

Cross-Border de-SPAC Structures

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More special purpose acquisition vehicles (common known as “SPACs”) completed their initial public offering (“IPO”) in 2021 than in any prior year. In 2021, approximately 613 SPACs completed their IPO within the United States alone. An increasing number of Canadian companies are being approached by U.S. and tax haven SPACs with significant US shareholders.

A SPAC is organized with no business operations and minimal direct assets (cash raised from private investors in the IPO is held in a trust account) for the purpose of acquiring a private company, effectively resulting in that company being taken public. Such acquisition is generally referred to as a “qualifying transaction” (or “de-SPAC” transaction). Private companies generally find de-SPAC transactions attractive because they can result in significant cash infusions and access to public markets while avoiding the complications of a direct IPO.

Common de-SPAC transaction structures include: (i) re-domiciling the SPAC to Canada prior to the acquisition of the Canadian company; (ii) acquiring the Canadian company utilizing an exchangeable share structure; (iii) structuring the de-SPAC transaction as an acquisition of the SPAC by the Canadian company; or (iv) forming a new Canadian holding company to acquire the SPAC and the Canadian company.

The re-domiciling of a SPAC to Canada will generally result in application of the U.S. anti-inversion tax rules unless the SPAC is organized in a non-U.S. jurisdiction. If the anti-inversion rules apply, the SPAC will continue to be classified as a U.S. domestic corporation for U.S. federal income tax purposes notwithstanding the re-domiciliation to Canada. As a result, U.S. SPACs are generally not re-domiciled to Canada.

Properly designed exchangeable share structures whereby the SPAC acquires an interest in the Canadian company and shareholders of the Canadian company receive shares exchangeable for SPAC shares can result in the deferral of taxes by shareholders of the Canadian company until they liquidate their holdings. However, the use of

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exchangeable share structures often adds cost, time and complexity.

The acquisition of a SPAC by the Canadian company, or a newly-formed Canadian corporation organized to acquire both the SPAC and the Canadian company, can result in tax-deferral for the shareholders of the Canadian company and the SPAC if certain detailed requirements are met including, with respect to a direct acquisition of the SPAC by the Canadian company, that such Canadian company have been engaged in an active trade or business (as defined for U.S. federal income tax purposes) for the 36 months preceding the acquisition of the SPAC.

Ultimately, the de-SPAC transaction structure to be utilized depends on the particular facts applicable to the Canadian company, the SPAC and their respective shareholders. Involving U.S. tax counsel early in the discussion process can make the de-SPAC transaction process more efficient and avoid unforeseen U.S. tax issues.