



Tax Efficient Inbound Investment

Tax Structures for Cross-Border
Acquisitions

Virtual Round Table Series
Tax Working Group 2018

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Anyone considering an inbound investment into another country or jurisdiction must give serious thought to taxation. Issues such as privacy, accurate asset valuation and liability protection are important, but it is the tax efficiency of a foreign investment that will most likely measure its long-term success.

There are, of course, many different types and methods of investment, whether that be via direct acquisition of a capital asset, the purchase of shares in an existing business or a real estate transaction. A smart investor will study the rules and regulations that apply to each scenario in their jurisdiction of choice, and adhere to them while minimising tax liability.

Investment by cross-border merger or acquisition is one area that has received much publicity recently, as the Organisation for Economic Co-operation and Development (OECD) works to redress certain tax-efficient structures legitimately used by smart corporates. Its Base Erosion and Profit Shifting (BEPS) legislation is designed to address the practice of shifting profits and assets across borders to minimise overall global taxation.

This drive to halt BEPS has affected various tax reduction techniques, including patent box regimes, interest deductibility and offshore structures (via business substance tests). Buyers may also have contingent tax liabilities due to BEPS exposure under the seller's aegis.

Where smaller investments are concerned, the rules are no less complex, as we will learn in the following discussion. For countries like the USA, which receives significant inward investment, there are withholding taxes for foreign investors on the sale of assets and the receipt of 'soft' income, as well as death taxes and individual state taxes to consider.

In Italy, on top of corporation tax of 24 per cent, there is a regional tax on productive activities of 4.82 per cent, which many investors will not be aware of.

Employing an experienced tax advisor in the jurisdiction to be invested in, is crucial before any other decisions are made. They will help investors to decide which vehicles are best to hold assets and which jurisdictions have the most favourable tax treaties to eradicate or reduce withholding tax. The advisor will also be able to 'read between the lines' of complex tax legislation, structuring transactions that are tax efficient and also tax compliant.

Examples include the concept of Fiscal Unity discussed here by Friggo Kraaijeveld in The Netherlands, the use of the European Union's Parent Subsidiary Directive (PSD) to reduce withholding tax, as explained by Tommaso Fonti in Italy, or the Portfolio Interest Exemption, employed in the USA by Jacob Stein.

They will also have details of any tax incentives offered by various governments to attract inbound investment and be able to guide investors in the customs and culture of tax authorities that may be very different from those they are used to.

The following pages contain advice and guidance from five of IR Global's tax experts and should provide an interesting insight into the many and varied tax-orientated challenges faced in pursuit of profitable foreign investment.



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The View from IR

Our Virtual Series publications bring together a number of the network's members to discuss a different practice area-related topic. The participants share their expertise and offer a unique perspective from the jurisdiction they operate in.

This initiative highlights the emphasis we place on collaboration within the IR Global community and the need for effective knowledge sharing.

Each discussion features just one representative per jurisdiction, with the subject matter chosen by the steering committee of the relevant working group. The goal is to provide insight into challenges and opportunities identified by specialist practitioners.

We firmly believe the power of a global network comes from sharing ideas and expertise, enabling our members to better serve their clients' international needs.



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Jacob Stein is the managing partner of Aliant, LLP. He specializes in structuring international business transactions, complex US and international tax planning and asset protection planning.

Mr. Stein received his law degree from the University of Southern California, and a Master of Laws in Taxation from Georgetown University. He has been accredited by the State Bar of California as a Certified Tax Law Specialist. He is AV-rated (highest possible rating) by Martindale-Hubbell, and has been named 'A Super Lawyer' by the Los Angeles Magazine. He was also named one of 'America's Most Honored Professionals 2016', by the American Registry.

Over the course of his career, Mr. Stein has represented officers and directors of Fortune 500 companies; Forbes 400 families around the world; celebrities; high-profile entrepreneurs; private equity funds and wealthy foreigners doing business in the United States and elsewhere.

Mr. Stein is a member of several international legal networks, including: Union Internationale des Avocats, International Practice Group, IR Global, and the International Bar Association.



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Wissam Abousleiman is a Lebanese certified public accountant (LACPA) and member of the IIA – Lebanon Chapter.

Since 2009, he has been the Managing Director of Abousleiman & Co., a family professional services firm established in 1971 that practices audit, assurance, enterprise risk management and tax advisory services. Over the course of his 18-year career, Wissam has gathered a wide range of experience in general, cost and financial accounting, financial management, internal and external audit, financial reporting and tax advisory services.

He has lectured at the CLET – Kafaat Institute University in Internal Controls and Auditing Practices, and has also given a wide range of workshops and seminars on International Financial Reporting Standards (IFRS), International Standards on Auditing (ISA), audit work papers, advanced accounting and financial reporting.

He is currently developing a number of far-reaching diploma programs based on good governance practices and responsible citizenry, including an eight course Tax Diploma Program for the American University of Beirut's Continuing Education Center covering international tax concepts and the Lebanese tax system.



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Friggo Kraaijeveld holds degrees in Tax Law and Civil Law and Philosophy from the University of Amsterdam. He also holds a postgraduate LLM in International Tax Law from the International Tax Centre of the University of Leiden.

Friggo worked in international taxation at PWC before joining a leading Dutch law firm. He specialises in tax issues with an international dimension, such as private equity structuring, cross-border investments, international trade and labour.

Friggo is a member of the Dutch Order of Attorneys (NOvA), the Dutch Association of Tax Advisors (NOB), the International Bar Association (IBA) and the International Fiscal Association (IFA).



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Tommaso Fonti is a partner of Bacciardi and Partners and the Head of its International Taxation Department. He specialises in international taxation, EU VAT law and VAT applicable to cross-border transactions, national and transnational corporate law, establishment and regulation of joint ventures abroad, and expatriation of Italian personnel abroad and impatriation of foreign personnel in Italy.

He holds a law degree from Bocconi University, Milan and a Master in International Taxation held by Il Sole 24 Ore – Training and Events Business Unit, Milan. He also has an LL.M. (Master of Laws), Master of Advanced Studies in International Tax Law, International Tax Center, Leiden (The Netherlands).

In 2008 he was the visiting attorney, Zumpano, Patricios & Winker, Miami, US and in 2009 the visiting attorney at Duane Morris, New York.

He has attended courses and seminars, both in Italy and abroad, on international taxation and secondment of Italian personnel abroad and foreign personnel in Italy.



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Todd graduated early from high school to focus on a career in accounting, graduating from Brigham Young University with a Bachelor in Science and a Masters in Accountancy.

Following receipt of his CPA qualification, he took a job at Ernst and Whinney in Los Angeles, and now has 30 years of experience as a trusted advisor to clients, providing insight and the tools to help them successfully achieve their goals.

Todd's true love is giving back to his local community, where he serves on the board of a New Leaf and is a co-founder of youth organisation, Lucky Sevan.

He is a member of both the American Institute of Certified Public Accountants and the Arizona Society of Certified Public Accountants. When Todd is not working he spends time with his wife and two granddaughters, on the prowl for his next culinary experience, playing Scrabble with family and friends, or planning his next excursion overseas.

SESSION ONE

Common Structures: What is the most common tax structure for inbound investments into your country?

USA – Jacob Stein (JS) In the US inbound investment is largely driven by taxation, but there are some other important considerations such as liability protection, privacy and flexibility of the corporate structure.

We frequently see foreign investors who want to minimise their reporting requirements to the US government, and obviously there is also a general desire to maintain privacy and anonymity.

The US has robust tax and compliance systems, and everyone pays income tax on income generated in the US. This rule also applies to foreign investors, with some minor exceptions.

We will usually look at foreign investment in two categories - real estate and non-real estate. Most of these investments are structured through US corporations or limited liability companies, which are in turn owned by a foreign corporation.

For example, a German investor will own a US business through a German corporation. The US business is a subsidiary of the German company, and will operate the business venture in the US or itself become an investor in a joint venture in the US.

The US tax system is extraordinarily complex, but there are lots of issues including whether income is subject to single or double tax. Another big question is whether the investor's country has an income tax treaty that allows the reduction of withholding tax.

USA – Todd Skinner (TS) The US is a bit unusual, because you have a choice of jurisdictions within the US in which to organise your domestic corporation or

LLC. The jurisdictions each have different laws as far as disclosure goes and they also have different tax considerations. Part of the extraordinary complexity is that each state has its own tax system as well as the federal tax system.

USA – JS Historically investors have organised entities in Delaware, which is one of the few states that allows a foreign investor to organise a legal entity on a fully anonymous basis. From a tax standpoint, if an investor sets up in California, the state will tax you. If a client has a business not already subject to state income tax, then we will seek to set up the legal structure in a state that does not have income tax, such as Delaware.

The Netherlands – Friggo Kraaijeveld (FK) The normal acquisition method in The Netherlands is via a share deal. We have a thing called Fiscal Unity, which allows companies in a group to hold 95 per cent of another entity. When that happens we can treat two or more entities as one single entity.

Typically, in a Dutch acquisition, a vehicle is set up to take out the debt for the acquisition of the target. After the acquisition, both entities form a fiscal unity, which allows the purchaser to deduct the interest costs of the acquisition financing against the taxable profits of the target company.

This is a good way to reduce tax costs in the Netherlands, by allowing a company to finance its own acquisition.

The Dutch tax code is full of anti-abuse measures, so the structuring has to be done carefully, but this is a general way to do it.

Italy – Tommaso Fonti (TF) In Italy we have a similar type of structure for acquisition of an Italian target company by a foreign investor.

Should the investor want to acquire a target company in Italy, it may set up a new Italian company ('NewCo') to obtain finance from a bank, and then use the finance to acquire the Italian target company. After the acquisition, the Italian target company is merged by incorporation into the NewCo, either via an upstream or a downstream merger.

As far as the most common tax structures used by investors are concerned, I can say that the preferred vehicles are corporate structures, usually in the legal form of limited liability companies, rather than partnerships due to the fact that corporations are opaque from a tax perspective while partnerships are tax transparent.

By doing this, foreign shareholders investing in Italian corporations are not taxed on the profits derived by Italian corporations until such profits are distributed and repatriated to the country where the foreign shareholders are resident.

In general, though, it mostly depends on the type of business that the foreign investor wants to carry out in Italy. For example, other possible structures, besides new corporations, include setting up a local branch of a foreign company. This works especially well in the public tendering sector, because, by setting up an Italian branch, a foreign investor/company can also extend its credentials towards the Italian Govern-



Wissam Abousleiman pictured at the 2017 IR Annual Conference in Berlin

ment-related entities in respect of sensitive public tenders (e.g. construction projects).

Lebanon – Wissam Abousleiman (WA)

To be straightforward, it depends on the level of investment. Some international clients who want to have Lebanon as a Middle Eastern operations base have a representative office here instead of a Lebanese corporation. They only have admin or marketing staff in order to promote the product line, so it is not a taxable entity. The office is limited to expenses and cannot do any billing.

If it is a sizeable investment in Lebanon, we would consider setting up either a Société A Responsabilité Limitée (SARL) otherwise known as a limited liability company, or a Société Anonyme Libanaise (SAL) as a corporate vehicle. It is, in fact, much easier to transfer shares in a SAL than in any other liability company and it works well for foreign investors who will be shareholders or sitting on the board of directors. If the investment is much larger, we would also set up a holding company, which would make it easier to extract dividends that are not taxable – capped at about USD3,400 per year. There remains the offshore

scheme, which, although efficient, has been dwindling in popularity due to AML and OECD directives.

These are mostly the types of entities we would recommend, since subsidiaries are much less efficient from a tax perspective. Investors can end up paying up to 25 per cent in both income and dividends tax as compared to the standard minimum income tax rate of 17 per cent for Lebanese corporate tax.

Of course, we don't compete on a tax basis with countries like Dubai, Qatar or Saudi Arabia, since they don't have income tax yet., but the reason people select Lebanon, besides the fact that it's less competitive than those other jurisdictions, are numerous.

Lebanon is closer to Europe and, culturally, it's an attractive place to be. Lebanese have a keen business sense and a culture of commerce and trade, we are also multilingual and most people speak Arabic, English and French while some also speak Spanish and German. It's less about the tax, and more about the operating environment.

USA – TS I have visited Wissam in Lebanon, and believe it to be a great bridge to the Middle East from either North America or Europe.

Italy – TF I would add that, for foreign investors who are not from the European Union, a possible tax-efficient structure to penetrate the Italian market would be that of incorporating and holding an Italian company via a subsidiary (i.e. sub-holding) established in another EU Member State. If certain conditions are met, this investment structure will allow non-EU resident companies to exploit the tax benefits of the EU Parent Subsidiary Directive (PSD), which would not otherwise be available to them.

In fact, while the International Convention for the Avoidance of Double Taxation on income possibly in force between Italy and the State of residence of the foreign investor would only reduce the Italian withholding tax on outbound dividends from Italy, the EU PSD would allow for this withholding tax to be zeroed out, under certain conditions.

Of course, the foreign investor must pay attention when structuring the EU subsidiary (i.e. sub-holding) in a way that it satisfies the minimum economic substance requirement provided for by the EU PSD.

This is essential to avoid the application of the general anti-avoidance rule present in the PSD and, consequently, the possibility that the tax benefits of the EU PSD are denied.

SESSION TWO

Tax Pitfalls: What are the most serious tax pitfalls to be aware of when considering an inbound investment into your jurisdiction?

Lebanon – WA The major tax pitfall we have in Lebanon is not directly linked to the tax itself, but to the entity's performance. Most of our cases have been to do with compliance, involving lots of companies which never really paid attention to the laws around residency. There are regulations that define who is tax resident or not, and that clarify the application of withholding tax vis-à-vis income tax and other taxes.

Many businesses don't have the best tax advice and therefore their activities are not in compliance with the rules relevant to their specific entities nor transactions.

For instance, foreign investors cannot own any companies engaged in financial monetary transactions, such as banks. These have to be owned by Lebanese. Another thing is that they often have the wrong tax adviser, without an international outlook, who is not aware of the proper application procedures for a double tax treaty.

Netherlands – FK When investing in to The Netherlands, we have to separate private and corporate investors. The overall tax rate should be balanced, since behind every corporate investor sits a private investor with a pension fund. The Dutch tax system is relatively simple, since corporates are taxed on gross revenue.

We don't have income tax on capital gains from real estate. We don't make the separation in the type of income like they do in the US, it's just that income is income and capital gains are capital gains.

Because of our tax treaties it is possible to work around any double taxation for foreign investors, but you need to demonstrate substance by showing things like sufficient salary costs or operational offices.

Italy – TF One of the most serious tax pitfalls in Italy is the overall level of taxation applicable to businesses. In addition to the Italian corporate income tax of 24 per cent, Italian businesses are also subject to a regional tax on productive activities with a standard rate of 3.9 per cent.

Therefore, when a foreign investor intends to start a business in Italy (either manufacturing or trading in nature), it has to take into account not only the standard corporate income tax, but also the additional regional tax on productive activities that varies from region to region. The Italian Government has, in fact, left a margin of discretion for each region to set its own level of such additional regional tax.

Another pitfall is likely to be the relations with the Italian tax authorities. They are quite aggressive, especially with respect to tax issues with an international dimension, such as transfer pricing rules, controlled foreign corporation (CFC) rules and similar.

Recently, the Italian Government also modified the domestic definition of permanent establishment ('PE') in order to align with the changes agreed upon at the OECD level, as resulting from the Action 7 – Final report 2018 - of the BEPS project. Such changes are aimed at broadening the Italian domestic defini-

tion of PE in order to tackle harmful tax structures that were not covered by the previous PE definition.

In addition to the above, a new concept of digital PE has been introduced in the Italian tax code. This is an anti-avoidance provision pursuant to which a foreign company can be considered as having a PE and, thus, be taxed in Italy, even if it does not have a physical presence in the Italian territory. It is designed to counteract the big foreign digital companies, like Google or Apple, and applies when a company has a significant and ongoing economic presence.

These changes to the Italian PE definition are not currently recognised by the Italian international tax treaty network, because there are no equivalent provisions therein; thus foreign investors/companies can still be protected by a relevant double tax treaty if there is one in force between Italy and the state of residence of the foreign investor.

From Jan 1st 2019, Italy is also likely to enforce a Web Tax, which is a new tax on digital transactions that applies to services supplied through electronic means.

The Web Tax is computed as 3 per cent of the gross compensation paid by Italian resident businesses (and Italian PE's of non-resident companies) for the digital services supplied, regardless of where the transaction is concluded and where the services supplier is resident. However, the Web Tax is not due if the digital service supplier does not exceed the threshold of 3000 transactions during any calendar year.



Jacob Stein pictured at the 2018 IR 'On the Road' Conference in Toronto

USA – JS The US has an extensive tax regulatory regime that applies to foreign investors and there are different sorts of rules that apply depending on what the investor is doing in the US. If they buy US real estate, we have a different sort of rule that applies.

In a real estate investment, there is a withholding tax that applies on the sale. The purchaser must withhold 15 per cent of the sale price and remit it to the US Treasury as a surety against the tax obligations of the foreign seller.

When you have a foreigner generating passive income in the US, it is subject to 30 per cent withholding tax. Whoever pays passive income to a foreign investor must withhold 30 per cent and remit it to the US Treasury. It includes things like interest income, dividends, rents, royalties and salaries.

The US does have income tax treaties with 60 countries, which reduce the withholding tax to anywhere between 0 – 15 per cent.

Special rules apply for capital gains on assets other than real estate. The US does not tax foreign investors on the sale of capital assets (other than real estate),

in order to encourage foreign investors to buy them. This can include interest in a legal entity or shares in a public company.

The other tax advice I have for foreigners, is to remember that the US will impose 40 per cent tax on the value of the assets a foreigner owns in the US at the time of death. This applies to any property with the exception of bank accounts.

We often see foreign investors purchase assets in their own name, but if they die holding those assets, then 40 per cent of the value goes to the US Government. One of the reasons we structure inbound investments through a foreign corporation or a foreign trust, is so that we can avoid the 40 per cent estate tax.

With regard to withholding tax, you either structure the investment in such a way that the income is not subject to 30 per cent withholding tax, or you structure it through a treaty country. There are obviously provisions against treaty shopping, to ensure you have substance in that country.

USA – TS With regard to withholding tax on real estate, although it's a flat withholding tax, the investor can file a tax

return reporting the gain on the sale and they will receive a refund on the withholding tax.

One of the biggest pitfalls in the US is compliance orientated. Depending on the jurisdictions the business operates in, you could have filing and tax paying obligations in 50 different states. That applies not only for income tax, but, depending on the activity, there could also be state and local sales taxes. The administrative obligations alone can become quite burdensome.

SESSION THREE

Inside Knowledge: What features of the tax system in your jurisdiction are particularly attractive to potential investors? Any little known structures you wish to share?

USA – TS One of the advantages within the parameters we are working in, is that there is plenty of flexibility as to the type of entity you can use, whether that is a limited liability company or a corporation. The choice of jurisdiction is also important, depending on what you are looking for in terms of discretion and not disclosing ownership.

One thing I should mention is that our corporate tax rates have been reduced recently from 35 per cent to 21 per cent. We have not seen an effect on inbound investment just yet, but it has been a benefit domestically.

USA – JS The US has always been very welcoming to foreign investors; they can invest in almost anything a US citizen can.

With proper planning we can help investors to avoid, minimise or defer taxes for a period of time, but that does require planning well ahead of making the investment. The best advice is to hire a tax advisor before you put the money into the US.

There is a tax trick called the Portfolio Interest Exemption, which may help avoid the 30 percent withholding tax on passive income. Under this exemption a foreign investor can lend money to the US entity with terms that instruct repayments on the loan to be made outside the US. Interest on that loan is then not subject to US tax and there is no withholding.

Very often you can structure transactions that look like loans into the US, but are really disguised equity investments. With proper planning you can get some nice tax results and we use these quite frequently with foreign clients who have inbound investment into the US.

The end result is that they can have earnings in the US that are not subject to US taxation.

Lebanon – WA Traditionally, we have always had holding companies attracted to Lebanon. There is an added value because of the bank secrecy laws which are still in effect for anyone who is not American. Lately though, the Lebanese Government has been trying to make it even more attractive for foreign companies to set up in Lebanon. This is aimed, in particular, at those connected to technology or IT sectors by offering a package of tax discounts. Another incentive is to encourage investment is the government's plan to cover employers' social security costs (25.5 per cent of taxable salary) with regard to their recently hired employees.

Italy – TF There are ongoing tax incentives being launched by the Italian Government to enhance foreign business investments and reduce the tax burden for businesses. One of the major tax incentives launched by the Italian Government is certainly the Patent Box Regime for R&D companies.

This regime allows R&D companies to remain exempt from tax on 50 per cent of income deriving from the exploitation of selected intellectual property (IP). It also allows R&D companies to remain exempt from tax on capital gains derived from the sale of that IP, provided that at least 90 per cent of the same capital gains are reinvested into other assets of the same type.

At the beginning of the Patent Box Regime, the Government also included trademarks within the spectrum of the eligible IP, but these measures were not aligned with OECD standards. Starting from the tax year 2017, trademarks have been eliminated from the spectrum of the IP eligible for the Patent Box Regime.

The R&D tax credit, which allows companies to benefit from a tax credit equal to 50 per cent of the annual increase in R&D expenses, is another incentive that the Italian Government has enacted to boost the Italian economy.

Finally, based on its electoral program, the new Italian Government has also planned to introduce a flat tax on both business and individuals to be set at a rate of 15 per cent, encouraging entrepreneurship and consumption. It is unlikely, however, that this new flat tax regime will be introduced before 2019/20.

Netherlands – FK The abolition of dividend withholding taxes, designed to encourage holding companies to move to The Netherlands has created political

tension. This strategy has led to multinationals such as Royal Dutch shell and Unilever basing themselves here, but it was not designed for mid-sized enterprises.

The general impression I get, is that we are passive in our tax policy due to pressure from the European Commissioner. There is this picture of the Dutch motherland as a tax haven, so we need new ideas to make the Netherlands more attractive for companies to physically move here, rather than use us for international tax planning. Withholding taxes do make it less attractive, but international businesses like Microsoft still use The Netherlands for international tax planning.

We do have an R&D box where income is taxed at lower rates, but it is not much better or worse than other jurisdictions and doesn't allow for aggressive tax planning.



Members pictured at the 2018 IR 'On the Road' Conference in Toronto

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