

Call in for a Coffee

Mergers and Acquisitions

RSM International has noticed an increase in Merger & Acquisition activity in both the USA and Thailand. This article summarizes the major tax and legal considerations in Thailand for foreign buyers and sellers. Foreign buyers are advised to ensure that transactions are planned at the earliest stage. Foreign sellers disposing of shares or assets in Thailand have some scope to mitigate or eliminate Thai taxes on the sale.

1. Share deals

1.1 Share deals for the seller

1.1.1 Profit on sale of shares

Capital gains derived from share sales are taxable as income and are calculated as the difference between sales proceeds and their cost price. Gains derived by a foreign investor on the sale of Thai company shares are generally subject to withholding tax of 15% if the gain is paid "in or from Thailand". However, many double taxation agreements provide exemption from tax on the sale of shares. Offshore entity share gains not paid "in or from Thailand" are exempt. If the sale is to be made to a Thai resident, tax on the gain may be avoided either by:

- Holding the investment through a company located in a country having a double tax agreement with Thailand that provides for exemption from Thai tax on the sale of shares; or
- Stepping up the cost base of the shares via an offshore sale before the sale into Thailand so that no gain is generated on the exit sale.

1.1.2 Stamp duty

Documents effecting the transfer of shares in a Thai company are subject to stamp duty, where such documents are executed in Thailand, or executed overseas and subsequently brought into Thailand. Stamp duty is at the rate of 0.1% of the greater of the selling price or the paid-up value of the shares.

1.2 Share deals for the buyer

1.2.1 Acquisition structure

Most share acquisitions are structured as direct investments from outside Thailand, except where foreign ownership restrictions necessitate the establishment of a holding vehicle in Thailand. If it is intended that an investment in the Thai company will be sold, it may be advantageous to hold the investment through a holding company located in a country which has entered into a double tax agreement with Thailand that exempts gains on sales of shares from Thai tax.

1.2.2 Funding costs

Interest on loans used to fund investments is deductible from profits subject to corporate income tax. However, as Thailand has no group relief or consolidated filing, the use of a leveraged holding vehicle in Thailand is not tax effective. As dividends received by the holding co should be exempt from tax, the holding co would have no taxable income to offset the interest costs against.

1.2.3 Preservation of tax losses and tax incentives

A change in ownership of a company does not affect the carry-forward of tax losses. A change in ownership will also generally not affect the availability of tax incentives, provided there is no breach of any ownership condition imposed by the Board of Investment.

2. Asset deals

2.1 Asset deals for the seller

2.1.1 Gains subject to corporate income tax

If an exit is via a sale of assets, including a sale of an entire business, the selling company will generally be exposed to both tax on the capital gain and withholding tax on the distribution of the profits. The gain on the sale of the assets is the difference between the sale proceeds less the tax book value of the assets. The company may offset its tax losses against the gain. Tax on the gain may be avoided by structuring the exit as an amalgamation or an entire business transfer. However, these strategies may not be acceptable to a buyer.

2.1.2 Amalgamation

An amalgamation is a statutory merger of companies, whereby the merging companies are dissolved and a new company is formed. For tax purposes, the merging companies recognize no gain or loss on the transfer of assets. The new company formed through the merger continues to depreciate assets on the same basis as the original companies. However, any tax losses in the merging companies cannot be transferred to the new company formed through the merger. The amalgamated company (i.e. the new company) assumes all the business assets and liabilities, rights and obligations of the merging companies, and that the capital of the new company is equivalent to the capital of the merging companies. The operation of the legal procedure includes a period of 6 months notice to the creditors of the merging companies.

2.1.3 Transfer of entire business

Where a selling company transfers its entire business to another company and enters into liquidation in the same accounting period as the transfer, the selling company may treat the transfer as taking place at no gain or loss. The buying company continues to depreciate assets on the same basis as the selling company. As with an amalgamation, tax losses in the selling company cannot be transferred to the buying company. For the tax exemption to apply, the dissolution must be registered in the same accounting period as the transfer of assets, and this criterion applies regardless of the buying company's accounting period in relation to the asset transfer date. If the transfer of assets occurs on say, 30 December, and the selling company has a 31 December balance date, then the selling company must register its dissolution on 30 or 31 December in order for the transfer to take place on a tax free basis. If the selling company does not register for dissolution in the same accounting period, then the transfer of the business assets must take place at market value, and the selling company will be subject to tax on any gains.

However, this can be useful if the shareholders of a selling company wish to utilize any tax losses before dissolving it.

2.1.4 Value added tax

Sales of movable assets are subject to value added tax, based on the value of the assets transferred. However, provided certain conditions are met, exemption from VAT is available under:

- A transfer of an entire business; and
- A partial business transfer between companies under common ownership or control (i.e. affiliated companies).

2.1.5 Specific business tax

Sales of immovable property are generally subject to specific business tax at the rate of 3.3% of the gross income received. A sale may be fully exempt from SBT if immovable property forms part of an entire or partial business transfer.

2.1.6 Employee issues

A transfer of employees from one company to another company under an assets deal results in a termination of employment of the employees of the selling company, unless all of the following conditions are met:

- The employees grant their consent for such transfer in writing;
- The length of their service with the selling company is counted together with that of their services with the buying company, and
- The benefits received from the buying company are no less favorable than those received from the selling company.

If any of the above conditions are not met, the selling company could be liable to pay up to 10 months severance pay depending on the employees' service years, and potentially salary in lieu of advance notice depending on the length of notice specified in the employment agreements.

2.2 Asset deals for the buyer

2.2.1 Acquisition structure

In most asset acquisitions, a foreign buyer will need to form a new limited company in Thailand through which the assets would be acquired.

2.2.2 Equity structure

In most circumstances, the capital of a limited company consists only of ordinary shares. However, where foreign ownership restrictions require the participation of local shareholders, the local shareholders could hold preference shares, carrying diluted rights. Preference shares could also be possibly used where the company acquiring the assets would be unable to utilize interest deductions e.g. where it has been granted a tax holiday. In such cases, the preference shares could be used as quasi-debt with mechanisms put in place to effectively redeem the preference shares on termination of the tax holiday.

2.2.3 Funding cost

Interest on loans used to acquire assets is generally fully deductible in calculating profits subject to corporate income tax. One exception is where the acquired asset is not immediately brought into use in the

business. In such circumstances, the interest is capitalized as part of the cost of acquiring the asset, until such time as the asset is brought into use. The capitalized interest is depreciated as part of the cost of the asset. Interest is deductible when it falls due for payment. Where a buying company is unable to utilize interest deductions (e.g. due to a tax holiday) financing may be provided by using discounted notes in order to defer interest. In such a case, the discount on the note is deductible upon the redemption of the note. If this takes place after a tax holiday, deduction for interest may be deferred until tax relief can be obtained.

2.2.4 Cost base step-up

The buyer is entitled to depreciate assets based on the acquisition price, and therefore the buyer may obtain a step-up in the cost base of the assets. The fact that the assets were previously depreciated does not reduce the depreciation periods. Maximum depreciation rates are imposed by statute, as follows:

- Durable buildings – 5%;
- Temporary buildings – 100%;
- Cost of acquisition of goodwill, patents, trademarks and other rights: If period of use is not limited – 10%; If period of use is limited – Period of use %;
- Other assets – 20%.

2.2.5 Treatment of goodwill

Goodwill purchased as a separately identifiable asset may be capitalized for a tax purposes and depreciated over a period of not less than 10 years.

2.2.6 Tax losses and incentives

Tax losses are not transferable on a sale of assets, even where the sale represents the transfer of an entire business. Tax incentives may be transferred at the discretion of the Board of Investment.

2.2.7 Value added tax

Provided the buyer is VAT registered at the time of the transaction, the buyer should be entitled to recover any VAT paid on the acquisition of the VAT paid against future liability for output VAT, or by claiming a refund.

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