


# MAZARS INTERNATIONAL TAX CONFERENCE 2019

 REAL ESTATE

1. INTRODUCTION
2. PHASE 1: ACQUISITION
3. PHASE 2: OPERATIONS AND MAINTENANCE
4. PHASE 3: EXIT OF INVESTMENT



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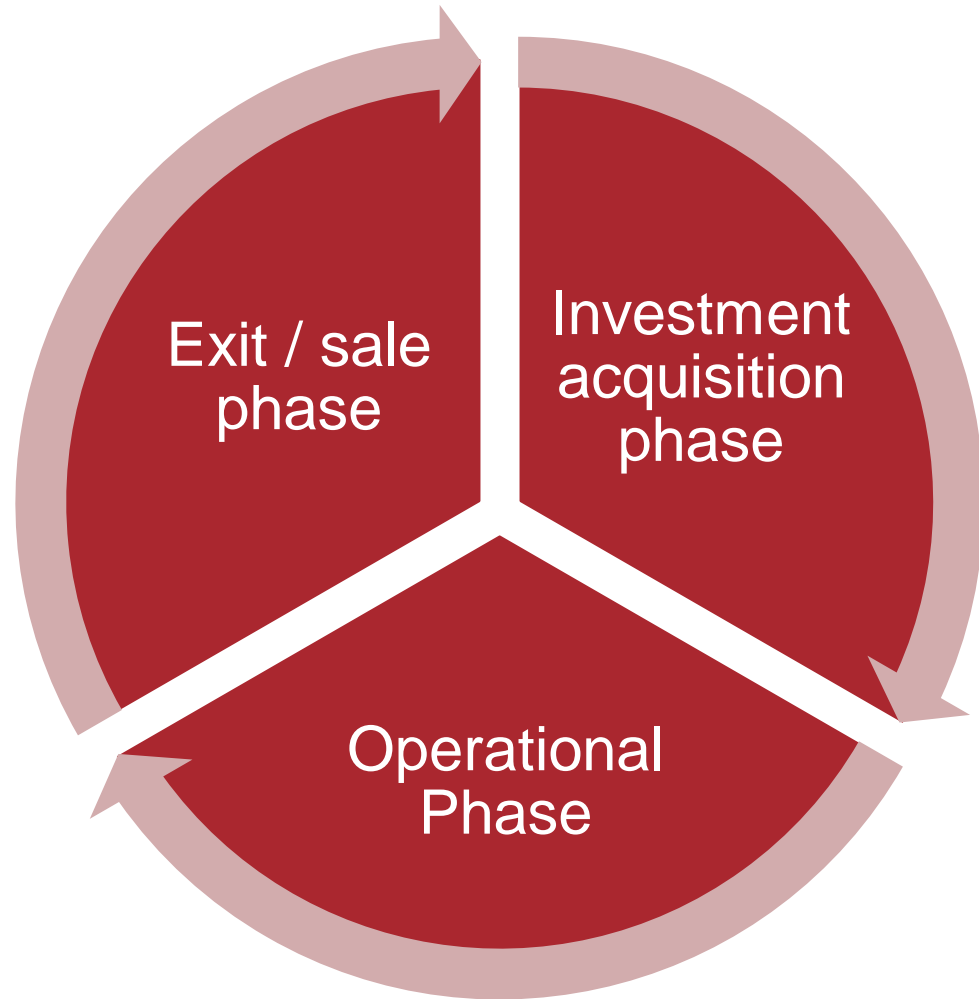
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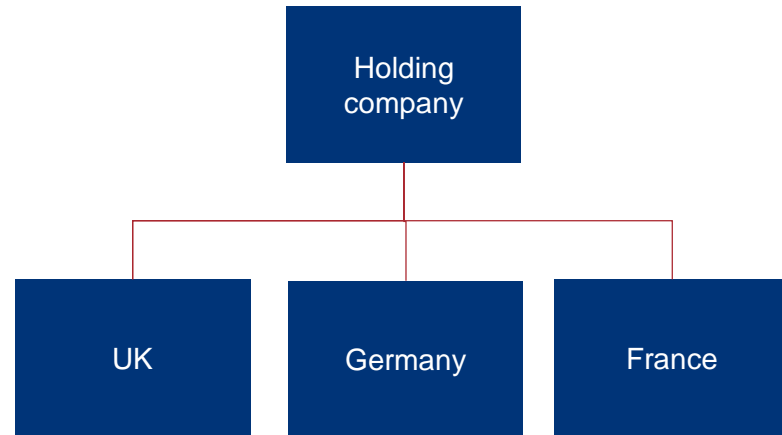
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# INTRODUCTION

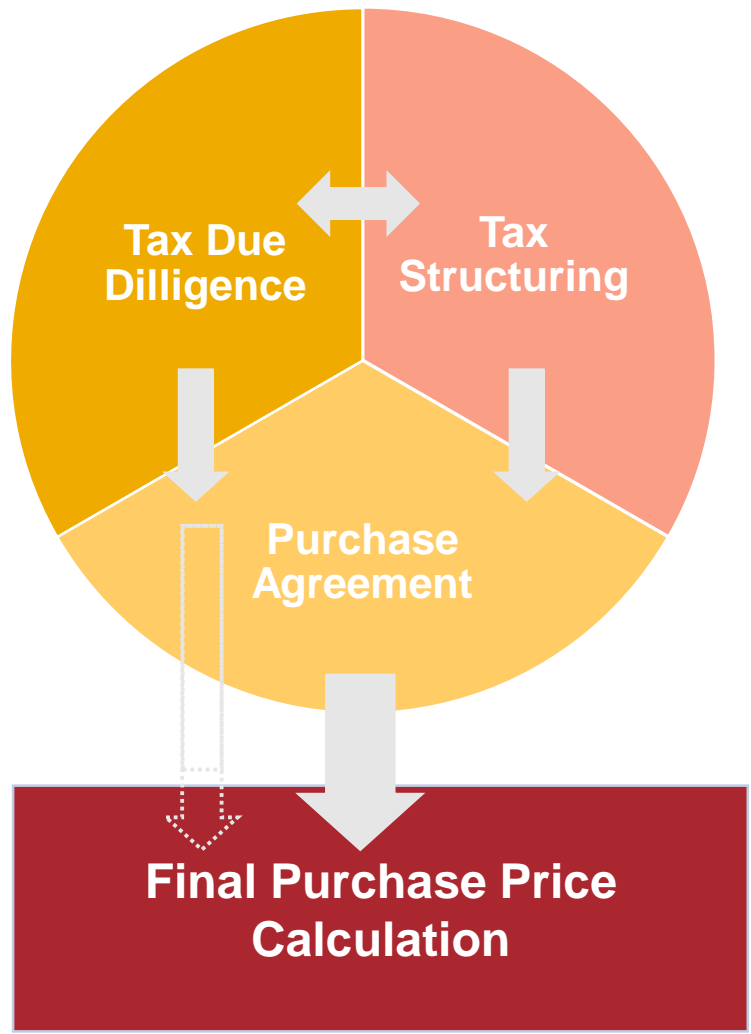


## PHASE 1: ACQUISITION

Tax and Financing considerations during the acquisition of real estate



## PHASE 1: ACQUISITION



## PHASE 1: ACQUISITION

### (1) Tax Due Diligence: Areas of typical Tax Risks

#### ⑩ Transactions with related parties

- - Compliance with arm's length principle
  - In particular in cross-border groups
  - Foreign Tax Act/ Constructive dividends

#### ⑩ Tax balance sheet treatment

- Purchase price allocation
- Capitalization of expenses
- Depreciation schedule (incl. extraordinary write-offs)

#### ⑩ Tax impacts from past re-structurings

- ⑩- Latent gains
- ⑩- Forfeiture of tax losses
- ⑩- Triggering of real estate transfer tax
- ⑩- Tax groups

#### ⑩ VAT related risks

- ⑩- Deduction of input VAT (mixed-use properties; formal requirements)
- ⑩- Reverse charge

#### ⑩ Building Withholding Tax

**complemented by:**



legal DD



financial DD



technical DD



marketing DD



## PHASE 1: ACQUISITION

### (2) Tax Structuring: Critical Aspects

| Asset Deal                                                                                                                                       | Share Deal                                                                                                                                      |
|--------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------|
| <ul style="list-style-type: none"> <li>▪ Taxation of disposal profit by the seller</li> </ul>                                                    | <ul style="list-style-type: none"> <li>▪ Forfeiture of tax losses at the level of the target entity</li> </ul>                                  |
| <ul style="list-style-type: none"> <li>▪ Triggering of real estate transfer tax</li> </ul>                                                       | <ul style="list-style-type: none"> <li>▪ Real estate transfer tax might be avoided</li> </ul>                                                   |
| <ul style="list-style-type: none"> <li>▪ Take-over of input VAT corrections in case of a qualification as a transfer of going concern</li> </ul> | <ul style="list-style-type: none"> <li>▪ Deductibility of interest expenses in the future (e.g. through debt-push-down or tax group)</li> </ul> |
|                                                                                                                                                  | <ul style="list-style-type: none"> <li>▪ Withholding taxes on future dividends</li> </ul>                                                       |
|                                                                                                                                                  | <ul style="list-style-type: none"> <li>▪ Exit taxation</li> </ul>                                                                               |

**complemented by:**



legal  
advisory



financial  
advisory

## PHASE 1: ACQUISITION

### (3) Purchase Agreement: Tax Related Issues

#### ⑩ Tax guarantees

- ⑩- General tax compliance

#### ⑩ Tax indemnities

- ⑩- Coverage of all taxes and ancillary costs up until Closing
- ⑩- Allignment with purchase price calculation
- ⑩- Restriction of exceptions
- ⑩- Avoid reference to general limitations (cap, de minimis, knowledge, time)
- ⑩- Rights and obligations in tax proceedings

#### ⑩ Purchase price determination

- ⑩- True-up vs. locked-box
- ⑩- Relevant closing date
- ⑩- Consideration/ assessment of assets and liabilities
- ⑩- Preparation, review and agreement procedures

**complemented by:**



legal  
advisory

## PHASE 1: ACQUISITION

### (4) Final Purchase Price Calculation: Typical Review Items

- ⑩ Recoverability of receivables
- ⑩ Operating costs
- ⑩ Provisions (tax and others)
- ⑩ Incoming invoices received post closing date
- ⑩ Prepaid expenses and deferred income



## Phase 1: Acquisition

### Financing instruments

Real Estate project finance structuring, e.g. asset deal or share deal structure

Loan and Equity and LTV considerations, mix of Equity, Mezzanine and Debt

Derivatives, e.g. interest rate swaps

Collateralization of Loans

### Financing Considerations

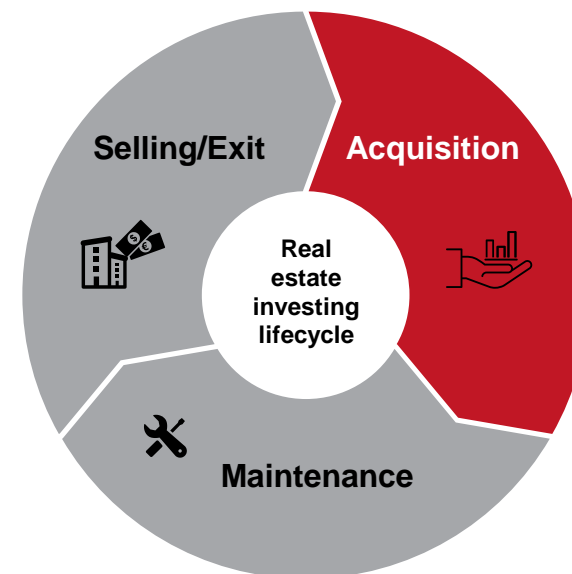
Financial structuring, e.g. mix of financing instruments (e.g. bank loan, debt fund as loan providers)

Net operating income vs. yield expectations

Interest rate related instruments (fixed or floating rates, derivatives such as swaps, caps)

Investment horizon and term of financing (implications on amortization period)

## Transaction Advisory and Valuation as well as Structuring



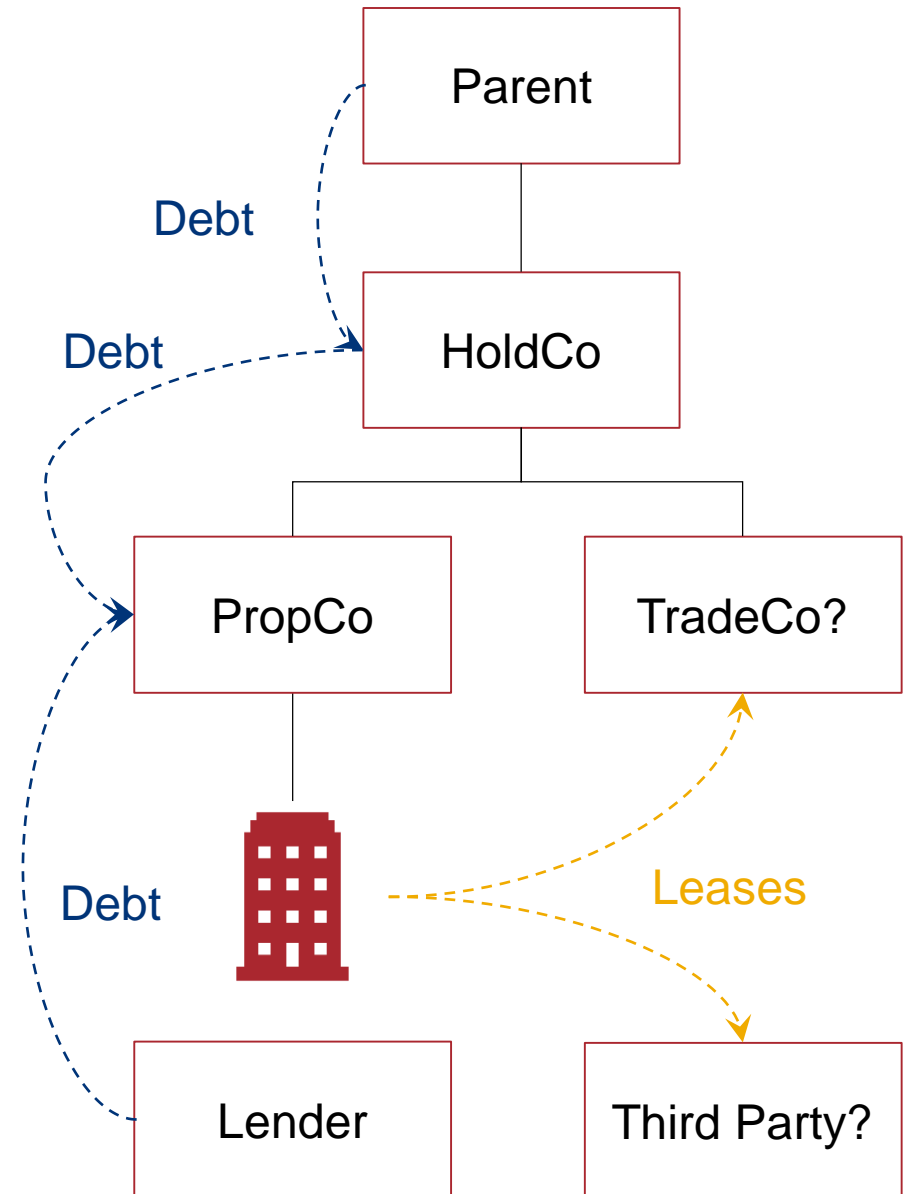
## PHASE 2: OPERATIONS AND MAINTENANCE

Tax and Financing considerations during the ownership of real estate



## POTENTIAL OWNERSHIP STRUCTURE AND TAX CONSIDERATIONS IN OPERATIONAL PHASE

- Third party/connected party tenants
- Tenant inducements – capital vs revenue
- Capital appreciation
- Inter-company lending – Anti-hybrids and other rules
- Third party financing (and refinancings)
- BEPS Action Point 4
- Capital Expenditure and Tax Depreciation





- Withholding Taxes
- VAT
- Corporate Income Tax filings
- Transfer Pricing
- IFRS 16? Limited impact for landlords (but may affect intra-group tenants!)

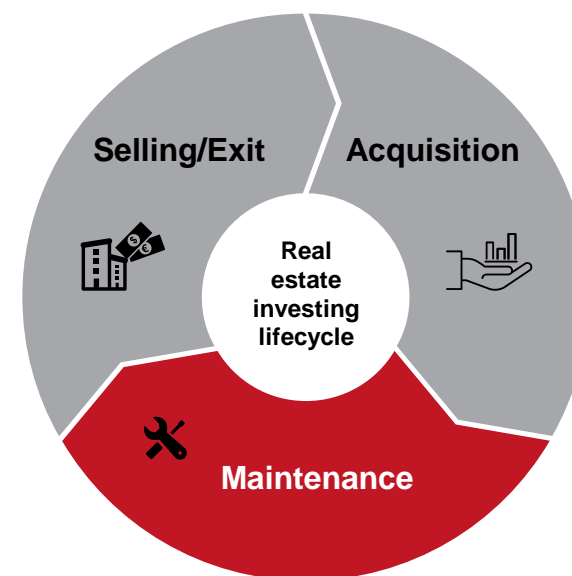
## **Other Tax Considerations in Operational Phase**

## Phase 2: Maintenance

### Financing Considerations

- Change in interest rate environment may have implications on financing structure
  - refinancing of loan
  - restructuring of financial structure
- Covenant breach
  - financial restructuring
  - collateralization
- Cash-out of Equity
  - excess cash outflow
- Additional financing for maintenance and/or modernization of property to increase value
- Real estate valuation on property level or portfolio level, calculation of lending value and market value for financiers

## Transaction Advisory and Valuation as well as Structuring





## PHASE 3: EXIT OF INVESTMENT

General considerations - main issues to have in mind



# TAKING THE RIGHT DECISIONS IN THE FRAMEWORK OF AN ACQUISITION

## Questions at the date of an exit for the **seller**:

- Tax leakage on capital gain
- Tax economy / transfer of the tax losses
- Tax leakage on registration duties (in France, buyer's liability)



Best option: asset deal or share deal?



### Criteria

- 1 Valuation
- 2 Nature of the asset or the shares
- 3 Tax losses availability

## Questions at the date of an acquisition for the **buyer**:

- Future tax leakage on latent capital gain (in case of a share deal)
- Tax economy / transfer of the tax losses
- Tax leakage on registration duties



Best option: asset deal or share deal?



### Criteria

- 1 Valuation
- 2 Nature of the asset or the shares
- 3 Tax losses availability

## How to deal with opposed interests?

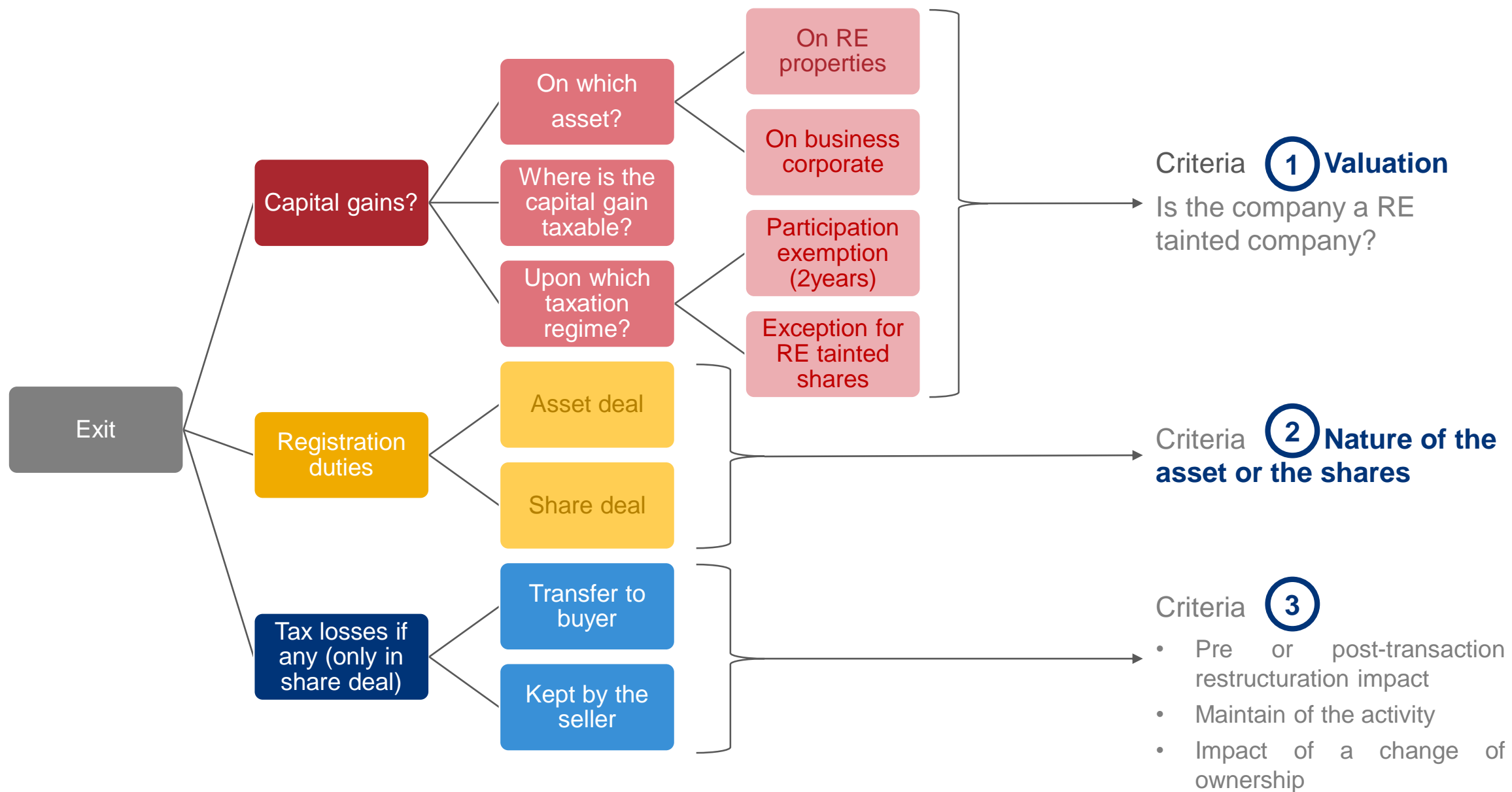


Best option: asset deal or share deal?



- 4 Finding a convenient solution for both parties

# TAKING THE RIGHT DECISIONS IN THE FRAMEWORK OF AN ACQUISITION



1

The qualification of RE tainted company will mostly **depend on the valuation of the different assets of the company**

2

**Consequence of the valuation / RE tainted qualification:**

- Location of taxation place
- Capital gain taxation
- Registration duties

3

**Most common valuation issues:**

- **Date of realization**
- **Trustworthiness** and on the edge valuation
- **Modification of the Target's asset / Pre-closing restructuring**
- **Reliance on the valuation**

## 2 REGISTRATION DUTIES

French example:

|       | Share deal        |      |                        | VS | Asset deal  |                    |
|-------|-------------------|------|------------------------|----|-------------|--------------------|
|       | SA, SAS           | SARL | RE tainted company (*) |    | RE Property | Business corporate |
| Rate  | 0.1%              | 3%   | 5%                     |    | 5.8%        | 5%                 |
| Basis | Fair market value |      |                        |    |             |                    |

(\*) Determination of the RE tainted qualification depends on the valuation (see before)

### Pre / post transaction restructuring

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- Split of a Company (e.g. OpCo /PropCo)
- Origin of the tax losses (activity) - holding activity
- Tax group before the Operation
- Necessary tax ruling

### Continuity of the activity

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### Change of control / ownership

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In France, no impact

# 4 DEALING WITH OPPOSED INTERESTS

| Share deal                                                                                                                                                                           |                                                                                      | VS | Asset deal                                                                                                                                                         |                                                                                                       |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------|----|--------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------|
| <b>Seller</b> ✓                                                                                                                                                                      | <b>Buyer</b> ⚠                                                                       |    | <b>Seller</b> ⚠                                                                                                                                                    | <b>Buyer</b> ✓                                                                                        |
| <ul style="list-style-type: none"> <li>• Latent capital gain on shares value</li> <li>• Participation exemption régime possible (in France, not for RE Tainted companies)</li> </ul> | <ul style="list-style-type: none"> <li>• Latent capital gain on the asset</li> </ul> |    | <ul style="list-style-type: none"> <li>• Taxation on the RE property capital gain generated since the booking date at the level of the acquired company</li> </ul> | <ul style="list-style-type: none"> <li>• No capital gain related to pre-acquisition period</li> </ul> |
| Open issue: tax saving: CIT rate                                                                                                                                                     |                                                                                      |    |                                                                                                                                                                    |                                                                                                       |



### Seller's interest

- Share deal rather than asset deal
- Reorganization post transaction



### Buyer's interest

- Asset deal rather than a share deal
- Reorganization pre transaction



3

### Potential solution

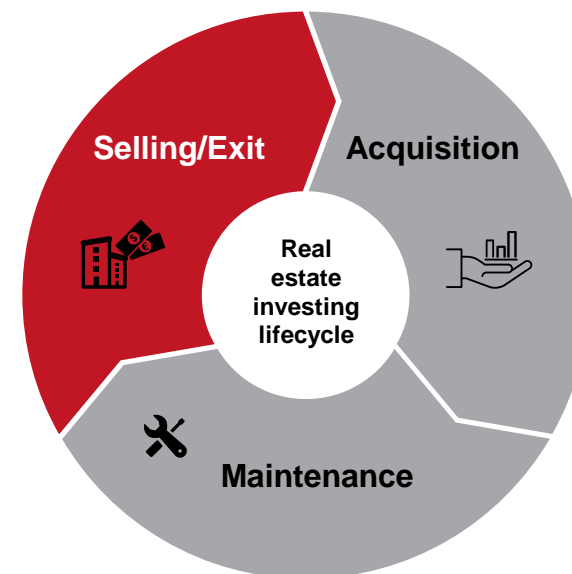
- Asset deal / Share deal: split of the tax economy between the parties
- Timing of reorganization:
  - pre transaction restructuring to isolate the business /RE property to be sold and
  - post acquisition restructuring to ensure tax efficiency

## Phase 3: Exit/Sale

### Financing Considerations

- Change of control may have implications on financing structure
  - restructuring of financial structure / transfer of loan
- Earlier as planned exits/sales may have implications on derivatives (swaps)
  - market value of swap depends on interest rate environment at time of exit
- Early repayment of financing structure may result in prepayment penalty (e.g. GER)
- Challenging or even distressed RE assets have implications on financial structure at exit (e.g. as a result of value driven portfolio analysis)
  - NPL assets vs performing assets / carve out portfolio transactions

## Transaction Advisory and Valuation as well as Structuring





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*Ronald Plat – ITC 2019 – London – 2/10/2019*

