TRAVERS SMITH

Talking. Secondaries.

Demystifying the secondaries market

Part 9: Indirect transfer taxes (non-resident capital gains taxes)

Indirect transfer taxes (or non-resident capital gains taxes) are a key issue on secondary transactions. Generally, this issue can be navigated with a combination of early tax advice and contractual risk allocation between Buyer and Seller.

Indirect transfer taxes (non-resident capital gains taxes)

What are indirect transfer taxes?

- Generally, investors only want to be taxed in their country of residence ("Country A"). However, some jurisdictions ("Country B") impose tax on gains realised by non-residents where the asset being sold is in Country B. Some go further still, imposing tax on the *indirect* sale of Country B assets, where they are held via one or more intermediate holding vehicles. We have illustrated this in the diagram opposite.
- These taxes are known as a non-resident capital gains taxes or, commercially speaking as "indirect transfer taxes". For a discussion of direct transfer taxes, please see our Part 8 – Talking. Secondaries.

What is the issue?

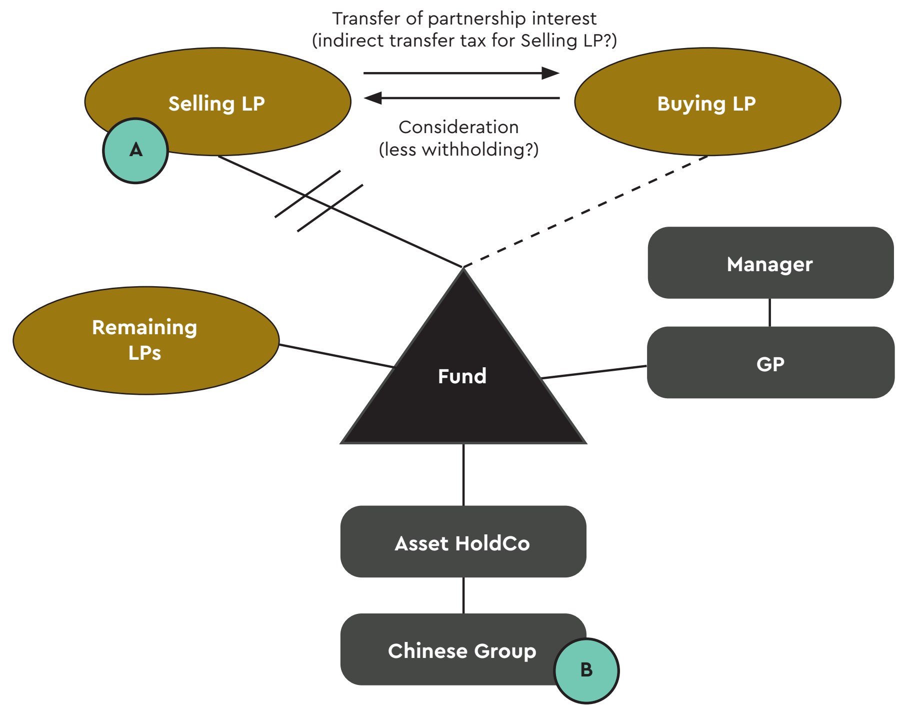
- On a secondary, the Seller could become liable for indirect transfer taxes on any gains realised on the transaction in a jurisdiction in which the fund holds underlying investments.

Why does it matter?

- The Seller may have local tax filing and/or payments obligations in the relevant investment jurisdiction (including needing to file for relief from taxation). The Buyer will also want to know whether it will need to make similar filings when the fund ultimately sells its investments.
- Some jurisdictions enforce indirect transfer charges by imposing a withholding tax on the Buyer. If the tax is enforced by a withholding on the purchase price, the Seller may also suffer a deduction from the price payable by the Buyer.

Key jurisdictions imposing indirect transfer taxes

It is not possible to provide a definitive list of all jurisdictions that impose indirect transfer taxes. However, particular care should be taken where the fund has investments located in **China, India, Brazil** or **South Korea** (amongst others) as well as the US which has its own ECI and FIRPTA regimes (see Part 6 – Talking.Secondaries). Where this is the case, local advice should be sought.



Contractual risk allocation

- As this is a tax liability on the Seller's investment gains, the Seller should bear the contractual risk of tax and indemnify the Buyer.
- If there is a risk of withholding on the purchase price, the Buyer may want specific indemnity protection from the Seller against the withholding risk, and a mechanic may also need to be included in the transaction documents to allow for the deduction of tax.

Our secondaries platform

Travers Smith has extensive experience in complex private markets transactions, with a focus on liquidity solutions across the private markets capital structure with exposure across all asset classes.

70+

We advise over 70 GPs across our firm.

£92bn

In transaction value during the last c.five years.

$4tn+

Assets managed by our clients in the private capital sector.

150+

Specialists focused on private equity, infrastructure, financial sponsor and M&A transactions. 30 of these dedicated specialists are partners in the business.

$5bn+

In 2022 we advised on the deployment of $5.1bn+ in commitments across more than 100 primary, co-investment and fund-of-one transactions.

400+

M&A transactions acted on since 2016.

Advisory/Consultancy: Tax Team of the Year
The Drawdown Awards
2023

Private Equity Team of the Year
Legal Business Awards
2022

Legal Fund Formation Team of the Year
The Drawdown Awards
2020, 2021 & 2022

IFLR 1000
Financial Services regulatory: Non-contentious
Tier 1

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Head of Asset Management

Elena Rowlands
Partner

Tosin Adeyeri
Partner

Phil Bartram
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Victoria Bramall
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Jeremy Elmore
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