WHT does not apply for interest related to a qualifying documented loan originally extended by a foreign lender to a French entity before 1 March 2010. Also, interest paid to a qualifying European affiliate – even through a permanent establishment – (with a minimum 25 per cent ownership for at least two years among other conditions) can be paid gross, unless the recipient is controlled by a non-EU shareholder and the chain of ownership is viewed as being abusive.

14 Tax-efficient extraction of profits

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

Hybrid instruments or distributions that do not qualify as dividends under certain tax treaties may be used as part of a cash repatriation strategy.

Specifically, some instruments are intended to be debt for French corporate income tax (CIT) purposes but equity for foreign income tax purposes. As a consequence, an interest deduction will be allowed in France subject to thin capitalisation rules (see question 8) for periodic payments on the instruments; and, although the payments are taxable for foreign holders, the holders may reduce their income tax liability in the foreign country on the payments by foreign tax credits allowable in respect of French CIT paid by the French company. Alternatively, the payments may be exempt under a participation exemption regime in the foreign country.

French companies may also make distributions, which do not qualify as dividends for the purpose of treaty law. OECD model tax treaties generally provide for a narrow definition of dividends, which restricts the application of the dividend provision to distributions that qualify as dividends under corporate law only in accordance with French case law. As a result, distributions that fail to qualify as a dividend are treated as 'other income' under the tax treaty and are not taxable in France as the source country.

For instance, this situation may arise on profits upon liquidation or exceptional distributions of reserves (subject to anti-abuse provisions) to the benefit of treaty protected recipients in the Netherlands or Luxembourg.

Update and trends

On 24 August 2011, the French government announced two reforms aiming at companies that will probably enter into force from 2012 (for fiscal year 2011):

- An increase to 3.4 per cent from 1.7 per cent of the taxation of gains on sale of substantial shareholdings as from 2012 (see questions 15 and 17).
- Limitations in the use of NOLs. Loss carried forward should be available for 60 per cent of the taxable profits of the financial year (for companies having a profit exceeding €1 million – no limitation otherwise). The excess could be carried forward and available within the same limitations. NOLs could be carried back but only against the preceding year profits (and no longer over a three-year period).
- The generous R&D tax credit may remain unchanged but precisions have been introduced as to the nature of operations considered as R&D.

In the context of the government's strong will to reduce the public debt, other measures aiming at increasing tax resources may be introduced in the tax bill for 2012.

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?

In France, a disposal of stock in the French operating company is generally favoured. Capital gains upon the disposal of substantial shareholdings (5 per cent or more) that have been held for at least two years are 95 per cent exempt (90 per cent as from 2012). Dividends receive the same treatment. NOLs may offset the remaining 5 per cent (10 per cent as from 2012) (see question 17).

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?

Under French domestic law, the disposal of stock in an operating French company (being a non-real estate holding company) by a non-resident company is not taxable, unless the seller's holding exceeded 25 per cent of the subsidiary at any time within the five-year period before the sale.

Generally, tax treaties signed by France deny France the right to tax capital gains where France is the source country, unless a specific article provides otherwise in respect of the disposal of a substantial shareholding (generally no less than 25 per cent); or of shares in 'real estate companies'. However, even in those cases, the French participation exemption applies to EU and EEA sellers (see question 17).

Special rules govern the taxation of gains upon the disposal of real estate holding companies. Real estate holding companies are defined as private companies, the whole assets of which consisted directly, over the three-year period before the year during which the sale occurs (for more than 50 per cent) in French real property, rights relating thereto or shares of other real estate companies. If the company has not yet closed its third fiscal year at the time of the sale, the real estate character is evaluated based on the already closed financial year or, if none, at the time of the sale. Capital gains on shares of real estate companies listed on the Stock Exchange (SIIC – equivalent of US REITs) are subject to a 19 per cent CGT.

A levy of 33.33 per cent for non-EU corporate sellers (and 19 per cent for EU and EEA corporate sellers) may apply in France subject to an annual amortisation of the purchase cost of constructions of 2 per cent per ownership year. Ordinary CIT then also applies, with a credit for the one-third levy. Any excess of the one-third (or 19 per cent) levy over the CIT is refundable.

CIT and the levy do not apply if the real estate is used within the course of the business of the company, or if the value of the non-real estate assets is at least equal to the value of the real estate owned.

Natural resource companies in France are not likely to qualify as real estate companies to the extent that the real estate is used for the business of the company. There are no special rules for energy companies.

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?

Disposal of French assets by a French company is generally taxable in France at the CIT rate of 34.43 per cent. Disposal of patents are, however, subject to a reduced 15 per cent CGT (provided the buyer and seller companies are not related). The same rate may apply on royalty income on the same patents.

Capital gains realised upon the disposal of substantial shareholdings (ie, 5 per cent shareholdings in partnerships, companies, either French or foreign and qualifying as participation shares for accounting purposes) are exempt from CGT, provided such shareholdings are held for at least two years. However, 5 per cent of the capital gain (10 per cent as from 2012), deemed to correspond to the share-

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holding costs, is taxable at the standard CIT rate (34.43 per cent), which brings the effective tax rate to 1.7 per cent (3.4 as from 2012), unless NOLs are available. Rollover relief may apply on this remaining 5 per cent (10 per cent as from 2012) of the capital gain if the stock transfer qualifies as a tax-free reorganisation, which implies that the contributing company keeps the stock issued in exchange by the beneficiary company for at least three years. The 95 per cent (90 per cent as from 2012) exemption for substantial shareholdings does not apply to the shares of real estate companies.

In case of disposal between affiliates of a substantial shareholding held for less than two years, the 95 per cent capital gains exemption shall apply if the substantial shareholding remains within the group for a total period of two years (periods of holding by the seller and the buyer affiliates are totalised).

Where France gets jurisdiction to tax gains on transfer by a non-resident of French issued stock (see question 16), the French exemption should be extended where the seller is EU (or EEA) resident, provided the French tests of the participation exemption are met.

CIT may be deferred should the disposal qualify as a contribution of a business as a going concern to another company. The rollover relief may apply if the shares issued in exchange are held for at least three years by the beneficiary company (whether French, EU or treaty protected). However, the deferred gain may be taxed twice in France if the beneficiary is a French company: first upon the disposal of the assets, and second upon the disposal of the newly issued stock.

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