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Tax issues in the SPA in the event of an acquisition of a company out of a fiscal unity

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1. Introduction

In the Dutch M&A practice it often happens that one or more Dutch companies (**Target**) are acquired out of an existing fiscal unity (tax consolidated group) for Dutch corporation tax purposes (**fiscal unity**) pursuant to Section 15 of the Corporation Tax Act 1969 (*Wet op de vennootschapsbelasting 1969* (**CITA**). The tax consequences of this are often a reason for the seller and buyer of the Target to include specific provisions in the share purchase agreement (**SPA**). Some of these tax aspects are discussed in this edition of *Quoted*. Although the statutory fiscal unity rules and regulations are extensive and impact on many other tax provisions, this contribution will focus on the points that are most common in practice. In order to gain a better understanding, some basic concepts of the SPA are discussed first in chapter 2. Next, the most important points for attention for the fiscal unity are discussed in chapter 3. In chapter 4, this contribution ends with a number of concluding comments.

The following situation has been taken as the starting point for this contribution:

*A domestic buyer buys from the seller 100% of the shares in the capital of the Target. The Target, in turn, holds 100% of the shares in the capital of another Dutch limited liability company (**Subsidiary**). The seller, Target and Subsidiary have been forming a fiscal unity for a number of years. Other subsidiaries of the seller that are not sold also form part of this fiscal unity."* [1]

2. Some basic terms of the SPA

2.1 Determination of the purchase price

A purchase price is usually determined by first determining the value of the entire business to be sold (**enterprise value**). This value can be determined in different ways. Typical methods are a discounted cash flow (**DCF**) valuation or a multiple of the EBIT(DA) (earnings before interest, tax, depreciation and amortization) valuation.

The enterprise value is then generally reduced euro-for-euro by the net debt (i.e. debt minus cash) of the business. In addition, the enterprise value will often be adjusted for changes in the actual net working capital, sometimes measured against a certain normalised level of net working capital that is deemed necessary for the continuation of the business operations. After these adjustments have been made, the shareholder value (**equity value**) is determined. In principle, the equity value is equal to the purchase price of the shares. The adjustments made, including those with respect to net debt and net working capital, to get from the enterprise value to the equity value is in practice often referred to as the "equity bridge".

The buyer and the seller obviously have opposite interests in the discussions as to what items must be included in the equity bridge. Tax items in the commercial annual accounts often also play a role in these discussions. Taxes formally due, but also taxes that are materially due but not yet formally established, will often be included in the debt or working capital item.

Deferred taxes form a separate category in the commercial financial statements. A deferred tax item is recognised if a temporary difference exists between the carrying amount of an asset or liability for financial reporting purposes and its tax base. This difference will disappear over time. Depending on the difference in valuation on the commercial and tax balance sheet, a deferred tax liability or a deferred tax asset will be taken into account. A deferred tax asset is also recognised in the commercial financial statements to the extent that, for example, there are available carry forward tax losses and it is probable that these losses will be utilized. In case of a fiscal unity, the offset of certain losses is somewhat more complicated; see chapter 3.5 below.

It is not always clear how deferred tax is treated for the purpose of determining the purchase price. In practice, a deferred tax liability is often not included under the definition of debt or net working capital and therefore does not affect the equity bridge. However, this does not necessarily mean that the deferred tax liability has no impact on the purchase price. An adequate DCF valuation

1 In this situation, a 'normal' fiscal unity exists between the seller, Target and Subsidiary. Section 15 CITA also allows for a so-called 'Papillon fiscal unity' or a 'sister fiscal unity' (*zusjes fiscale eenheid*). For an extensive discussion of this, please refer to *Quoted "The Fiscal Unity (Amendment) Act*", May 2017, no. 114. In principle, the points for attention described below also apply to a sale out of such a fiscal unity, on the understanding that in certain cases the consequences may turn out differently, e.g. in the case of the sale of a company that has been designated as the parent company of a 'sister fiscal unity'. This contribution does not discuss such situations further.

may well have taken into account the effect of this deferred tax liability on future profits and thus on the purchase price.[2] This seems unlikely in the case of an EBIT(DA) multiple valuation.[3] Whether a deferred tax asset or liability will in practice be taken into account when determining the purchase price, i.e. via the enterprise value or in the equity bridge, is not always clear from the outset and is not rarely the subject of negotiation.

2.2 Purchase price mechanism: completion accounts or locked box

In most transactions, the purchase price is determined by means of a completion accounts mechanism or a locked box mechanism. In short, these widely used mechanisms determine as per which date the purchase price must be determined and, consequently, from which date the target business will be for the buyer's risk and account.

In a completion accounts mechanism, a completion balance sheet is drawn up as per the date of actual legal transfer of the shares (**completion**) and the items in the equity bridge, net debt and net working capital are derived from this. The business will be legally and beneficially transferred to the buyer at completion. Since the completion balance sheet and other relevant financial data of the Target and Subsidiary will not be available when completion occurs, the completion balance sheet will have to be drawn up by the parties after completion. The SPA will therefore need to spell out in detail provisions with respect to the purchase price, the adjustments and the definitions of net debt and net working capital. After the completion accounts have finally been determined in accordance with the criteria in the SPA, the purchase price can be adjusted for net debt and changes in the net working capital. In practice, the parties often prefer to use a purchase price at the moment of completion based on an estimate of net debt and (changes in) working capital. On the basis of the completion balance sheet prepared and finalised later, these estimates will be compared with the actual amounts and differences will be settled by adjusting the purchase price. The subsequent preparation and finalisation of the completion balance sheet is a process that, in practice, might give rise to great deal of discussion between the parties, for example because the net debt or net working capital is not clearly defined.

Partly because of the discussions that may take place before and after completion in the case of a completion accounts mechanism, the 'locked box' mechanism is often preferred, especially in Europe. The locked box mechanism is based on a balance sheet as per an effective date prior to the signing of the SPA and completion. The purchase price, in particular the adjustments via the equity bridge, is determined on the basis of this historic balance sheet. The purchase price will then in principle be fixed, so the SPA does not need to include provisions for subsequent purchase price adjustments based on the equity bridge. From the effective date, the buyer usually is charged a form of interest on the purchase price, as a result of the fact that the seller only receives it on completion.

While the target business will be for the buyer's risk and account as from the effective date, the buyer does not yet have legal control over the Target and Subsidiary prior to completion. The buyer will therefore want the SPA to provide protection that no value, other than in the ordinary course of business, "leaks" from the company (**leakage**) between the effective date and completion. The idea is that on the effective date the target company, like a box, will be locked and that the buyer acquires it on that basis on completion. Should nevertheless leakage occur during the interim period, the SPA will usually provide that such leakage will be reimbursed by the seller.

As a rule, the SPA will contain provisions ("pre-completion undertakings") requiring that specific acts or decisions in the period from signing to completion must be approved in advance by the buyer often under the condition that the buyer cannot withhold such approval on unreasonable grounds. This concerns actions or decisions outside the ordinary course of business of the Target and Subsidiary

2 This may be the case, for example, if the tax depreciation used to determine the outflow to corporation tax is taken into account in determining the free cash flows.

3 More generally, therefore, tax items may also impact on the purchase price in a different way. It is important for the buyer and the seller to have the best possible insight into exactly what has been taken into account when determining the purchase price and the underlying enterprise value, equity bridge and equity value. This is sometimes difficult because transparency in this respect is not always in the buyer's or seller's interest.

that could have a negative impact on the (future) value of the company.[4] These include, for example, the distribution of dividends, the purchase of shares, the amendment of the articles of association, the making of material investments and disinvestments, the entering into of material commitments and the dismissal of key employees.[5]

As indicated above, the actual legal transfer of the shares in the Target to the buyer will take place on completion. In the Netherlands, this concerns the execution of the notarial deed of transfer. Completion takes place as soon as all the conditions in the SPA have been met. Often, the seller and buyer include conditions precedent in the SPA that suspend completion until all these conditions have been fulfilled or waived by the buyer. An obvious example of such a condition precedent is to obtain the approval of the relevant competition authority.

2.3 Tax warranties and indemnities

Each acquisition agreement involves an allocation of risks, often with particular attention to tax risks that have been specifically identified in the buyer's tax due diligence or for which it cannot be excluded that they will materialize. In short, there are three possibilities for the buyer to address these risks in the SPA: (i) by factoring it into the purchase price, (ii) by including tax warranties, or (iii) by asking for a tax indemnity. The greater the likelihood of the quantifiable tax risk materialising, the sooner a buyer would want to address that risk by adjusting the purchase price. In other cases, a buyer will choose to include certain tax warranties or a tax indemnity.

The tax warranties are statements of facts with regard to the tax position of the Target and Subsidiary, which the seller warrants to be true and accurate.[6] If certain facts and circumstances later turn out to be incorrect and a warranty is breached, damage for which the buyer can claim compensation may arise. However, various limitations, both in time and scope, apply to claims for damages under the warranties. It would be going too far to discuss this here in greater detail, but I would like to mention one important limitation: the disclosure provision. This provision generally provides that anything disclosed by a seller qualifies the warranties. The buyer cannot make a claim under the warranty if and insofar as the buyer should have known about the breach of the warranty on the basis of the information disclosed. This therefore excludes the possibility of providing the buyer with protection for identified tax risks by including tax warranties in the SPA. In that case, the inclusion of an indemnity offers protection in principle.

An indemnity is generally negotiated between parties on the basis of specific known facts and circumstances for related risks. However, in the case of taxes, it is often not unusual - and a buyer often takes that position - for a general tax indemnity to be given by the seller on the basis of the “our watch/your watch” principle. This means that the seller will give an indemnity for all tax liabilities relating to the Target and Subsidiary in respect of the period up to and including completion, unless the relevant tax liability has already been taken into account in the purchase price. In the case of a locked box transaction, the general tax indemnity for the period between the effective date and completion will generally not apply to taxes that arise in the ordinary course of business. The general tax indemnity is usually given on a euro-for-euro basis, with fewer limitations on the liability of the seller than in the case of warranties. For example, the disclosure provision does not normally apply to the indemnity.

Recent years have seen increased use of warranty & indemnity insurance, W&I insurance in short, in M&A transactions, in which claims relating to tax warranties and the general tax indemnity in the SPA are covered by a W&I insurance policy. While W&I insurance in principle covers claims under the tax warranties and the tax indemnity, there are generally many issues that are excluded from

4 In case of a completion accounts mechanism, such pre-completion undertakings are also often included in the SPA if a time lag exists between signing and completion. Such agreements are often made despite the fact that the buyer, in the case of a completion accounts mechanism, already has a certain degree of protection because, based on the acquisition balance sheet, a later purchase price adjustment can be made for net debt or changes in the net working capital. The buyer does not want to be confronted with unexpected (future) changes in value, nor does he want to run the risk that an obligation or withdrawal in connection with that action or decision will not be included in a purchase price adjustment. The buyer will also not want the nature of the acquired business to change.

5 Similar undertakings are often included in loan agreements by banks in order to avoid that the ability to perform the obligations (e.g. repayment and interest) under the loan may adversely be affected.

6 Besides the protective effect that tax warranties can offer, requiring such warranties is also a good way of gathering information about the Target and Subsidiary.

cover. Excluded are, for example, matters that are already known to the buyer, transfer pricing matters and, in many cases, joint and several liability (secondary liability) for the tax liabilities of others. The latter category relates specifically to the fiscal unity; see chapter 3.6 below. For that reason, W&I insurance may not provide sufficient cover for the specific issues involved in an acquisition of a company out of a fiscal unity.

3. Important points for attention in the event of an acquisition out of a fiscal unity

3.1 When does the fiscal unity terminate with regard to the Target and Subsidiary?

Under Section 15 CITA, the fiscal unity between the seller, Target and Subsidiary terminates when the seller no longer meets the “ownership requirement”. This ownership requirement as it currently applies means that the seller (i) must have the full legal and economic ownership of (ii) at least 95% of the shares in the nominal paid-up capital of the Target and (iii) that this ownership must represent at least 95% of the statutory voting rights in the Target and (iv) must in all cases entitle it to at least 95% of the profits and equity of the Target. The same requirements apply to the holding of the shares in the Subsidiary by the Target. Whether the ownership requirement is satisfied is a continuous test.

It is often undesirable for the Target and Subsidiary to leave the fiscal unity prematurely, i.e. before completion, with all the associated deconsolidation complications and a period where the Target and Subsidiary are separately liable to tax. In practice, therefore, parties often agree in the SPA the moment at which they will regard the Target and Subsidiary as deconsolidated and will take their positions accordingly. However, this is not decisive for the deconsolidation itself; after all, the law stipulates that deconsolidation occurs if the ownership requirement is no longer met.

3.1.1 Legal ownership and voting rights

Legal transfer of the shares in the Target to the buyer takes place on completion. As a result, the seller no longer meets the requirement, at least as from completion, that the holding of the full legal ownership of at least 95% of the shares in the nominal paid-up capital of the Target represents at least 95% of the statutory voting rights in the Target. It follows from legislative history, however, that this legal ownership and voting rights requirement must be satisfied not only in ‘form’ but also in ‘fact’.[7] This means that the seller must be the owner under civil law of the shares in the Target and be entitled to the voting rights to the shares and that these voting rights may not subsequently be hollowed out in any way.[8] Also otherwise legal title to the shares should be unconditional and unencumbered.[9]

As mentioned above, both completion accounts and locked box transactions often contain ‘pre-completion undertakings’ in the SPA; these concern, for example, specific acts or decisions relating to the Target and Subsidiary in the period from signing to completion, which are subject to the prior approval of the buyer. Such specific

7 This follows, among other things, from Parliamentary Papers I, 2011-2012, 31.058, no. E, p. 21-22 with regard to the test as it applied until 9 December 2016, in which the following was noted: Pursuant to Section 15(1) of the Corporation Tax Act 1969, the formation of a fiscal unity requires that the parent company holds the legal and economic ownership of at least 95% of the shares in the nominal paid-up capital of the subsidiary. With this ownership requirement, and specifically the requirement that the parent company must hold at least 95% of the legal ownership of the shares, the legislator has implicitly expressed that the parent company must also hold at least 95% of the voting rights in the subsidiary. Although the new law applicable to private limited companies explicitly prompted the addition, with effect from 1 January 2013, in the legislative text that the shares must represent voting rights under the articles of association, this was not intended to change existing practice. In the regulation as of 9 December 2016, this has been maintained unchanged and the word “full” has been added to explicitly emphasise a material approach.

8 Parliamentary Papers II, 2015-2016, 34.323, no. 6, p. 35 notes the following: The NOB asks whether it is sufficient for the “full” legal ownership to accrue to the parent company under the provisions of the articles of association, where it is irrelevant whether the voting rights accrue under a shareholders’ agreement to another party, so that in the latter case a fiscal unity can still be formed. In the situation outlined by the NOB, is not possible to enter into a fiscal unity under the current legal provisions. No change to current practice is envisaged in this respect. Although it is true that the rights attached to the shares must be assessed on the basis of the provisions of the articles of association, it must then also be considered whether the rights granted under the articles of association are somehow materially eroded. If, for example, the voting rights accrue to a shareholder other than the shareholder concerned on the basis of a voting rights agreement or by way of pledge, the ownership requirement may possibly no longer be met. It therefore remains relevant whether the voting rights under a shareholders’ agreement accrue to another party.”

9 Parliamentary Papers II, 2015-2016, 34.323, no. 3, p. 6 notes the following: “Legal ownership must be vested, both formally and materially, in one or more tax payers who are part of the fiscal unity, or in a top or intermediate company.”

acts or decisions may relate to the statutory voting rights attached to the shares or otherwise to the legal ownership of the shares as such, but also to other aspects, such as control or powers that concern the management board or the business itself. This raises the question of whether these arrangements have impact legal ownership and voting rights to such an extent that the legal ownership and voting rights requirement may no longer be considered met.

On the basis of the legislative history, arrangements that concern the business and the responsibilities of or actions by the management board and therefore do not directly relate to the shares as such are not relevant to the legal ownership and voting rights requirement.[10] Pre-completion undertakings that concern the authority of the management board or the business may, for example, be that the Target or Subsidiary cannot, without the consent of the buyer, deviate from the principles previously consistently applied in respect of the determination of profit and the valuation of assets and liabilities for tax purposes, nor can the Target or Subsidiary enter into agreements of any significance with the tax authorities without the consent of the buyer. The fact that third parties have effective control over a certain business act (which is ultimately a management board responsibility) does not mean that the shareholder has given up part of its shareholder voting rights.

While certain pre-completion undertakings may contractually curtail legal ownership and voting rights (possibly in such a way that it results in a deconsolidation of Target from the fiscal unity prior to completion), it may still be argued that, in the case of such pre-completion undertakings, the seller is, in principle, free not to seek approval for the decisions and acts referred to therein as the buyer often has no legally enforceable right to block the aforementioned decisions and actions, except that this would result in a breach of contract and the seller may then be liable to pay damages. The latter, however, does not detract from the fact that the seller is free to exercise his shareholder rights. In principle, therefore, these rights still belong entirely to the seller. Unfortunately, the law and legislative history do not actually provide a definite answer in respect of such pre-completion undertakings.

The policy in Decree BNB 2011/63[11] regarding the pledging of shares may provide a starting point.[12] In this decree, the Ministry of Finance takes the position that the legal ownership and voting rights requirement is not met if a parent company/pledgor formally retains the voting rights, but may only exercise the voting rights for certain acts or decisions after consultation with or approval from the pledgee.[13] According to the Ministry of Finance, the inclusion of such provisions on consultation or approval when establishing a pledge prevents the formation of the fiscal unity, regardless of whether consultation or approval actually takes place, unless the approval or consultation is solely aimed at maintaining (the value of) the shares as security for the pledgee.[14] The decree contains a list of subjects and decisions. Although not exhaustive, it concerns subjects and decisions that actually only concern the legal ownership of the shares as such.[15]

10 See for example Parliamentary Papers II, 2012-2013, 33.403, no. 3, p. 25, which notes: “This concerns the holding of (95% or more of) the statutory voting rights. This means that, for example, agreements between the management board of the subsidiary and other parties involved in the subsidiary whereby those other parties have a certain degree of control or participation in important decisions of that subsidiary, do not affect whether the required holding of the voting rights (under the articles of association) is complied with.”

11 The decree of 14 December 2010, no. DGB2010/4620M, BNB 2011/63, as last amended by decree of 16 December 2014, no. BLKB 2014/2137M, V-N 2015/7.13.

12 It follows from Parliamentary Papers II, 2015-2016, 34.323, no. 6, p. 35 that this policy has remained applicable in full following the legislative amendment of 1 January 2016.

13 It is noteworthy that the decree mentions that consultations on certain subjects or decisions can also result in the legal requirement of ownership and voting rights not being complied with. I do not share this view. Consultation is something essentially different to consent. In principle, the pledgor is free to do what he wishes with the voting rights. The power of decision remains entirely with the pledgor. In my opinion, there is no material erosion of the voting rights. This may be different in specific cases if the facts are such that even in the event of consultation no material choice to exercise the voting rights is available.

14 Various authors (e.g., Q.W.J.C.H. Kok, “*De bezitseis in het regime fiscale eenheid*”, MBB 2013/12, p. 367-373) assume that other decisions or subjects that affect the value of the shares, such as the entering into of obligations by the subsidiary, are also important. This position seems to be derived from the approach taken in the decree, but it can be deduced from the legislative history that only subjects that affect the legal ownership of the shares as such appear relevant.

15 This concerns decisions that affect the statutory voting rights, such as the decision to amend the articles of association of the Target, dissolution of the Target or the issue of new shares by the Target, and other decisions that affect the legal ownership as such; for example, the decision by the seller to sell the shares in the Target or grant option rights to the shares in the Target.

There is an argument that the approval in Decree BNB 2011/63 should also apply to an SPA with a pre-completion undertakings provision, because a pledge often goes further than a pre-completion undertaking in a SPA. For example, a breach of a pre-completion undertaking will generally not lead to the actual transfer of voting rights. After all, the buyer cannot challenge, prevent or reverse the breach, but can only claim damages under the SPA if the seller acts before completion in breach of the pre-completion undertaking, whereas in the case of a pledge on shares, the pledgee is actually in a position to claim the voting rights.

Approval that the pre-completion undertakings provision does not affect the legal ownership and voting rights requirements would also be in line with the approach taken for special shares to which specific voting rights are attached. It seems possible to derive from the legislative history, whether or not in combination with Section 2 of the Fiscal Unity Decree 2003 (*Besluit fiscale eenheid 2003*), that it is permitted for a third party to have certain control rights, via a priority or preference share, in the subsidiary forming part of the fiscal unity, without this affecting the legal ownership and voting rights requirement.[16] It may therefore be argued that a special share to which is attached the right that certain decisions of the general meeting of shareholders can only be taken with the consent of the holder of this share, would not be a problem for the legal requirement of ownership and voting rights.

Notwithstanding the aforementioned argument of reasonableness and the analogy with a right of pledge on shares or special shares, pre-completion undertaking provisions have, in practice, given rise to discussions with the tax authorities. In some instances, the tax authorities have taken the position that, per signing, the legal ownership and voting rights requirement was no longer met as a result of pre-completion undertakings, including undertakings that do not concern the shares as such. This is, of course, undesirable in practice as, in the case of a sale out of a fiscal unity, it almost without exception results in premature deconsolidation issues. For smaller transactions this is, to say the least, impractical, for larger transactions it can involve dozens of companies that deconsolidate from the fiscal unity, with all the consequences that entails, and are independently subject to taxation for a short time until completion. We understand that the Ministry of Finance has since indicated its intention to develop policy in this area, which will allow the inclusion of pre-completion undertakings in the SPA without breaking up the fiscal unity.

3.1.2 Economic ownership

Another question is when, as a result of the transaction, the seller no longer has full economic ownership of the relevant shares, which also represent at least 95% of the profit and at least 95% of the equity. In this context, the question arises as to what is meant by “full economic ownership”. Economic ownership is generally divided into three parts: the risk of a change in value, the risk of damage and loss and the right to income.

Although different positions have been taken in the literature[17], it follows from the requirement of full economic ownership for the ownership requirement that this is no longer met if the seller, as legal owner, transfers any

16 Section 2 of the Fiscal Unity Decree stipulates that if a third party has been issued one special share with a symbolic nominal value and a right to profit of less than 10% of that value, this right to profit will not be taken into account for the purpose of assessing whether the parent company meets the ownership requirement. Although Section 2 of the Fiscal Unity Decree does not explicitly refer to the voting rights requirement, such a special share should also be disregarded for the voting rights requirement on the basis of the legislative history and earlier policy. Furthermore, it seems to follow from the legislative history that Section 2 of the Fiscal Unity Decree is not at all necessary to exempt such a special share from the voting rights requirement. See Parliamentary Papers I, 2016-2017, 34.323, D, p. 4, in which it is noted: “Furthermore, the NOB asked for comments on Cornelisse’s opinion published in NTFR that said Section 2 is not necessary to disregard the special control rights attached to a special share. This view can also be confirmed. The fact that special control rights are attached to such a share will not affect the fact that the remaining shares held by the parent, top or intermediary company may represent at least 95% of the voting rights provided for in the articles of association. Simonis notes in P.H.M. Simonis, “*Wet aanpassing fiscale eenheid (deel 2)*”, MBB 2016/12, p. 461-481 that the word ‘may’ in the aforementioned passage in the legislative history may also have to be interpreted differently and that such shares may possibly have an impact on the voting rights requirement. For a more detailed discussion, refer to S.A.W.J. Strik, *Cursus Belastingrecht*, Vpb.2.9.2.E.b5, R.P.C Cornelisse, ‘*Bijzonder aandeel en fiscale eenheid*’, NTFR 2013/291. and P.H.M. Simonis, ‘*Wet aanpassing fiscale eenheid (deel 2)*’, MBB 2016/12, p. 461-481.

17 See F.J. van Lemel, “*Wanneer heeft een moedermaatschappij voldoende bezit om een fiscale eenheid te vormen?*”, WFR 2005/1702, in which it is argued that the seller, as legal owner, has full economic ownership in the Target for application of the ownership requirement, if it has legal ownership of the shares and is also exposed to a certain valuation risk with respect to the shares. In other words: if the legal owner has any economic interest in the shares, the required full economic ownership of the shares in question for application of the ownership requirement is assumed.

economic interest in the shares. This can also be derived from the legislative history.[18] It is also in line with the position adopted by the Ministry of Finance in Decree BNB 2011/63 that options in respect of shares may affect the requirement of full economic ownership and therefore the ownership requirement.

In a share sale transaction, a number of moments can be recognised at which it could be argued that the seller no longer holds the full economic ownership of the shares in the Target and indirectly in the Subsidiary[19]:

(i) The effective date in the case of a locked box transaction;
(ii) Signing;
(iii) The moment at which all conditions precedent in the SPA are met (if included in the SPA); and
(iv) Completion.

Re (i)

It follows from the legislative history that an effective date is not decisive for the moment at which the seller no longer has the full economic ownership of the shares in question.[20] It also follows from the ruling of the Amsterdam Court of Appeal of 30 June 2004, V-N 2004/59.13 that an effective date used in an SPA does not mean that (retroactively) from that date the seller no longer has the full economic ownership.

Re (ii)

Under certain circumstances, entering into the SPA, the signing, may result in the seller no longer having the full economic ownership of the shares in question. In my opinion, this can in principle only be the case if the SPA has been entered into without any conditions precedent.[21] In practice, however, it is uncommon for the SPA to be entered into without conditions precedent and as long as the conditions precedent have not been met, the buyer does not have a vested economic interest in respect of Target or Subsidiary. After all, the obligation first takes effect only when all the conditions have been fulfilled or waived. This consequence of a condition precedent has been explicitly recognised in legislative history.[22] I also refer to the ruling of the Supreme Court of 16 January 1985, BNB 1985/143 and the ruling of the Amsterdam Court of Appeal of 16 July 2008, V-N 2009/5,15, in which it was held that a disposal only took place when the condition precedent was fulfilled.

On the basis of other Supreme Court decisions, not directly related to the subject matter, theoretically there is still a risk that a fiscal unity would already terminate upon signing, even if there are unfulfilled conditions precedent. This would of course be undesirable in practice (the example in chapter 3.1.1 above also applies here). Such an outcome would also be at odds with earlier statements in the legislative history and the policy of the Ministry of Finance regarding the ownership requirement for the fiscal unity. The decree of 18 July 1989, V-N 1989/2825, which concerned the ‘old’ fiscal unity regime, refers to an “irrevocable obligatory agreement” as a moment at which the seller no longer has the full economic ownership.[23] In the same decree, which was later repeated in the legislative history[24], the Ministry of Finance also applies the general principle that economic ownership passes when

18 See Parliamentary Papers II, 1999-2000, 26.854, no. 3, p. 31 and Parliamentary Papers II, 2000-2001, 26.854, no. 6, p.13-15.

19 In some cases there may be other identifiable moments which generally occur before signing, for example the signing of a letter of intent or a signing protocol. Without elaborating, it can often be argued that these moments are not relevant because they occur prior to signing of the SPA.

20 Parliamentary Papers I, 2002-2003, 26.854, no. 45a, p. 5.

21 In my opinion, however, this must involve genuine conditions precedent, in the sense that it constitutes a meaningful uncertainty as to whether the transaction will proceed.

22 See Parliamentary Papers II, 1999/2000, 26.854, no. 3, p.31 in which it is noted that, in the context of a transfer of voting rights under a condition precedent in connection with a pledge of shares, the ownership requirement is first no longer met when the condition precedent occurs.

23 The term “irrevocable obligatory agreement” in any event seems to cover a share purchase agreement which results in a valid legal title as meant in Section 3:84 of the Dutch Civil Code. In our M&A practice, we sometimes encounter an SPA in respect of an acquisition of a Dutch target which is not governed by Dutch law and in which the parties agree that the seller ‘shall sell’ or ‘agrees to sell’ the shares. Under Dutch law, this does not seem to provide for an (unconditional) legal title to transfer the legal and economic ownership of the shares unconditionally at completion and, consequently, there may not be an irrevocable obligatory SPA. However, in order to achieve a valid transfer of shares pursuant to Dutch law in such a situation, a valid legal title is included in the notarial deed of (sale and) transfer of the shares and the parties agree to waive the right to terminate (or to claim termination of) the agreement in the notarial deed. Furthermore, a seller will typically want to exclude the applicability of provisions regarding non-conformity as laid down in section 1 of Book 7 of the Dutch Civil Code. It may then be argued that the seller only transfers the full economic ownership of the shares at the moment of execution of the notarial deed of (sale and) transfer as this seems the moment that an irrevocable obligatory agreement arises in respect of the transfer of the (legal) and economic ownership. This will (unsurprisingly) depend on all facts and circumstances, and it is questionable whether this approach fits in the Dutch M&A practice.

24 Parliamentary Papers II, 1999/2000, 26.854, no. 3, p.31.

the obligatory purchase agreement is concluded, but only if the price agreements in the obligatory agreement are such that the price of the shares is unambiguously fixed, so that neither the buyer nor the seller can subsequently exert any influence on this price. In any event, as regards the fiscal unity, the application of a material interpretation in line with this decree would appear to be more justifiable.[25]

In order to unambiguously determine the final purchase price in the case of a completion accounts mechanism, one looks at the situation at the moment of completion, rather than the moment of signing or the fulfilling of the condition(s) precedent. On this basis, it could be argued that completion should be the last moment at which the fiscal unity terminates because only on that day the purchase price will be unequivocally and finally fixed and only then will the requirement of full economic ownership cease to be met, even if the conditions precedent have been fulfilled earlier. Furthermore, the SPA in respect of a completion accounts mechanism often includes a provision that the target business shall be for the risk and account of the buyer with effect from completion. However, this does not necessarily exclude the possibility that as from the moment that the last condition precedent has been fulfilled at least some risk of change in value or damage and loss and, hence, some economic exposure, rests with the buyer. This will depend on all relevant facts and circumstances. In a locked box transaction, the purchase price is in principle unambiguously fixed at the moment of signing, although the SPA may and generally will include further conditions precedent.

Re (iii)
As indicated above, the moment of fulfilment of the last condition precedent in a locked box transaction may result in the seller no longer owning the full economic ownership. As discussed under (ii) above, in a completion accounts mechanism with condition(s) precedent, this risk may also exist.

Re (iv)
As indicated, completion may coincide with fulfilment of the last condition(s) precedent in the SPA. However, in practice, the moment of fulfilment of the last condition precedent sometimes lies some (often short) time before completion. In a locked box transaction this would mean that the Target and Subsidiary would be deconsolidated before completion. This risk may also arise in a completion accounts mechanism (taking into account the comments under (ii) above), but it could be argued here that the purchase price is first determined unequivocally at the moment of completion.

Because of the uncertainty in situation (iii) and (iv), it frequently happens in practice that parties, in both a locked box transaction and a completion accounts mechanism, come to a practical arrangement with the tax authorities about deconsolidation of the Target and Subsidiary at the moment of completion. This depends on the specific circumstances.

If the moment of deconsolidation of the Target and Subsidiary from the fiscal unity with the seller lies before completion, the buyer may under certain circumstances, pursuant to Section 4 of the Fiscal Unity Decree, form a so-called successive fiscal unity between the buyer, Target and Subsidiary as of the aforementioned moment of deconsolidation so that Target and Subsidiary do not become independently liable for tax before completion. This provision approves that if the parties intend to transfer the full legal ownership of the shares without delay, in any event within 5 business days, acquisition of the full legal ownership will be deemed to have taken place simultaneously with the acquisition of the full economic ownership. The buyer can then form a fiscal unity as of that date (if all other conditions are met). The period of 5 business days may, under certain circumstances, be extended on request to a maximum of 3 months if transfer is dependent on circumstances beyond the buyer's and seller's control, for example approval by the competition authority.

3.2 Have all the tax sharing agreements with the Target and Subsidiary been settled?

During the period that the Target and Subsidiary are part of the seller's fiscal unity, tax is levied as if the companies included in the fiscal unity are one tax payer according to Section 15(1) CITA, in the sense that the activities and the (net) assets of the Target and Subsidiary (as subsidiaries) form part of the activities and assets of the seller as the

25 In its ruling of 10 January 2001, V-N 2001/6.20, the Supreme Court also applied a material interpretation of the ownership requirement by allowing a fiscal unity to be formed from the moment at which the economic ownership of shares was acquired by the buyer, while the legal ownership of those shares was acquired by the buyer only at a later stage.

fiscal unity parent. The tax is levied from the seller as fiscal unity parent and, under Section 24(2) CITA, the corporation tax assessment is issued in the name of the seller.
As regards the tax collection, the main rule is that the party to whom the tax assessment is issued must pay the tax due or is entitled to a tax refund.[26]

The question is how the seller handles the corporation tax and the tax sharing within the fiscal unity. Does the seller bear the total corporation tax owed by the fiscal unity, or does the seller charge the attributable portion of corporation tax to the Target and Subsidiary? And how are the losses of a company belonging to the fiscal unity that have been offset against profits of other companies belonging to that fiscal unity handled? Is the benefit of horizontal loss compensation passed on to the company that incurred the loss in question or not?

From a tax point of view, there is no obligation for corporation tax sharing within a fiscal unity.
Dutch accounting rules offers great freedom for addressing the corporation tax sharing within the fiscal unity in the stand-alone financial statements of the companies that are part of the fiscal unity.[27] Four options can be distinguished: (a) the seller settles with the Target and Subsidiary as if it were an independent tax payer; (b) the seller settles on the basis of the profit for tax purposes of the Target and Subsidiary, taking into account an allocation of the benefits of the fiscal unity to the different companies that form part thereof; (c) the seller settles on the basis of the result for financial reporting purposes; or (d) the seller bears the entire tax burden.

Dutch accounting rules and guidelines recommend that the method of corporation tax sharing be laid down in an agreement. This is not required, however, and hence tax sharing may happen without a written agreement.

In any event, the buyer will want to be sure that all tax-sharing agreements between the Target and Subsidiary and the seller's group have been terminated prior to the sale and all related rights and obligations have been settled by including protective provisions in the SPA. The buyer will not want to be confronted with an unforeseen liability to the seller by virtue of tax sharing relating to a period before completion.[28] This is in line with the position that buyer generally takes with regard to the general tax indemnity described under the 'our watch/your watch' principle in chapter 2.3. The buyer may consider bringing payments under a tax-sharing agreement specifically within the scope of this tax exemption.

In case of a locked box transaction, a special situation arises in which the economic risk relating to the Target and Subsidiary is borne by the buyer from the effective date. From that date, the profits and losses of the Target and Subsidiary therefore fall to the buyer. However, it is quite possible that the Target and Subsidiary will still form part of the fiscal unity with the seller until a certain moment after the effective date, often completion; see chapter 3.1 above. In the absence of any further tax sharing arrangements, the corporation tax on any profits made by the Target and Subsidiary during that period would be for the seller's account. The seller will therefore generally want to include a specific provision in the SPA on the basis of which it will be reimbursed by the buyer for corporation tax attributable to the Target and Subsidiary over that period without such reimbursement reducing the purchase price. The buyer will usually find this reasonable insofar as it is attributable to the normal business operations of the Target and Subsidiary and the allocation and calculation of the

26 The Tax Collection Act 1990 (*Invorderingswet 1990*) provides a number of exceptions to this, including the possibility for the tax authorities to hold all the companies that form part of the same fiscal unity liable for tax liabilities; see in this context chapter 3.6 below.

27 The core provision of Dutch accounting law, Section 2:362(1) of the Dutch Civil Code, provides that financial statements must, according to generally accepted standards, provide an insight such that a reasonable judgement can be formed regarding the company's (net) assets and results. According to paragraph 802 of the Annual Reporting Guidelines 272.8, in the case of consolidated financial statements the existence of the fiscal unity does not have any particular significance for this insight, but it does have special significance in the case of stand-alone financial statements. This seems only relevant if the fiscal unity parent or any of the subsidiary members of that fiscal unity are obliged to draw up stand-alone financial statements, and for example the so-called group exemption in Section 2:403 of the Dutch Civil Code is not applied. Although a similar legal requirement to provide an insight applies under IFRS and US GAAP, these do not specifically address the issue of tax sharing within a fiscal unity.

28 It sometimes happens that, at the moment of completion, the Target and Subsidiary have an outstanding liability to the seller by virtue of tax sharing over a period before completion. Such a liability would normally reduce the purchase price on an euro-for- euro basis (see chapter 2 on net debt above). The Target and Subsidiary must then also pay the liability to the seller. For the seller this is no more than a shifting of funds and therefore rather pointless. However, as will be explained below, this is different in a locked box transaction for the period from the effective date if the Target and Subsidiary are still part of the fiscal unity with seller until a certain time thereafter.

amount payable by the buyer can be sufficiently verified by the buyer and disputed if necessary.[29]

The buyer will want to include in the SPA a mirror tax-sharing arrangement in the event that losses are incurred by the Target and Subsidiary in the relevant period and these are offset against the profits of the other companies in the fiscal unity in that period or against the profits of the fiscal unity, including the Target and Subsidiary, before the effective date. As a main rule, any losses, possibly including those of subsidiaries / Target and Subsidiary, remain with the seller (see chapter 3.5 below), while they are for the buyer's account. Although it is possible in the case of deconsolidation, under certain conditions, to transfer losses to the Target and Subsidiary on request, Section 15 CITA prescribes an all-or-nothing approach in the sense that, if so requested, all fiscal unity losses attributable to Target and Subsidiary from before the effective date will be transferred to the Target and Subsidiary. The question is whether a seller will agree to this as the seller may have use of the losses itself. See also chapter 3.5 below.

3.3 The fiscal deconsolidation and opening balance sheet must be drawn up

As indicated in chapter 3.1 above, the sale of the shares in the Target will result in the termination of the fiscal unity of the seller in respect of the Target and Subsidiary. From the moment of deconsolidation, the independent corporation tax liability for the Target and Subsidiary will in principle commence based on Section 7 CITA.[30]

Under Section 15aj(5) CITA, from the moment of deconsolidation, the Target and Subsidiary in principle essentially "step in the shoes" of the seller's fiscal unity in respect of what is continued after the deconsolidation. It follows from this "step-in-the-shoes" approach that the assets and liabilities of the Target and Subsidiary after deconsolidation in principle remain subject to the same book values and valuation methods that applied to the fiscal unity. Under Section 13 of the Fiscal Unity Decree, a statement of assets and liabilities of the Target and Subsidiary (the so-called 'deconsolidation balance sheet') is attached to the tax return of the fiscal unity of the seller for the year in which the Target and Subsidiary were deconsolidated. This deconsolidation balance sheet in principle determines the continued assets and liabilities of Target and Subsidiary immediately after deconsolidation. Preparation of this deconsolidation balance sheet is a matter for the seller, in which the buyer is not involved.

However, the buyer does have an interest in the deconsolidation balance sheet because it will in principle form the basis for the opening balance sheet for tax purposes of the Target and Subsidiary as from the date of deconsolidation. After all, the deconsolidation balance sheet and the opening balance sheet must match with regard to the assets and liabilities of the fiscal unity.[31]

Through the due diligence investigation, the buyer will usually have formed a picture of what the above deconsolidation balance sheet and opening balance sheet should look like and will have taken this into account when determining the purchase price, for example by taking into account a deferred tax liability in respect of the assets and liabilities. In order to avoid surprises, the buyer will therefore want to make arrangements in the SPA with regard to the deconsolidation balance sheet and include a provision that the seller will draw up the deconsolidation balance sheet consistent with past practice, provide the buyer timely with a draft of this and take the buyer's comments into account, and that the seller will not deviate from the deconsolidation balance sheet in the tax return, unless required by law. A buyer may also want to be involved if, at a later date, the tax authorities deviates from positions in the tax return by the fiscal unity of the seller and this has consequences for the deconsolidation balance sheet.

Of course, the seller also has an interest in sound arrangements, for example that the buyer, Target and Subsidiary do not deviate from the deconsolidation balance sheet in the future tax return.

29 In practice, the SPA often includes a provision that all existing tax sharing agreements between the seller, Target and Subsidiary are economically terminated and settled as of the effective date and that, for the period from the effective date until deconsolidation from the fiscal unity, specific arrangements are included concerning the determination of the attributable corporation tax and the amount to be reimbursed, and the related rights and obligations of the buyer and the seller.

30 Pursuant to Section 7 CITA, the corporation tax is, in principle, levied per financial year. If deconsolidation of the fiscal unity with the seller takes place during the tax year, Section 7(4) CITA specifically provides that the remaining part of the financial year after deconsolidation constitutes a separate financial year for the Target and Subsidiary.

31 See also Supreme Court 27 November 2015, BNB 2016/36.

3.4 How should revaluations in the fiscal unity that result in a tax benefit for the Target or Subsidiary be dealt with?

Section 15ai CITA contains a provision according to which the transfer of an asset within a fiscal unity ("tainted transfer") may trigger a tax liability if the fiscal unity is terminated with respect to the transferor and/or transferee within three or six calendar years after the transfer.[32] The asset(s) transferred within the fiscal unity will have to mark-to-market immediately prior to the deconsolidation and any mark-to-market gain will be subject to corporation tax.[33] If, at the time of the deconsolidation, it appears that the asset transferred is already outside the fiscal unity (e.g. because it has been sold on), the sanction is in principle no longer applicable, with the exception of certain situations in which a reinvestment reserve has been formed.

If the Target and/or Subsidiary were involved in a tainted transfer prior to the sale, the sanction under Section 15ai CITA applies in principle on termination of the fiscal unity as a result of the sale of the Target. The taxable profit as a result of the revaluation of the transferred asset results in taxation at the level of the fiscal unity or reduces the (carry forward) losses of the fiscal unity. If the assets in question, after deconsolidation, belong to Target and/or Subsidiary, the tax book value of those assets will be stepped up in the opening balance sheet for tax purposes of the Target and/or Subsidiary. This leads to a benefit in the form of a higher basis for tax purposes and/or a lower unrealized gain at the Target or Subsidiary. In such a case, the seller will want to include in the SPA a provision on the basis of which it receives compensation from the buyer for this higher value for tax purposes. The amount of the compensation depends on the commercial agreements, but the seller could, for example, set the compensation at an amount equal to the present value of the (future) tax benefit of the Target or Subsidiary.

The question is whether the buyer would consider it commercially acceptable to take into account a revaluation under Section 15ai CITA in the SPA. A buyer would usually want to know explicitly whether, and if so which, tainted transfers have taken place. The seller may be uncertain about this. Moreover, when determining the purchase price of the shares in the Target, the buyer may not have taken into account any available deferred tax liabilities and may therefore not wish to compensate the seller for such a revaluation to the extent that it relates to the same deferred tax item. Otherwise, the buyer would, from an economic perspective, compensate the seller twice.

It is also conceivable that the sanction of Section 15ai CITA may not actually lead to taxation at the level of the fiscal unity, in which case the buyer may feel less inclined to pay compensation to the seller. Should there nevertheless be a willingness to accept a certain degree of compensation, the question arises whether the tax benefit for the Target or Subsidiary should not be reimbursed until it has actually been realised and led to savings in the hands of the Target or Subsidiary. A similar discussion also arises with regard to other revaluations of assets or liabilities at the fiscal unity that result in a (future) tax benefit for the Target or Subsidiary. These could be, for example, corrections imposed by the tax authorities on the fiscal unity in respect of the period prior to completion or effective date in relation to depreciation charges or transfer pricing adjustments.

In certain cases, upon request, the sanction of Section 15ai CITA does not apply in respect of the fiscal unity of the seller, but the Section 15ai claim may be transferred to a newly formed successive fiscal unity. Decree BNB 2011/63 provides this option for three specifically described situations. A common situation in the Dutch M&A practice that is regulated in the decree concerns the situation where the transfer of an asset has taken place within a fiscal unity and a smaller fiscal unity would have been possible between the transferor and the transferee both at the time of the transfer and at the time of the deconsolidation.[34][35]

The seller therefore has the possibility to request a transfer of the Section 15ai claim if there has been a tainted transfer between the Target and Subsidiary within the fiscal unity and a new successive fiscal unity between the Target and Subsidiary is formed and, possibly, the buyer. This request must be made by the seller together with the

32 The 3-year period applies to a transfer of a business or an independent part of the business in exchange for the issue of own shares by the transferee.

33 The revaluation sanction does not apply if the transfer has taken place in the context of normal business operations that are appropriate to the nature and size of the transferor and the transferee.

34 The other two situations that are dealt with in the decree relate to a parent company of a fiscal unity that is involved as a disappearing legal entity in a legal merger in which the acquiring legal entity does or does not belong to the same fiscal unity. Such situations are not discussed further in this contribution.

35 For the other requirements set for the transfer, reference is made to part I of paragraph 8.1 of Decree BNB 2011/63.

Target and Subsidiary before the seller's fiscal unity has submitted its return for the relevant year.

However, the seller does need the buyer's cooperation in this respect. After all, the request for transfer will usually only be submitted by the seller once the Target and Subsidiary belong to the buyer's group. The Target and Subsidiary (and, possibly, the buyer, if it is the parent of the fiscal unity) will have to accept the transfer and the associated conditions in writing within two months of the date of the approval for transfer of the Section 15ai claim. In cases like this, the SPA will generally include provisions requiring the buyer to cooperate.

3.5 Are tax losses transferred?

It is possible that the Target or Subsidiary itself has so-called pre-fiscal unity losses. These are the losses of that company that are still available for compensation and which it incurred separately before being part of the seller's fiscal unity. Pursuant to Section 15af(1)(a) CITA, that company retains the right, in principle, to offset these losses against profits realised by that company after the sale.[36]

In addition, the seller's fiscal unity may have carry forward losses that arose during the period that the Target and Subsidiary were part of that fiscal unity. As a general rule, on deconsolidation, these fiscal unity losses remain with the seller as the parent company of the fiscal unity. However, pursuant to Section 15af(1)(b) in conjunction with (2) CITA, fiscal unity losses attributable to the deconsolidated company may be transferred to that company if requested by the seller and the relevant deconsolidated company. According to the Ministry of Finance, an all-or-nothing approach applies in this respect; it is not possible to transfer only a portion of the attributable fiscal unity losses .[37]

Based on the ruling of the Supreme Court of 13 May 2011, BNB 2011/217, fiscal unity losses are understood to mean all fiscal unity losses on the date of deconsolidation. In this ruling, the Supreme Court held that the result of the fiscal unity after deconsolidation had no influence on the amount of any fiscal unity losses to be transferred. A 'cut' must therefore be made at the time of deconsolidation. This approach can lead to remarkable situations in practice. Suppose that the fiscal unity with the seller, up to and including the financial year 2017, has 10,000 in carry forward losses that are attributable to Target. The financial year of the fiscal unity is equal to the calendar year. In the first 8 months of the financial year 2018, the Target itself incurs a loss of 1,000. The seller and Subsidiary make no profit or loss in this period. On 1 September 2018, the Target and Subsidiary are deconsolidated from the seller's fiscal unity. The seller makes a profit of 2,000 on the remaining part of 2018. Although the loss of 1,000 over the first 8 months of the 2018 financial year of the fiscal unity is not determined by way of a formal decision and in principle is not a formally compensable loss, according to the Supreme Court it does qualify as a compensable loss for the application of this provision and can be transferred together with the amount of the losses determined by way of a formal decision (i.e. 10,000).[38] In total, 11,000 in loss can therefore be transferred to the Target on request, while the seller has to pay corporation tax on a profit of 2,000. It is therefore possible that the loss transferred is higher than the loss ultimately incurred by the fiscal unity during the whole financial year.

36 Subject to the loss compensation restrictions pursuant to Section 20(2) CITA (loss carry forward restricted to a maximum of 9 years under current law), Section 20(4) CITA (holding and financing loss regulation) and Section 20a CITA.

37 This all-or-nothing approach follows from paragraph 7.1 of Decree BNB 2011/63. The Ministry of Finance bases this on the legislative text. However, various authors (see, e.g., Q.W.J.C.H. Kok, '*de fiscale eenheid in de vennootschapsbelasting*', Sdu Fiscale & Financiële Uitgevers, Amersfoort 2005, p. 490-491 and S.A.W.J. Strik, *Cursus Belastingrecht*, Vpb.2.9.6.D.b3.V) have concluded that it is possible to only transfer a portion of the losses. This could be derived, among other things, from the terminology used in the legal text 'to the extent' and the fact that the tax payer 'has to make plausible' the amount of losses to be transferred. In this way it seems possible to make only a portion of the attributable loss plausible.

38 Section 20(2) CITA provides that a loss is offsettable on the condition it has been determined by way of a formal decision that is open to objection. Section 20b(1) CITA stipulates that the inspector must, simultaneously with the assessment for that year, determine the amount of a loss of a year by means of a formal decision that is open to objection. Under Section 7 CITA, the year in this respect is in principle the same as the financial year of the tax payer, i.e. the seller as parent of the fiscal unity, unless regular accounting with regular annual closures is not in place. In that case, the calendar year will be taken as the year. Deconsolidation of the Target and Subsidiary does not end the seller's current financial year. The part of the 2017 financial year until deconsolidation will therefore not be considered a separate year and the loss for that period will not be formally established by decision as referred to in Sections 20 and 20b CITA. Nevertheless, in BNB 2011/217, the Supreme Court ruled that this loss could also be transferred as carry forward loss. This approach is in line with the literal text of Section 15af(1) CITA in which explicit reference is made to Section 20(2) CITA: "as from the time of deconsolidation of a subsidiary, the following losses are offsettable (...) for the purposes of Section 20(2)".

The request to transfer the fiscal unity losses must be made in the tax return of the fiscal unity of the seller in the last year in which the company in question, the Target or Subsidiary, was still part of the fiscal unity. As mentioned before, this therefore requires the cooperation of the seller. The seller will often only be prepared to cooperate if the tax value of the losses has increased the purchase price (see chapter 2 above) For example, a deferred tax asset in respect of these losses included in the relevant commercial annual accounts or completion accounts has been taken into account in determining the purchase price. If the seller has no further potential for offset after the sale, this may affect the amount of compensation for tax losses.

Whether, and if so how much, the buyer is prepared to pay for tax losses, being pre-fiscal unity losses of the Target and Subsidiary and fiscal unity losses attributable to the Target and Subsidiary, depends on the circumstances of the case. Normally, the buyer would not be prepared to increase the purchase price by an amount equal to the nominal value of the tax losses. Moreover, in a locked box transaction, the buyer will not be willing to pay compensation for fiscal unity losses of the seller that are attributable to the Target and Subsidiary after the effective date because the buyer already has economic ownership thereof; See chapter 3.2 above. The buyer will make its own assessment of the possibility to utilize the tax losses in view of the future expectations within the buyer's group and, moreover, of the period within which this utilization will take place.[39] The outcome determines the (present) value of the tax losses for the buyer and what amount the buyer may be prepared to pay for them.

In practice, at the time of acquisition, the amount of the tax losses (to be transferred) will often not yet be determined because not all the returns of the fiscal unity, Target and Subsidiary have been submitted and the tax authorities has not yet imposed all the relevant assessments and decisions. It is then important for the buyer to include sufficient protection in the SPA, for example in the form of a specific tax indemnity, in the event that the actual amount of available tax losses (transferred) is lower than the parties had agreed.

3.6 Liability claim and set off by the tax authorities

Under Section 39 of the Tax Collection Act 1990 (*Invorderingswet 1990* ("**IW**")), all companies that form part of a fiscal unity are jointly and severally liable for the corporation tax levied from that fiscal unity in respect of the period that they formed part thereof. This therefore also applies to the Target and Subsidiary in respect of the periods during which they were part of the seller's fiscal unity.

Section 39 IW speaks of "the corporation tax that has been levied from the fiscal unity over a period". In principle, this term seems to refer to the financial year of the fiscal unity.[40] Suppose that the financial year of the seller's fiscal unity corresponds with the calendar year and that the Target and Subsidiary are deconsolidated from this fiscal unity during 2017. Based on a literal reading of the legislative text, it could be argued that the Target and Subsidiary can be held liable for the corporation tax liabilities of that fiscal unity for the whole of 2017, thus also in theory for the part that is in fact attributable to the period after deconsolidation.[41] However, the more reasonable interpretation on the basis of a material application of Section 39 IW is that only the period during which Target and Subsidiary were part of the fiscal unity should be considered. This is also in line with the approach of the Supreme Court in its ruling BNB 2011/217 that a 'cut' must be made to the deconsolidation period under Section

39 In this respect, the buyer should be aware that a transfer of losses after deconsolidation could lead to a fragmentation of losses. The consequences of this should not be underestimated. Suppose that the fiscal unity with the seller has a tax loss of 500 in 2017, of which 400 is attributable to the Target and 100 to the Subsidiary. As a result of the transaction, the Target and Subsidiary are deconsolidated. Together they immediately form a new successive fiscal unity. Upon request, the 400 loss is transferred to the Target and 100 to the Subsidiary on deconsolidation. These losses are then the Target and Subsidiary's own pre-fiscal unity losses and can, in principle, only be offset against the profits of the new fiscal unity to the extent that those profits are attributable to the deconsolidated company, according to Section 15ae(1) CITA. Thus, if the new fiscal unity makes a profit of 200 that is fully attributable to the Subsidiary, then loss compensation is limited to 100 and the new fiscal unity will pay corporation tax on 100. It follows from paragraph 7.3 of Decree BNB 2011/63 that the Ministry of Finance is unfortunately not prepared to mitigate the effect of this fragmentation by allowing a group approach for the Target and Subsidiary.

40 Period means year. After all, pursuant to Section 7 CITA, the corporation tax is, in principle, levied per year. As indicated above, the year is generally the same as the financial year of the tax payer, i.e. the seller as parent of the fiscal unity, except in the absence of regular accounting with regular annual closures. In that case, the calendar year will be taken as the year.

41 The seller, as parent company of the fiscal unity, does not close its fiscal year as result of the deconsolidation by Target and Subsidiary. Section 7(4) CITA only covers the Target and Subsidiary as deconsolidated companies.

15af CITA. This approach also seems to be supported by the legislative history.[42] This means that if the seller, as parent of the fiscal unity, defaults on the payment of corporation tax liabilities attributable to a period when the Target and Subsidiary were part of that fiscal unity, the tax collector may hold the Target or Subsidiary jointly and severally liable for that liability.

It is important for the buyer to include adequate protection against this liability in the SPA.[43] The general tax indemnity described in chapter 2.3 often relates to tax liabilities of the Target and Subsidiary and not to (secondary) liability claims by the tax authorities. It is therefore prudent for the buyer to include a specific tax indemnity for this in the SPA. A specific tax indemnity alone may not provide sufficient protection, however. After all, if the seller remains in default of payment of the corporation tax liability to the tax authorities, one may not necessarily expect payment under this indemnity from the same seller. In case of specific concerns regarding a possible (secondary) liability claim, the buyer may therefore consider additional protection.

Under Section 24(1)(b) IW, the tax collector is entitled, subject to certain conditions, to set off all tax refunds to a company against taxes due. This applies to all taxes and levies to the extent that the tax collector is responsible for the collection thereof, such as corporation tax, value added tax, payroll tax, real estate transfer tax, etc.
This possibility to set off also applies if companies are part of the same fiscal unity. In that case, the tax collector is entitled to set off a tax refund to the Target or Subsidiary against all tax liabilities of other companies that are part of the fiscal unity of the seller with the Target and the Subsidiary, and vice versa. This possibility to set off is only applicable insofar as the tax refund and tax liability relate to a period in which Target and the Subsidiary and the other relevant company form part of the same fiscal unity, even if these formally arise only after termination of the fiscal unity.[44] The buyer and the seller both have an interest in arranging this properly in the SPA and, where relevant, in providing each another with indemnities.

4. Close

This contribution addresses some relevant aspects in respect of an acquisition of a company out of a fiscal unity. In order to be able to properly assess and consider those aspects, it is important to have a good understanding of the fundamentals of the transaction, such as the way in which the purchase price was established and which purchase price mechanism is used. Depending on the circumstances relevant to the transaction, it may be necessary to include in the SPA specific provisions for the following key issues:

- moment of deconsolidation of the Target and Subsidiary;
- settlement of tax-sharing agreements with the seller's group;
- preparing a deconsolidation and opening balance sheet for tax purposes for the Target and Subsidiary;
- fiscal unity revaluations with a benefit for the Target and/or Subsidiary;
- transfer of tax losses to the Target and/or Subsidiary; and
- protection against (secondary) liability claims, and the possibility to set off, by the tax authorities.

Finally, it should be noted that this contribution does not address the possible consequences for the fiscal unity following the legislative proposal "the Fiscal Unity Emergency Repair Act" which was published by the Ministry of Finance on 6 June 2018.[45] The emergency repair measures (which were already previously announced) in the legislative proposal are in response to the ruling of the European Court of Justice of 22 February 2018 in two cases concerning the application of the

42 See Parliamentary Papers II, 2015-2016, 34 323, no. 12, p. 2 which states: "I assume Mr Groot is referring here to corporation tax liabilities. Every company that is part of a fiscal unity - i.e. both the parent company and each subsidiary - is jointly and severally liable under the aforementioned Section 39 IW for the corporation tax owed by the fiscal unity. This joint and several liability does not expire at the time of deconsolidation. The liability thus covers all corporation tax due over the period that the company in question was part of that fiscal unity, even if followed by deconsolidation."

43 If the Target or Subsidiary is part of a seller's fiscal unity for value added tax purposes, there is a similar risk of joint and several liability for the value added tax liabilities of this fiscal unity under Section 43(1) IW. Moreover, Section 43(1) IW stipulates that even if a fiscal unity no longer exists, joint and several liability remains for the value added tax payable by other companies that were previously part of the fiscal unity, if the tax authorities has not been notified in writing of the termination of the fiscal unity. Of course, a buyer also wishes to be protected against this liability and will also want to include in the SPA that the seller and Target or Subsidiary inform the tax authorities timely.

44 Here, too, the term 'period' is used. Using the same argument as applied to Section 39 IW, this term must be interpreted materially as 'period' and a cut is made at the time of deconsolidation.

45 Parliamentary Papers II, 2017-2018, 34 959, no. 2.

so-called 'per element' approach to the Dutch fiscal unity regime.[46] The emergency repair measures entail that some provisions in the CITA and the Dividend Withholding Tax Act must be applied as if there is no fiscal unity. Most of the emergency repair measures in the legislative proposal apply with retroactive effect to 25 October 2017, 11:00 am. The Ministry of Finance has also indicated that the emergency repair measures will in time be replaced by a new group regime that is future-proof. The design and drafting of such a new group regime will also be subject to consultation with the business community, interest groups and academics. This process is likely to take some time. It will have to be considered whether, and if so which of the above points for attention in the new group scheme may no longer be relevant to the SPA.

46 Ruling of the European Court of Justice of 22 February 2018, joined cases C-398/16 and C-399/16, ECLI: EU:C:2018:110.

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