



MERGERS AND ACQUISITIONS

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Taxation of Cross-Border
Mergers and Acquisitions

2010 Edition

TAX

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 affected by establishing a limited liability company or through a sponsorship arrangement.

Recent Developments

- The tax liability of foreign companies investing in Kuwait for the fiscal years commencing after 3 February 2008 is set by the new Tax Law No.2 of 2008 at 15-percent flat rate on the net taxable income. This replaced a range of rates of from 0 percent to 55 percent under the old law.
- Gains derived by a foreign company on the disposal of assets including conveyance of title to a third party are taxable under the new Tax Law No.2 of 2008.
- Cash dividends received by any foreign entity as a result of investment in Kuwait Stock Exchange (KSE) are subject to 15-percent tax. However, capital gains derived by a foreign company from trading in shares listed on KSE are exempt from tax.
- According to current Tax Law in Kuwait, investment trustees and funds managers managing portfolios for customers are required to deduct 15-percent tax on cash dividends referred to earlier.
- According to the new Tax Law, tax losses for a financial year can be carried forward for three 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 will be 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 necessary both for claiming tax depreciation and determining goodwill.

Goodwill

Amortization of goodwill is not allowed for tax purposes, under the new Tax Law and related circulars.

Depreciation

Depreciation is normally allowed on the cost of assets acquired at rates prescribed under Kuwait 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 new 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; and
- merger of the incorporated body with another incorporated body.

Value-Added Tax (VAT)

Value-added tax 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, or both from the target as to any of undisclosed tax liabilities. In practice, the Kuwait tax authorities do not deem the acquirer liable for taxes due from the vendor. In other words, the vendor is liable for taxes until the date of disposal.

Tax Losses

The acquirer will 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 KSE are exempt and cash dividends earned 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 will also be subject to 15-percent tax, each transaction should be structured according to other considerations.

Transfer Taxes

Stamp duty is not levied in Kuwait.

Tax Clearances

It is not possible to obtain tax clearances from the Kuwait tax authorities.

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; or
- 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 or 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. However, branch operations may be carried out by a foreign entity through the sponsorship arrangement.

Joint Ventures

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 joint venture with other foreign entities by appointing a Kuwaiti sponsor/agent.

WLL (with limited liability) and KSC (Kuwait shareholding company) companies require a minimum of 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 Kuwait tax law. Interest paid to banks on the purchase of assets can generally be capitalized as part of the asset cost. Interest paid to related companies and interest incurred on share purchases are not allowed as deductible expenses.

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 by a foreign entity operating in Kuwait in respect of its current account with its head office abroad is not deductible for tax purpose.

Withholding tax on Debt and Methods to Reduce or Eliminate

There is no withholding tax (WHT) in Kuwait. However, compliance with the Law is enforced by the Ministry of Finance through Ministerial Order No. 44 of 1985. 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 profit is reduced to a lower rate as per double taxation treaties (DTTS).

Other Considerations

Transfer Pricing

There are no specific transfer pricing regulations in Kuwait. However, the tax authority deems 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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