

[Korea] Recent Tax Considerations in Cross-Border Corporate Transactions

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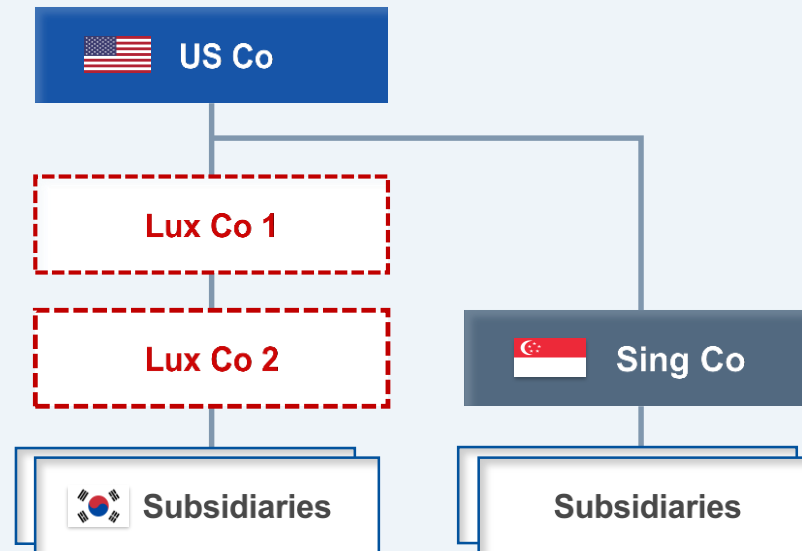
1. Corporate Migration / Domestication

Corporate Migration / Domestication

Corporate migration and domestication becoming more common among MNE groups

📦 Driven by strategic, financial and operational reasons

📦 Example



Taxation of Corporate Migration / Domestication

Treatment under Korean tax law

- ❏ Cross-border conversion of corporate nationality is not a familiar concept in Korea
 - Korea does not permit inward or outward corporate migration
 - Korean tax law does not have any explicit provision regarding taxation of corporate migration

- ❏ Issue
 - Does the offshore corporate migration of a foreign company holding a Korean subsidiary give rise to a taxable event in Korea?
 - i.e. deemed transfer of the Korean subsidiary from the pre-migration entity to the post-migration entity

- ❏ Until very recently, the Tax Tribunal decisions and NTS tax rulings only discussed corporate migration in the context of “relocation of a foreign company’s POEM (place of effective management)”
 - “Tax migration” of foreign companies

Taxation of Corporate Migration / Domestication

Tax rulings

If a foreign company holding Korean shares **relocates its POEM (i.e. central management and control)**

- Does the relocation constitute a taxable event in Korea?
 - Deemed transfer (disposal and acquisition) of the Korean shares
- (i) Does the relocation liquidate the existing foreign company or create a new foreign company?
 - (ii) Is there a change in the substance of the foreign company (including its rights and obligations, legal personality, and ownership)?
 - (iii) Is there a reasonable business purpose for the relocation?

Two tax rulings issued in 2023

- A foreign company's **conversion of corporate nationality (its country of incorporation)** from one jurisdiction to another
- Does the conversion constitute a taxable event in Korea?

Taxation of Corporate Migration / Domestication

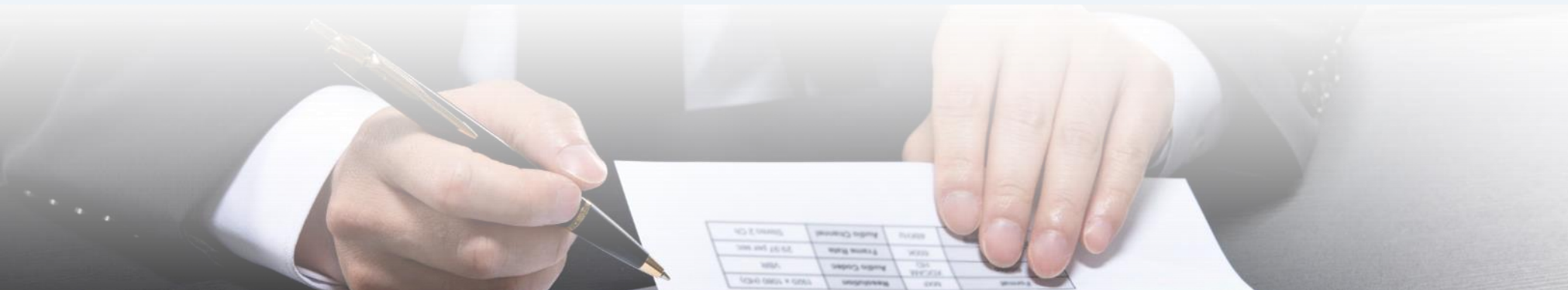
Risk of re-characterization for Korean tax purposes

Risk of re-characterization still remains

- Can trigger CGT, securities transaction tax, deemed acquisition tax in Korea
- Need to mitigate the risk of challenge by the NTS

Conduct a detailed review of the transaction structure, related documents, and the legal implications of the migration or domestication in relevant jurisdictions

Establish a clear business rationale

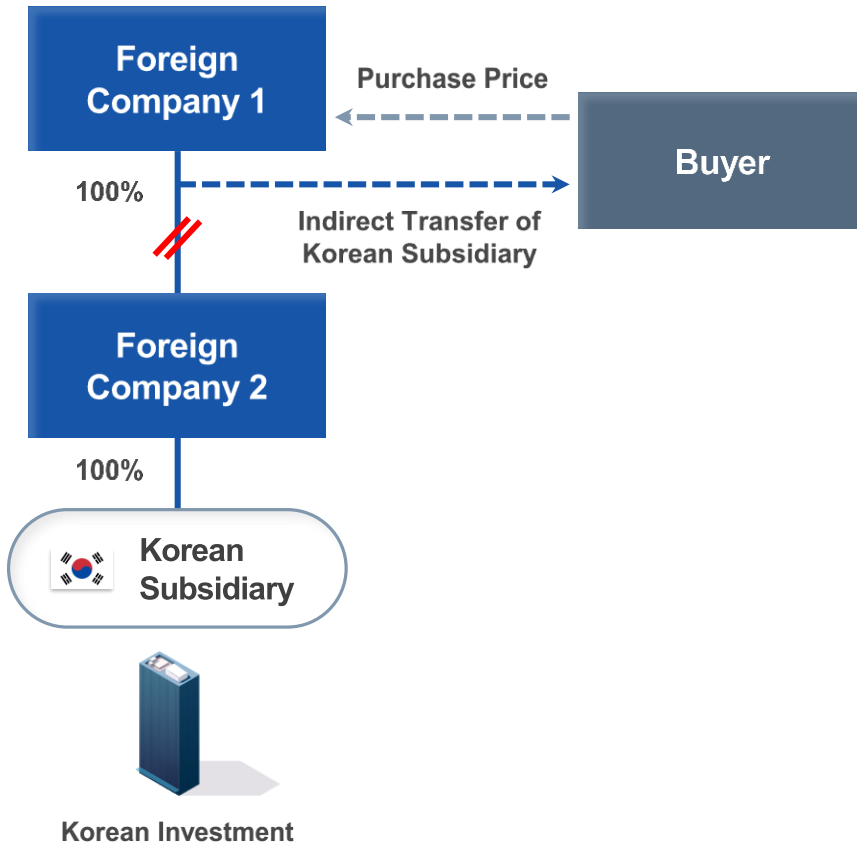


2. Offshore Indirect Share Transfer

Offshore Indirect Share Transfer



Typical structure



Issue

- Can the sale of the shares in Foreign Company 2 be deemed to be a direct sale of the shares in Korean Subsidiary?
 - Transaction reconstructed based on the substance-over-form principle
 - Capital gain recognized by Foreign Company 1 treated as Korean-source income & subject to Korean withholding tax
 - Securities transaction tax and deemed acquisition tax implications

Taxation of Offshore Indirect Share Transfer

Not explicitly listed as Korean-source income in tax law

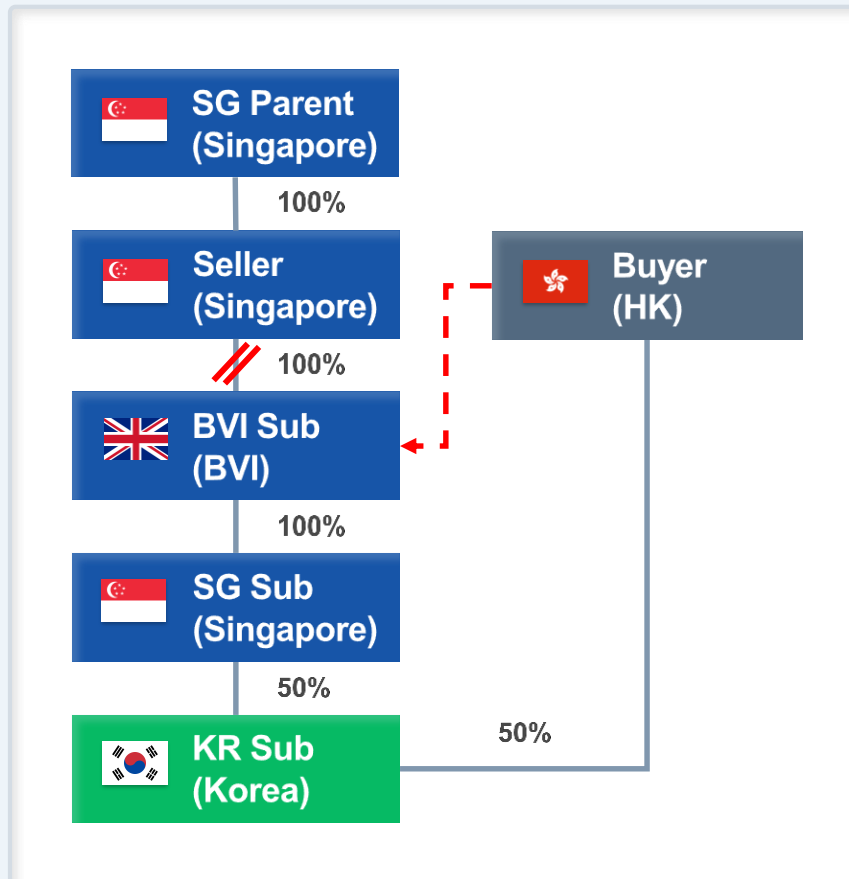
- ❏ The Corporate Income Tax Act provides an exhaustive list of taxable Korean-source income for foreign corporations
 - Capital gain from the indirect transfer of Korean company shares is not included

Substance-over-form principle

- ❏ The NTS may attempt to reconstruct the transaction as a direct transfer of Korean company shares by applying the substance-over-form principle
 - Foreign Company 2 deemed to be a conduit
 - Foreign Company 1 taxed as if it directly sold Korean Subsidiary shares
- ❏ Supreme Court limits the scope and application of the substance-over-form principle
 - The NTS should respect the legal form taxpayers choose to achieve a given economic objective
 - Offshore transactions between two independent foreign entities should not be arbitrarily deemed as “fictitious”
 - No specific provision allowing the NTS to disregard offshore indirect share transfers

Offshore Indirect Share Transfer – Recent Case

Taxation attempt by the NTS



- ❏ The NTS reconstructed the transaction as a direct sale of KR Sub shares & issued tax assessments
- ❏ In December 2024, the district court (court of first instance) cancelled the tax assessments
- ❏ If the NTS is allowed to reconstruct this transaction as a direct sale of KR Sub shares, the NTS can effectively impose tax on any level of share transfer occurring within the Seller's group
 - Excessively broaden the scope of taxation on foreign companies
 - Significantly undermine legal certainty by leaving taxation to administrative discretion, causing a serious threat to taxpayer predictability

Thank you

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