Davis Polk

Allocating tax risks in private M&A transactions: non-resident capital gains tax

September 17, 2020 | Articles & Books

Cross-border private M&A transactions will often involve a seller tax resident in one jurisdiction and a target company tax resident in another. Commonly that target company – the entity whose shares are transferred to the purchaser – may be a holding company, whose principal assets will be subsidiaries that (directly or indirectly) operate the underlying target business in some third jurisdiction (the ‘source country’). If, rather than a share sale, the transaction were structured as a sale of the local assets – for example, a sale of the assets of a local branch or permanent establishment – then generally the tax system would allocate taxing rights to the source country. Where, instead, the transaction is structured as a sale of an intermediate, nonresident company – an ‘offshore indirect transfer’ (OIT) – the source country may still wish to tax the underlying gain (which it may consider remains properly attributable to its taxing jurisdiction), but its ability to do this becomes more difficult and more controversial. This article focuses on practical considerations for parties that encounter the risk of an OIT charge in a private M&A transaction and need to manage it in the diligence process and transaction documentation.

Read the Full Article >

Copyright 2020 Davis Polk & Wardwell LLP