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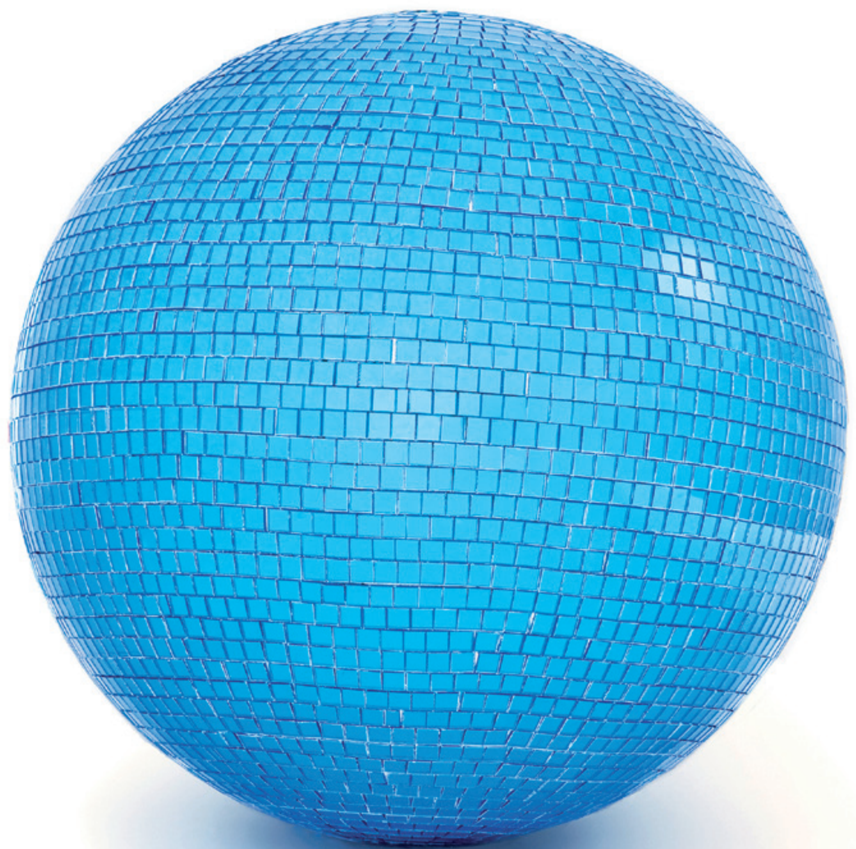
Restructuring Services Tax
A European Perspective



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Introduction

Welcome

The Restructuring Services ("RS") EMEA Tax network comprises teams in member firms across Europe with expertise and experience in the fields of re-financing and restructuring, distressed M&A, insolvency and corporate simplification assignments.

This brochure contains a guide to the services RS Tax can offer across the EMEA network.

However, its key function is to highlight some of the main tax implications of restructuring transactions and insolvency procedures in a selection of jurisdictions. It is by no means an exhaustive list of territories nor should it be seen as a guide to all of the tax implications in those territories. Rather it contains some key issues per jurisdiction to raise awareness of when an RS Tax team may need to be involved in a transaction in order to avoid the bear traps that may otherwise catch the unwary.

There are a number of key tax issues that are common across the different jurisdictions. However, the complexities of corporate and tax law across Europe inevitably mean that the issues may need to be approached in different ways. As always, specialist advice is recommended.

The various country teams included in this brochure (and those listed in the contact schedule at the back) regularly work together on pan-European projects in providing clear, integrated, and above all, commercial advice to our clients.

Marcus Rea
RS Tax Partner, London

Restructuring Services Tax
What can we offer?

Overview

RS Tax teams across EMEA have experience of advising on business reviews, re-financings and restructurings, distressed M&A, insolvency and corporate simplification assignments.

In doing so, they have advised a range of stakeholders: lenders and borrowers, regulators, management and shareholders.

Services

The teams included in this brochure can provide a number of services in relation to restructuring and insolvency transactions which include, but are not limited to, the following:

- **Focused reviews of tax cashflow forecasts** – aiming to employ our specialist knowledge to support that the cashflow forecasts of a business reflect reasonable assumptions in the circumstances and reflect the underlying tax law.

- **Specialist due diligence expertise** – not only investigating the standard issues, but focusing on the specific concerns of a distressed-company investor.

- **Transaction structuring guidance** – aimed at avoiding the tax pitfalls that might crystallise immediate taxable income.

- **Corporate structuring advice** – considering an appropriate future holding structure aimed at increasing the return to an investor (for example managing capital gains and withholding taxes and commenting on financing structures) and potentially also encompassing advice on appropriate incentive arrangements for the management team going forward.

- **Advice on preservation of tax attributes** – calling on our experience to provide practical guidance in respect of post transaction scenarios, insofar as that is possible.

- **Managing historic issues** – assisting in managing relationships with tax authorities, dealing with historic issues and, where possible, securing unclaimed tax cash refunds.

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Restructuring Services Tax
An Austrian Perspective

Overview
There is no Austrian Tax Act which deals exclusively with restructurings. The relevant legislation on restructurings is spread over various tax acts and includes a number of complex rules.

Common Issues
There are a number of key tax issues that regularly impact restructuring and insolvency transactions in Austria. These issues, together with possible actions to manage the tax aspects, should be carefully considered in advance.

Debt forgiveness and debt/equity swaps
Under Austrian tax rules, a taxpayer is generally free to fund an investment with shareholder debt or equity. Tax deductions for interest on shareholder debt are reduced if the amount and/or terms of the debt exceed what might have been available in an arm's length scenario, in which case the debt may be considered "hidden equity".

Straightforward debt forgiveness will in general lead to taxable income for the borrower company. The rules are more complex when the debt may qualify as hidden equity. In such circumstances the transaction may be tax neutral.

It will be necessary to determine whether the debt is recoverable or not when a waiver or debt/equity swap is considered as this can affect the outcome. Either could potentially trigger a 1% capital duty if a transaction is inappropriately structured.

Tax group
A resident company may set up a tax group including resident and non-resident subsidiaries as tax group members. If a tax group member is part of a restructuring transaction the tax group may (in part) cease to exist, which in turn may have a material impact on the tax position of group members.

Disposal of national and/or international subsidiaries
Capital gains on disposals of Austrian subsidiaries will be fully taxable at the normal rate of 25%.

Capital gains or losses relating to non Austrian subsidiaries will generally be tax neutral unless a particular form of transaction is adopted.

Stamp Duty
Certain legal transactions (e.g. an assignment) will generally trigger stamp duty (at 0.8%-2%) if evidenced in a written deed. Note even that if there is no written deed such that no stamp duty immediately arises, it can still be triggered at a later date if there is correspondence which refers to that transaction.

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Restructuring Services Tax
A Belgian Perspective

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Overview

Restructuring transactions require a multidisciplinary approach in which proper analysis of the tax consequences is imperative. The complex world of Belgian tax law provides numerous opportunities to stumble into a bear trap but equally to make a contemplated restructuring tax efficient. Our restructuring team is closely linked to the M&A department, acting together as a one-stop shop.

Common Issues

There are a number of key tax issues that regularly impact restructuring and insolvency transactions in Belgium. The most frequent are:

Debt forgiveness

The forgiveness of debt can create taxable income in a borrower company unless the transaction is appropriately structured. The extraordinary accounting income that is generated in the hands of the borrower company on an unconditional ordinary forgiveness of debt between related parties will generally be considered abnormal for tax purposes (on the basis that two unrelated parties would never enter into such a transaction). Available tax attributes (such as tax losses or notional interest deductions) cannot be offset against this income and this often results in an effective cash tax cost unless the transaction is properly structured.

Withholding taxes

Debt restructurings can also have withholding tax implications. Interest payments to non-Belgian resident are generally subject to withholding tax. However, Belgium tax law provides for a number of exemptions (and it is worth noting that the exemption in the EU Interest and Royalty Directive have been implemented very broadly).

Corporate disposals

Generally, both the sale of shares and the sale of assets can result in taxable gains, except where specific exemption regimes are applicable. In this respect, Belgium tax law provides for a conditional exemption regime (i.e. a very low tax rate of 0.412%) applicable to capital gains on shares (subject to various requirements including a holding period of one year) and a conditional roll-over relief for certain capital gains on assets. The EU Merger Directive has been fully implemented in Belgian tax law, which also provides for certain exemptions.

Secondary liabilities

The inability of a seller to meet its own tax liabilities may result in (secondary) tax liabilities for which the buyer can be held responsible. Belgian tax law provides the possibility of verifying the tax status of the seller on entering into a transaction.

Tax attributes

Part of the value of a distressed company may be in its accumulated tax assets (e.g. losses, notional interest deduction, etc.). Belgian tax law however includes a change of control rule, which can result in the loss of the accumulated tax losses. Additionally, even under a tax neutral reorganisation, a dilution of the available tax losses may occur. Exceptions and structuring may be available to mitigate these general rules.

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Restructuring Services Tax
A Danish Perspective

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Danish tax legislation on re-financings and restructurings includes a number of complex rules where the tax consequences depend on various issues, for example, whether the transaction is intragroup, or whether the transaction has a cross-border element.

Common Issues

There are a number of key tax issues that regularly impact restructuring and insolvency transactions in Denmark. The most frequent are:

Debt forgiveness

A debt conversion or a capital increase used to repay debt may be seen as debt forgiveness from a tax perspective. These rules are complex, but it may be possible to take steps to avoid adverse tax consequences.

A "composition" is generally an arrangement with unsecured creditors holding more than 50% of the unsecured debt, whereas a "singular arrangement" is generally an arrangement with unsecured creditors holding 50% or less of the unsecured debt.

The release of irrecoverable debt by a lender can create taxable income (in the event of a singular arrangement) or loss restrictions (in the event of a composition) in the borrower company, although appropriate structuring may mitigate these consequences. In addition, a company may lose part of its previously tax deducted interest expense if interest has not actually been paid.

Within a group (usually parent – subsidiary) there are often no tax consequences for the borrower company in respect of the capital gain realised in connection with a debt forgiveness, unless the lender company (being a Danish or a foreign company) can set-off a corresponding loss against its Danish or foreign taxable income.

Corporate disposals

A capital gain realised in connection with the sale of non-listed shares is generally tax exempt for companies and any losses realised on disposal are not tax deductible. A capital gain or loss realised in connection with the sale of listed shares by a company are not recognised for tax purposes if the shareholding is at least 10%. Various anti-avoidance rules exist in relation to these rules.

A capital gain realised in connection with the sale of assets is generally taxable. There are certain opportunities to transfer assets tax-free, for example, under the EU merger directive.

Tax assets

Part of the value of a struggling company may be in its accumulated tax losses (or other deferred tax assets). When there is a change of control, those accumulated tax losses may be restricted (for operational companies) or lost (for dormant companies). If the restriction applies, the accumulated tax losses for operational companies cannot be utilised against financial income or certain leasing income.

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Restructuring Services Tax
A Dutch Perspective

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The RS Tax team in the Netherlands has a wide and in-depth experience of restructuring transactions. Since the Netherlands is still one of the top European countries in which to form a holding company, it is often the case that pan-European RS transactions will have a Dutch component.

Common Issues

There are a number of key tax issues that regularly impact restructuring and insolvency transactions in the Netherlands. Five of the most frequent are:

Debt forgiveness

The release of excess debt can create taxable income in a borrower company unless the transaction is appropriately structured.

Although an exemption should be available in the case of distressed debt when it is forgiven for business reasons, all too often the situation is unclear and discussions arise on whether the exemption is applicable. Further, the exemption will only be applicable to the extent there are no tax losses being carried forward, otherwise any tax losses must be used against the debt forgiveness in the first instance.

Specific rules apply within a fiscal unity (i.e. tax group) for Dutch corporate income tax purposes when dealing with debt forgiveness. Forgiveness of external debt or even a bankruptcy of a single fiscal unity company may trigger unexpected taxable releases of debt for the fiscal unity as a whole.

Tax attributes

Part of the value of a struggling company may be in its accumulated tax losses (or other deferred tax assets). It is easy to lose these tax losses on a change of ownership if the way the business has or is to be operated, or indeed in some circumstances how it is intended to be funded, change.

Corporate disposals

The sale of shares or assets may result in taxable gains, although the sale of shares may commonly be exempt under the Dutch participation exemption. However, if the sale of shares causes a break of the fiscal unity, specific anti-abuse and (mandatory) revaluation rules become applicable.

Secondary liabilities

The inability of a seller to meet its own tax liabilities may result in those liabilities being passed to other companies in a group (including, for instance, those companies that may be being acquired by a new owner).

Status of tax in insolvency

Tax arising during an insolvency process or existing tax liabilities that have not been settled before a insolvency should generally be treated as unsecured liabilities. Insolvency processes also bring unique challenges given, for instance, their impact on tax groupings and the specific tax rules covering a sale or restart of a business.

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Restructuring Services Tax
A Finnish Perspective

Overview

Finnish tax legislation in this area is particularly complex and subject to interpretation. In addition, the legislation is evolving and therefore it is imperative to take specific advice.

Common Issues

There are a number of key tax issues that regularly impact restructuring and insolvency transactions in Finland. Four of the most frequent are:

Debt forgiveness

The release of debt can create taxable income for a Finnish borrower company unless the transaction is appropriately structured. Recently, the tax authorities have sought to challenge even established tax practice in this area.

A taxable release may arise when a borrower has its debt waived or forgiven by a related party or even from a third party bank. This area is often subject to scrutiny by the tax authorities and evidence of the fair value of the debt to be waived or forgiven is required. This area therefore requires careful thought to avoid crystallising a significant tax liability.

Corporate disposals

The sale of shares or assets may result in taxable gains. There may also be certain add-backs of previous deductions taken for shares or receivable write-downs relating to 2004 or earlier.

Transfer tax

Finland levies a 1.6% (2% on real estate rich companies) securities transfer tax on the sale of Finnish shares in cases where either the seller or the buyer is tax resident in Finland. In addition, certain debt re-financings can be included within the scope of this tax under new transfer tax rules.

Tax losses

Part of the value of a struggling company may be in its accumulated tax losses. It is easy to lose these tax losses on a change of ownership if more than 50% of a company's shares change hands (cumulative change). Note that certain indirect changes in control may also trigger these restrictions.

However, it may be possible to obtain a discretionary clearance from the tax authorities to preserve losses despite a change in control event.

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Restructuring Services Tax
A French Perspective

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Overview

The main tax issues in France on a debt restructuring arise for the debtor and creditor as a result of the steps of the transaction itself. There are also certain post-restructuring issues for the debtor that need to be considered.

Common Issues

Debt restructurings generally take the form of debt waivers, debt transfers, or conversion of debt into equity which can trigger various tax consequences and which require appropriate analysis and structuring.

Debt forgiveness

Under French law, a partial or full waiver of existing debts as a result of the debtor being in financial difficulties is treated as a non-tax deductible expense for the creditor, unless the debtor is insolvent and subject to a Safeguard Procedure. In this case, the tax deductibility of the waiver is however subject to certain conditions. A waiver of debt generally qualifies as a taxable profit for the debtor (with certain limited exceptions).

Debt-for-equity exchange

Contrary to a debt waiver, the capitalisation of an existing debt does not trigger any taxable profit for the debtor. However, such operations may generate significant tax leakage for the creditor with regards to a debt purchased from an original creditor at a discounted value.

Under current regulations, the taxable profit arising for the creditor on a debt for equity swap (where the debt was originally acquired at a discount) is limited to the difference between the market value of the shares received and the acquisition price of the receivable. To benefit from this rule the receivable must have been acquired from an original creditor which is not related to the acquirer or the debtor (at the acquisition date or during the 12 months preceding or following this date).

Debt transfers

The transfer of debt from one creditor to the other does not generate any specific tax issue provided certain legal formalities are adhered to. In particular the debt transfer must be notified to the debtor by a bailiff or accepted by the debtor in a notarised deed. If these formalities are not properly adhered to then the transfer of debt may qualify as a taxable waiver of debt for the debtor followed by the creation of a new debt.

Amendments to the terms and conditions of the loan

In the case of loans entered into with third parties, new guarantees granted by related parties may have adverse tax implications for the debtor, i.e. taint the loan as a being a related party debt falling into the scope of French thin capitalisation rules (subject to certain limited exceptions).

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Restructuring Services Tax
A German Perspective

Overview

The range and complexity of holding structures in Germany coupled with complex tax legislation can make restructuring transactions an especially complex area. The RS Tax team in Germany has significant experience in advising in this field.

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Common Issues

There are a number of key tax issues that regularly impact restructuring and insolvency transactions in Germany, including the following:

Debt forgiveness and debt-equity swaps

The release of excess debt can create taxable income in a borrower company unless the transaction is appropriately structured.

On a release or waiver, the difference between a debt's book value and market value (assuming it is lower) is treated as taxable income for the borrower. Only if the loan debt was of full value will it be assumed that there was a non-taxable shareholder's contribution instead. Comparable rules apply for a debt-for-equity swap and similar refinancing transactions.

One potential option is to implement a "debt push up" (where a parent company assumes the loan, effectively equating to a shareholder contribution), which we have advised on in various transactions.

Tax losses carry forwards

Under the German change in ownership rules, tax losses carried forward in companies will be forfeited if more than 50% of the shares are directly or indirectly transferred. Where there is a transfer of 25 - 50% of the shares, losses will be partially forfeited.

However, there are two exceptions available: (i) if the same person holds directly or indirectly 100% of the shares in the transferring entity as well as in the transferee entity, or (ii) to the extent of any taxable "built-in gains" in the respective German entity. The latter may require detailed investigation to determine if it applies.

Note, in Germany there are minimum taxation rules in place which could lead to cash tax payments even in cases where there are significant tax losses carried forward.

Secondary liabilities

The inability of a company to meet its own tax liabilities may result in (secondary) tax liabilities being passed to other companies in a tax group as a result of reorganisations or transfer of a business. This may include those entities which are being acquired by a new owner.

Status of tax in insolvency

The extent and volume of tax risks arising on acquisition of a business out of an insolvency process depends on the status and timing of the insolvency procedure. Thus it is important from a structuring point of view to minimise any potential cash tax risks in connection with the transferred

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A Greek Perspective

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Overview

Changes in Greek tax legislation, effective from 1 January 2014 onwards, make RS Tax advice in Greece more challenging than ever before. Deloitte Greece has a dedicated team of experienced professionals that can provide accurate and up-to-date advice on the newly introduced anti-abuse legislation, corporate M&A legislation, complex interest deductibility rules and transfer pricing regime.

Common Issues

There are a number of key tax issues that regularly impact restructuring and insolvency transactions in Greece. Four of the most frequent are:

Debt forgiveness

Both corporate income tax and stamp tax implications need to be taken into consideration during a debt restructuring process. Debt forgiveness is a particular issue because it is considered to be taxable income for the borrower. If the transaction is structured appropriately then tax losses can be used to offset the taxable income. In addition, assignments and assumptions of debt and ant associated potential stamp tax exposures need to be carefully considered.

Corporate disposals

Asset and share deals often create taxable gains for the seller and the structure of a transaction may be of concern to potential investors when considering what their exit strategy might be. It is also important to understand the indirect tax aspects of a transaction and the transfer taxes and duties that might be imposed.

Tax losses carried forward

A recent change in the legislation relating to carried forward losses prohibits loss utilisation if there is a significant change in the ownership of the loss making entity. However, if the restructuring is for *bona fide* commercial reasons the company may retain its right to carry forward the available losses.

Minimising the interest and dividend withholding tax exposure

The use of EU Directives and the extensive network of Double Tax Treaties entered into by Greece can help potential investors manage their withholding tax position.

Transfer Taxes

Taxes imposed upon the transfer of shares or a business should be carefully considered as they can range from 0.2 – 10%. Stamp taxes may also apply to other transactions including directors' fees, some insurance contracts, non-bank debt, non-residential property rents, etc.

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Restructuring Services Tax
An Irish Perspective

Overview
The RS Tax team in Ireland has considerable experience in this area having advised on many transactions in recent years. In the absence of much specific tax legislation, experience in dealing with the Irish tax authorities and knowledge of precedent is key.

Common Issues
There are a number of key tax issues that regularly impact restructuring and insolvency transactions in Ireland. Some of the most frequent are:

Debt forgiveness
The release of excess debt can create taxable income in a borrower company unless the transaction is appropriately structured.

Corporate disposals
The sale of shares or assets may result in taxable gains (although the sale of a trading company may be exempt under the Irish "capital gains tax participation exemption").

However, so-called "degrouping charges" may also arise when a company is sold having previously received an asset tax-free from another member of its corporate group.

Secondary liabilities
The inability of a seller to meet its own tax liabilities may result in those liabilities being passed to other companies in a group (including, for instance, those that may be acquired by a new owner).

Tax attributes
Part of the value of a struggling company may be in its accumulated tax losses (or other deferred tax assets). It is easy to lose these tax losses on a change of ownership if the way the business has or is to be operated also changes.

Status of tax insolvency
Tax arising during an insolvency process must normally be settled as an expense of the receiver or liquidator.

However, insolvency processes also bring unique challenges given, for instance, their tax impact on tax groupings.

VAT
During insolvency, VAT complications can typically arise and result in issues which require careful consideration. This is particularly the case for any transactions relating to property.

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Restructuring Services Tax
An Italian Perspective

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Overview

Restructuring operations have become increasingly common in Italy over the last few years. On the one hand, a reduction in the number of new opportunities has meant investors have focused on the restructuring of their existing portfolios. On the other hand, many companies have underperformed and are facing significant problems in meeting their financial obligations.

Meanwhile, the legal framework has evolved with both the introduction of new financial instruments and also changes in tax law. The latter has aimed to regulate the tax implications of certain legal procedures available to enterprises facing a crisis or imminent insolvency.

Inevitably, the demand for specialist tax advice on restructurings has grown significantly.

Common Issues

There are a number of key tax issues which can impact restructuring and insolvency transactions in Italy, including the following main ones:

Tax implications of debt restructuring and of insolvency procedures

A number of tax implications need to be considered within insolvency procedures, such as the treatment of losses (for lenders) and of the related gains (from the reduction of debt) for borrowers.

Tax implications of debt purchases at a discount to face value and of debt waivers need to be considered from the standpoint of the lender, the buyer and the borrower.

Withholding taxes

Debt restructurings can also have withholding tax implications. Interest payments to non-Italian resident lenders are generally subject to withholding tax - unless an exemption is available - the rate of which depends on the lender and on the specific conditions.

Indirect taxation

Tax obligations related to bank financing (bridge and senior loans) need to be carefully monitored, and depend on the related security packages.

Capital gains and tax attributes

Restructuring operations may involve share or assets disposals, contributions etc., and therefore have potential tax impacts in terms of capital gains which should be considered (e.g. in terms of availability of the participation exemption regime on share disposals).

Also, change of control, mergers and demergers may impact on the ability of the companies concerned to carry forward their tax attributes in certain cases.

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Restructuring Services Tax
A Luxembourg Perspective

Overview

The RS Tax team in Luxembourg has significant experience in this area, and in part reflects the fact that it is very common to use Luxembourg holding and financing companies in group structures.

The Luxembourg tax practice works closely with other Deloitte member firms to provide bespoke advice relating to a range of distressed situations.

Common Issues

There are a number of key tax issues that regularly impact restructuring and insolvency transactions. Some of the most frequent are:

Debt forgiveness

The release of excess debt can create taxable income in a borrower company unless the transaction is appropriately structured.

A taxable deemed release may arise where a borrower and lender are (or become) connected and the debt stands at a discount to face value. This may happen in situations where none of the debt is actually being released. There are a number of possible options available.

Corporate disposals

The sale of shares or assets may result in taxable gains, except where specific exemption regimes are applicable. "Degrouping charges" may also arise when a company is sold and has previously received an asset tax free from another member of its corporate group.

The Luxembourg participation exemption regime requirements and Luxembourg law following the adoption of the EU Mergers Directive, allow for certainty and efficiency when a restructuring also involves the disposal and reorganisation of assets. Furthermore, a wide variety of instruments and vehicles may be put in place in order to meet commercial requirements of an acquiror.

Cash flow repatriation to the Senior Lenders

The efficient repatriation of funds to the investors/lenders is often a challenge in restructuring and refinancing transactions. Careful consideration before implementing the restructuring transaction can provide greater flexibility in the structure as well as meeting commercial constraints.

Loan Origination

In the event of third party debt refinancing (i.e. loan origination) there are a number of key legal issues to consider, notably banking licence requirements. Luxembourg has proven to be a flexible route in loan origination due to the proactive approach of the Luxembourg regulator.

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Restructuring Services Tax
A Norwegian Perspective

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Overview

The RS Tax Team in Norway are integrated with the Norwegian M&A Tax service line and the team have wide experience of independent business reviews, re-financings and restructurings, distressed M&A, insolvency and corporate simplification assignments.

Common Issues

There are a number of key tax issues that regularly impact restructuring and insolvency transactions in Norway. Three of the most frequent are:

Debt forgiveness

The release of excess debt will have an impact on any tax losses carried forward and may also be considered as taxable income in a borrower company unless the transaction is appropriately structured.

Equally, a taxable deemed release may arise where a borrower and lender are (or become) connected and the debt stands at a discount to face-value. This may happen in situations where none of the debt is actually being released. This area, in particular, is often overlooked and requires careful thought to avoid crystallising significant tax liabilities or loss of tax attributes.

Tax attributes

Part of the value of a struggling company may be in its accumulated tax losses (or other deferred tax assets). Tax losses will be lost on a change of ownership if the change is motivated by the possibility of obtaining the tax losses.

In the event that the activities in an entity are closed down or the entity is liquidated, any tax losses will be forgone. This can be avoided in certain circumstances if the transaction is appropriately structured. Further, any losses arising in the liquidation process may be carried back for two years and previous tax paid can be refunded.

Corporate disposals

The sale of shares will normally be tax exempt due to the Norwegian participation exemption regime, while the sale of assets will normally result in a taxable gain.

Nevertheless, depending on the tax position of the different companies in the distressed group, an asset sale may be more favourable than a share transaction as there may be tax losses which can be offset against the taxable gain and the purchaser may get a step-up in base cost in the assets for the future.

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Restructuring Services Tax
A Portuguese Perspective

Overview

Portuguese tax law in this area is particularly complex. It is also important to note that there are currently proposals to reform the Portuguese corporate tax framework which may come into force from 1 January 2014. These changes could increase the complexity of Portuguese tax law. However the RS Tax team in Portugal has extensive experience, having advised on many of the most important transactions that have occurred in this space in Portugal over recent years.

Common Issues

There are a number of key tax issues that regularly impact restructuring and insolvency transactions in Portugal. Some of the most frequent are:

Restructuring taxes

If certain conditions are met, a corporate income tax neutrality regime is available for most of the restructuring operations implemented at a Portuguese level to remove tax that would otherwise arise.

A transfer of ownership of immovable property may be subject to property transfer tax and/or stamp tax. Exemptions are available in certain circumstances.

Financial restructuring

A restructuring transaction can often be the opportunity to improve the efficiency of a company's capital and debt structure. Careful consideration of this area can have significant working capital benefits. This can particularly be the case where Portuguese group taxation relief applies allowing the use of interest expense to offset profits generated by other Portuguese resident companies.

Maintenance of the existing tax attributes

The value of a company may partially depend on its accumulated tax losses and other tax attributes, which, in some situations, may be lost as a result of a change in the ownership of the company or the implementation of a restructuring operation. This area requires detailed thought in order to maintain the existing tax attributes where possible.

Corporate disposals

The sale of shares or assets of Portuguese companies may result in taxable gains. The corresponding taxation may be reduced under a rollover relief mechanism such that only 50% of the capital gain may be immediately taxable.

Additionally, in relation to Portuguese pure holding companies, capital gains derived from the disposal of a financial participation held for more than one (general rule) or three years (when the financial participation was acquired from related entities, entities resident in a black list territory or from Portuguese resident entities liable to a special taxable regime – e.g. from a pure holding company - and, finally, if the holding company was liable to a different capital gain tax regime in the three years prior to the disposal of the financial participation) are typically not taxable. This may also be available for capital gains assessed on non resident entities on the sale of shares under the domestic rules where an applicable double taxation agreements does not automatically mitigate a charge.

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Restructuring Services Tax
A Spanish Perspective

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Overview

The Spanish tax regime is fundamentally linked to a company's underlying accounting treatment. In the world of restructuring and distress, this can create numerous complications that require very careful consideration. In addition, Spain's tax law is evolving in this area. The RS Tax team in Spain has a significant amount of experience dealing with these issues.

Common Issues

There are a number of key tax issues that regularly impact restructuring and insolvency transactions in Spain. Four of the most frequent are:

Tax attributes

Part of the value of a struggling company may be in its accumulated tax losses (or other deferred tax assets). During 2013 there is a restriction on the use of tax losses such that only 25% of profits can be sheltered by tax losses carried forward. It is currently anticipated that this limitation will be extended into 2014 and 2015.

Debt capitalisation and forgiveness

Waiver / capitalisation of debt often results in an accounting credit which may trigger taxable income, depending on a number of factors (e.g. whether there has been a previous acquisition of the debt at a discount and whether the lender is also a shareholder). If taxable income accrues, the current restrictions on loss usage may result in a cash tax cost.

Novation of debt terms

If there is a novation or modification of debt, it will be necessary to analyse whether the new terms are substantially different to the original terms. If this is the case, there can be accounting implications with a potential tax impact for the borrower.

Mortgage foreclosure

Transfer of properties upon a mortgage foreclosure may result in transfer taxes, VAT and/or stamp duty. Additionally, local taxes and corporate income tax costs may arise. Planning for the foreclosure procedure can help to manage tax costs.

Impact of balance sheet insolvency

If a company becomes balance sheet insolvent it may no longer be able to form part of a tax consolidation group (or if it is the principal entity of that group, it could cause the group to be extinguished). The loss of tax consolidation can cause significant cash tax costs. Where possible, remedying balance sheet insolvency in a timely fashion is therefore critical.

Share or Asset disposals

The sale of shares or assets may result in direct and indirect taxes, especially when real estate or "property rich companies" are involved.

Local taxes could also result in additional costs to be considered in a proposed restructuring or insolvency transaction.

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Restructuring Services Tax
A Swedish Perspective

Overview
The RS tax team in Sweden is integrated with the Swedish M&A Tax service line. The team has wide experience of independent business reviews, re-financings and restructurings, distressed M&A, insolvency and corporate simplification assignments.

Common Issues
There are a number of key tax issues that regularly impact restructuring and insolvency transactions in Sweden. The most frequent tax issues are described below.

Forgiveness of receivables
The forgiveness of debt may result in taxable income for the borrower and may also have an impact on the availability of tax losses carried forward, unless the transaction is appropriately structured. Taxable income can also arise where there is no actual release of debt but the debtor and creditor are (or become) associated parties and the debt stands at a discount to face-value.

Capital maintenance rules
Sweden has capital maintenance rules that require the introduction of new capital if a company loses more than 50% of its equity value.

Corporate disposals
A sale of shares will normally be tax exempt due to the Swedish participation exemption regime, whereas a sale of assets may result in a taxable gain or loss. Depending on the tax position of the selling company and of the acquiror, an asset sale may in some situations be more favourable than a share transaction.

Real estate
Real estate transfers are subject to stamp duty of 4.25%. If a direct sale of a property to a third party purchaser generates a gain then it is taxable at 22%. Losses can be used to offset a capital gain.

Tax losses
Certain restrictions apply to carried forward losses where there is a direct or indirect change of ownership. Broadly speaking losses carried forward exceeding 200% of the purchase price for the shares in the acquired company, reduced by any capital contributions, are extinguished.

Interest deductibility
From 1 January 2013 the Swedish interest deduction limitation rules have been broadened and now apply to all interest payable on loans granted by affiliated companies, regardless of the purpose or origin of the loan.

General anti-avoidance rule
Under the General Tax Avoidance Act, a transaction may be disregarded if it produces a substantial tax benefit, the tax benefit can be viewed as the predominant reason for the transaction and certain other conditions are satisfied.

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Restructuring Services Tax
A Swiss Perspective

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Overview

In Switzerland, financial restructuring measures can trigger corporate income tax, withholding tax and stamp duty liabilities. Various reliefs are available. The complexity results from the conditions that must be fulfilled in order to qualify for the reliefs and different (cantonal and federal) authorities applying different approaches.

Restructuring may trigger tax consequences not only for the over-indebted company, but also for other parties participating in the restructuring. Consequently, financial restructuring requires careful advanced tax planning.

Common Issues

There are a number of key tax issues that regularly impact restructuring and insolvency transactions in Switzerland. The most frequent are:

Debt forgiveness

For corporate income tax purposes, even if a restructuring is a qualifying financial restructuring under Swiss tax law, the forgiveness of debt is a taxable event. If the borrower is a shareholder, exemptions might apply which allow for income tax neutrality.

The forgiveness of debt by a shareholder is generally subject to stamp duty at 1%. The stamp duty code allows for a one-time relief for contributions up to CHF10m (and above that, subject to certain requirements being met). Whether or not such reliefs are available needs careful analysis based on the fact pattern of each individual case.

Mergers

A merger of an over-indebted company can trigger withholding tax consequences for the merged entity, which might not be refundable for non-Swiss shareholders. Furthermore, there may be income tax consequences for Swiss individuals holding shares.

Tax attributes

In Switzerland, tax losses carried forward remain available even after a merger or a change in ownership, provided there is no tax avoidance motive and the seven year loss carry forward period has not expired.

In the context of a financial restructuring the impact on tax losses carried forward needs to be evaluated. These rules are complex and it may be possible to revisit previous accounting periods and refresh tax losses that have been lost due to expiration of the seven year loss carry forward period.

Considering the above, taxpayers should carefully consider financial restructurings to avoid unexpected tax consequences and/or to benefit from reliefs and exemptions to the extent they are available.

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Restructuring Services Tax
A UK Perspective

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Overview

The RS Tax team in the UK has a wealth of experience in this area having advised on more than 600 transactions over the last 5 years alone. Inevitably, most of those transactions have had a UK dimension (if only UK lenders). However, we work closely with colleagues throughout the Deloitte network in Europe, North America and Asia-Pacific to provide bespoke advice.

Common Issues

There are a number of key tax issues that regularly impact restructuring and insolvency transactions in the UK. Five of the most frequent are:

Debt forgiveness

The release of excess debt can create taxable income in a borrower company unless the transaction is appropriately structured.

Equally, a taxable deemed release may arise where borrower and lender are (or become) connected and the debt stands at a discount to face-value. This may happen in situations where none of the debt is actually being released. This area, in particular, is often overlooked and requires careful thought to avoid crystallising significant unexpected tax liabilities.

Corporate disposals

The sale of shares or assets may result in taxable gains (although the sale of a trading company may be exempt under the UK "substantial shareholding exemption").

However, so-called "degrouping charges" may also arise when a company is sold having previously received an asset tax-free from another member of its corporate group.

Secondary liabilities

The inability of a seller to meet its own tax liabilities may result in those liabilities being passed to other companies in a group (including, for instance, those companies that may be being acquired by a new owner).

Tax attributes

Part of the value of a struggling company may be in its accumulated tax losses (or other deferred tax assets). It is easy to lose these tax losses on a change of ownership if the way the business has or is to be operated, or indeed in some circumstances how it is intended to be funded, also change.

Status of tax in insolvency

Tax arising during an insolvency process normally must be settled as an expense of the administrator or liquidator. Unusually, UK legislation treats pre-appointment tax as an unsecured creditor, with the aim of fostering rescue transactions.

However, insolvency processes also bring unique challenges given, for instance, their impact on tax groupings and how they interact with the UK's scheduler system of taxation.

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