

MERGERS & ACQUISITIONS



Legal & Tax Guideline for Successful M&A Deals in Thailand

Foreword

Memo to companies, small or big, privately or publicly held: watch out your back because every one is susceptible for being a target of buyout. Despite recent ups and downs due to the political hiccup and flooding, Thailand has always been in the shortlist for investors when going on their shopping sprees with the hope to boost their presence in Thailand market and to profit handsomely in the long run. A growing economy, strategic location and well built infrastructure are those competitive advantages of Thailand that naturally trigger a wave of mergers and acquisitions by ambitious companies driven for further growth. Over the past 20 years, the value of M&A in Thailand has been soaring and from here, it is poised to rise to a record deal activity going forward.

Like it or not, the trend in the recent takeover wave is that buyers are being more and more aggressive than in years past. Companies with massive cash stockpiles or easy access to debt financing cannot wait to put a bid on their potential target. After eyeing the target company hungrily for so long, they begin trying to wolf it down. It does sound nerve racking for those at stake, but it can also bring an excitement because it could mean an opportunity to grow in size for the company or to quickly cash the profit out for the shareholders. Increasingly, local businessmen become more accustomed to selling their business to cash out even in a good time, the practice uncommon in previous generations.

So, the essential question is: are you prepared for this kind of intensified takeover? As M&A are very serious, complex matters, executives and shareholders should brace themselves for this M&A potential to avoid ending up as a loser, financially or emotionally.

Based on our years of experiences and expertise in handling M&A matters, we have compiled a comprehensive, yet practical M&A guide to give an overview of various aspects of M&A in Thailand. It explains the M&A process step by step and breaks down critical issues for both perspective seller and buyer before making a decision about the merger or acquisition of the business. This guide also surveys a number of tax factors that need to be carefully evaluated and introduces some strategies on how to structure the sale of the business as a tax-free transaction.

I hope you find this guide useful. In any event, if you need legal and tax advice on M&A matters, we are here to help you make key strategic decisions. Our M&A team is ready to ensure that your transaction is adequately planned, properly executed and securely documented, so that you can mitigate any legal risks as well as save tax costs along the way.

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We have in depth knowledge in legal and financial affairs as well as a diverse set of skills that can help our clients structure their M&A deal in the most advantageous way.

M&A in Thailand



From a legal point of view, a merger is a combination of two or more companies to form a new entity, whereas an acquisition occurs when one company takes over an equity in another company, in which no new company is formed as the target company still survives as a separate legal entity controlled by the buyer. An acquisition also takes place when one company buys a business out of another company, in which the business is transferred from the book of a transferor company to the book of a transferee company. Under Thai laws, there are certain options available for M&A:

1. Assets Acquisition;
2. Shares Acquisition; or
3. Amalgamation (Merger).

According to the Institute of Mergers, Acquisitions and Alliances (IMAA), Thailand's busiest year for M&A activities was in 2004 with a record of almost 400 transactions announced and since then the number has steadily declined over the last 10 years. In part because a rising Thai stock market offers an alternative option for business owners/founders to cash out at a relatively high valuation through an IPO or a secondary offering, instead of selling the stake to an acquirer.

Although the growth in the Thailand's M&A market has moderated, the announced dollar value is well above the levels seen in the earlier years, with an impressive \$22 Billion in 2012 as compared to only \$4 Billion set in year 2004. The trend clearly signals that Thailand has become one of the active M&A players in the region, whether it's for inbound or outbound investment. With the AEC comes into place, Thailand's M&A may come roaring back to life, and it could be in for another strong year.

M&A is a natural step in the growth story of many businesses in Thailand paving the way for ambitious companies to become a regional power house via the merged entity.

Assets Acquisition



In an assets acquisition, a buyer buys the business, which can be assets, liabilities, contracts, goodwill and employees from the seller. For an entire business buyout, the transaction is commonly referred to as the entire business transfer ("EBT"). On the other hand, if only some portion of the business is on the deal, then the transaction is structured as the partial business transfer ("PBT").

In the transaction structured as an assets acquisition, the buyer enters into the agreement with the seller company rather than with its shareholders. Those shareholders continue to own the seller company's shares and the seller company remains the same legal entity after the transaction. To avoid or quickly mitigate any business disruption, the buyer should, to the extent possible and beneficial, hire all employees, continue existing contracts, and run the business just as it was before the purchase.

Advantages

1. The buyer can cherry pick employees, assets, or contracts, leaving unwanted ones with the seller. Personnel problems (if any) can be left with the seller.
2. More limited scope of legal and financial due diligence means lower transaction costs. The buyer only focuses on the selected items, not all.
3. The buyer is less likely to assume any contingent liability.

Disadvantages

1. Transfer of each contract requires contractual party's consent and execution of a novation agreement, which is time consuming and lengthy process.
2. Unwilling employees may create a problem by asking severance pay from the seller.
3. No loss carried forward can be transferred to the buyer for future use.
4. Only EBT is eligible for tax privileges, while the latest tax package for PBT has already expired since 2011.
5. Getting tax privileges for EBT is far from straight forward and subject to potential delay, assessment officer's discretion and scrutiny.
6. Certain governmental licenses/permits can be transferred to the buyer, while others are nontransferable.

Shares Acquisition

In an acquisition of shares, a buyer purchases the shares in a target company from either existing shareholder(s), newly issued shares from the target company in the capital increase, or combination of both. The share price will be made in cash or noncash. The target company will usually continue to operate under its existing name and business entity. The financial and legal liabilities of the target company will also remain unchanged.

The share purchase virtually eliminates the need to transfer the title to all assets used in the business. There is also no need to transfer or renegotiate existing contracts or permits, unless it involves some provisions on change of control that requires special attention.



Advantages

1. Employment of target company's existing employees is not interrupted by the shares transfer.
2. All assets and liabilities of the target company are assumed. No need to transfer the assets/properties with registration records, which effectively saves time and money.
3. No need to transfer any governmental licenses/permits.
4. It is possible to minimize income tax on the capital gain derived from the shares sale.

Disadvantages

1. Undesirable employees will have to be let go, which incurs termination expenses (i.e. severance pay, unfair termination compensation and payment in lieu of advance notice).
2. Financially, the buyer assumes liabilities of the target company, either known or unknown, existing or contingent. This includes off-balance sheet items.
3. The buyer of the shares in a publicly held target company will have to make a tender offer to all existing shareholders of the target company.
4. Change of control may trigger the target company's counterparty in a material contract to terminate the contract immediately.
5. It is necessary for the buyer to conduct a comprehensive due diligence, which is costly.

Amalgamation (Merger)

Amalgamation is the process where two or more companies are merged into one combined entity. In the amalgamation, neither of the original companies survives as a legal entity, rather, a completely new company is formed to house the combined assets and liabilities of both companies. All assets and liabilities are transferred from the original companies to this new company. In this guide, we focus largely on the assets acquisition and shares acquisition.

M&A Planning:

Step by Step M&A Process



1. Letter of Intent/MOU

One party or its investment banker, also known as a financial advisor, may initiate a discussion between a perspective buyer and a perspective seller. At an early stage of a transaction, both parties may prefer to put the framework of the transaction in writing, containing both binding and nonbinding terms in a document called a letter of intent ("LOI"), a memorandum of understanding ("MOU") or a term sheet. Entering into LOI, MOU or term sheet shows some sort of commitment of two parties to pursue a mutually agreeable deal. An execution of it also allows each party to take position on common understanding of and agreement on major deal points before proceeding further. Those deal points include scope of acquisition, details of assets or shares, price and payment, period, exclusivity, due diligence, unwanted assets, and confidentiality obligations. Having this framework established in the early stage, the parties can expect a smoother and more organized negotiation, which increases the odds of a deal closing successfully.



Common Questions on LOI/MOU

Is the signed LOI/MOU/term sheet legally binding?

It depends on the wording. Certain provisions may be binding, while other provisions are nonbinding. In general, the wording tends to suggest that the LOI/MOU/term sheet is legally binding.

Is the seller's demand for a deposit in this stage reasonable?

In some transactions, the seller requests for the deposit payment from the buyer upon signing the LOI/MOU/term sheet. This request is somewhat considered reasonable and in line with the market practice. From the seller's viewpoint, an answer to this request essentially tests the seriousness of the buyer. If the buyer walks away from the deal at this point, the deposit becomes nonrefundable.

What about the request for exclusivity?

Negotiating with two or more perspective buyers obviously gives the seller some sort of leverage in negotiation, especially on pricing. The setup allows the seller to turn one perspective buyer against another just to get a premium price. To avoid ending up paying the hefty high price, the buyer may demand the seller to take the business off the market and negotiate exclusively for at least a specified period. In return for this exclusivity, the seller may request for a nonrefundable deposit or a breakup fee from the buyer. As the name implies, if the buyer backs out of the deal, the seller can forfeit the deposit or charge the fee.



2. Due Diligence

Prior to any acquisition, the buyer is highly recommended to engage attorneys and accountants to conduct legal and financial due diligence on a target company. The due diligence process generally starts after the LOI/MOU/term sheet is executed and finishes before the contract signing. Although by its nature the process is both time consuming and costly, conducting due diligence is a must, unless the buyer is 100% sure on the creditworthiness and the financial/legal standing of the target company's business. The purpose of due diligence is to:

- verify legal standing and legal ownership of its assets,
- review the status of material contracts,
- spot any red flags (i.e. contingent liability), and
- analyze the financial standing and creditworthiness of the target company.

Prior to opening the books of the target company, the seller may require that the buyer and its team of financial advisors (investment bankers), accountants, attorneys and other advisors sign a confidentiality agreement.

All contingent and existing liabilities of the company will be under scrutiny during the due diligence process. So buyer's financial advisor can factor all liabilities and risks into the valuation of the target company and with the help of the legal advisor, structure the deal in the manner that mitigates such risks. It is not uncommon for the buyer to negotiate for a downward price adjustment in the proposed sale price of the target company or target company's business as the due diligence team makes some unfavorable discoveries in the book of the target company. In some cases, the fatal discoveries can even jeopardize the deal.

Generally legal due diligence covers the followings:

1. Corporate Matters
2. Financial Matters
3. Management and Employment Matters
4. Tangible and Intangible Assets
5. Material Contracts and Obligations
6. Litigations and Claims - Contingent and Actual
7. Taxation
8. Miscellaneous



3. Buy/Sell Negotiation - Structuring the Deal



Based on the result of the due diligence, the buyer and its team will calculate the valuation of the target company and come up with the offer price, which may not be synonymous with what the seller wants to receive. Both parties will probably battle over the proper valuation of the business and other terms and conditions. As expected, each buyer and seller may have its own desire for the outcome of the deal. To close this gap, the buyer and the seller will have to come to the negotiation table to allow both parties present their argument and finally settle on the agreeable buyout price and other terms and conditions.

At this point, the parties will also have to finalize the structure of the deal, that is to choose the type of M&A deal that they intend to pursue, whether assets acquisition, shares acquisition or merger. The advisors from both parties need to consider carefully the implications of each potential structure and then help implement a constructive negotiation to successfully close the deal. If the deal is finally reached, the parties will have to sign the Definitive Agreement, which depending on the structure of the deal can be Shares Purchase Agreement, Shares Sale and Purchase Agreement, Business Acquisition Agreement, Assets Acquisition Agreement or Business Purchase Agreement.

What is Escrow Account?

Upon signing the Definitive Agreement, normally the seller will demand the buyer to make the first installment of the sale price with the remaining amount to be paid upon the closing. Not getting the full payment in this stage means the seller assumes the risk of losing the remaining amount of the sale price if something goes really wrong on the closing date. The buyer might have run out the money, unable to secure outside financing, or simply does not want to pay due to whatever reasons. Understanding these crucial issues of non payment prompts the parties to carefully structure the transaction by engaging a third party, i.e. an escrow agent, to act as a temporary pass through account holder that would safely keep the fund during the process of the transaction.

In this case, upon the execution of the Definitive Agreement, the seller demands the buyer to place the remaining amount of the sale price with the escrow agent. An escrow agreement will normally provide that the escrow agent will release the money to the seller on the closing date if the seller delivers all required documents to the buyer and both parties instruct the escrow agent to release the money to the seller. Without consistent instructions from both parties, the escrow agent will be bound to hold the fund in its escrow account until the court by the final judgment rules one way or another.



Is the Escrow Agreement enforceable under Thai Law?

The Act on the Protection of the Benefits of the Contractual Parties B.E. 2551 (2008) (the "Escrow Act") only allows licensed escrow agents engage in escrow business. So far only commercial banks, finance companies and special purpose banks are qualified to apply for an escrow license from the Fiscal Policy Office, Ministry of Finance. Law firms are no longer allowed to provide escrow services. Any provision of the escrow services without the escrow license amounts to the Escrow Act violation, which will result in a criminal fine of not exceeding Baht 1,000,000 to be imposed on a violator. If the parties use any non-licensed escrow agent, the escrow agreement is considered void (invalid) and unenforceable.

4. Contract Signing

All terms agreed by both buyer and seller are duly documented in the Definitive Agreement and probably the Joint Venture Agreement/ Shareholders' Agreement, and signed by the representatives of both parties.



5. Closing & Post Closing

On the closing date, the documents are to be exchanged as set out in the Shares Purchase Agreement and payment is to be made against the delivery of the documents. But, closing isn't the end of the transaction. The buyer and the seller are still subject to post closing obligations. Normally the seller is required to enter into a number of covenants after closing, such as settling certain issues with the tax authorities, ensuring that certain executives of the seller stay on for an agreed period of time, or no competition with the target company. As for the buyer, typical post closing obligations can be the requirement to provide equal benefits for the seller's employees and executives, indemnification for the outgoing directors (if any), making certain filing and announcement. Depending on the negotiated terms of the transaction, until those obligations are fulfilled by both parties, typically a specified portion of the sale price is still held by the buyer or in the escrow account.

Seller's Actions

1. Deliver shares certificates, share transfer instruments, a shareholder register book, a company seal and other required documents.
2. Handover of the business premises.
3. Register change of directors of the target company.
4. File a new list of shareholders.

Buyer's Actions

1. Pay the sale price.
2. Take transfer of the business premises.
3. Cause buyer's designees to accept the appointment as the new directors of target company.

Seller's Guide for Business Sale

Whenever one plans to sell a business, what comes to the seller's mind, besides the right sale price and an escrow account, is ultimately a tax bill. Regardless of whether the business sale is made as an assets deal or a shares deal, it is possible to structure the deal to minimize tax liability. While this guide attempts to introduce certain tax planning strategies that can be readily applied for the business sale, every strategy has to be used with care, possibly with the help of tax attorney and accountant because there is no such thing as a bullet proof strategy. The Revenue Code arms an assessment officer with anti-avoidance provisions to scrutinize a taxpayer if the strategy is not carefully structured and not correctly implemented to get around those anti-avoidance provisions. Understanding these would be crucial for the seller desperate for a way out to minimize the tax bill.

As explained previously, there are two common routes for selling a business: (i) selling assets along with its liabilities, contracts, goodwill and employees, which refers to as the assets deal; and (ii) selling the shares in a company (privately or publicly held) that owns a business, which refers to the shares deal.



For Assets Deal

The parties may structure an assets deal to be an entire business transfer (EBT), which is largely tax free. In general, a seller company does not have to recognize any income or even loss derived from transferring the entire business to a buyer company, for the purpose of computing the net profit. The downside of the assets deal is that any loss carried forward cannot be transferred from the seller company to the buyer company. As a result, the buyer (transferee) cannot utilize such loss carried forward of the seller (transferor).

Recent Development on EBT's Tax Privilege

Amid the exploitation of EBT to legally avoid the tax bill, in September 2012 the government decided to take away the income tax exemption for the shareholders of the transferor. The exemption is now limited only to the share swap deal and the amalgamation deal, under which the shareholders receive transferee's shares or combined entity's shares upon dissolution of the transferor, instead of cash. In other words, at present, the shareholders of the transferor are entitled to income tax exemption if only they receive transferee's shares that are exchanged with transferor's shares. For a business seller who is keener on selling a business and cashing out, retaining any shares in the transferee does not serve this purpose well. With the right planning, there is still a way to minimize the income tax burden of the shareholders of the transferor even if in the cash deal, but outright exemption of income tax is no longer possible. It has to apply some creativity to structure most assets deals to be an EBT so that it can enjoy the VAT exemption. Specific business tax on transfer of real estate is also exempt if certain conditions are fulfilled.

Tax Planning Strategy for Assets Deal



From a tax standpoint, in order to achieve a tax-free transaction, the assets deal should be structured as an EBT, so that the corporate income tax, specific business tax and stamp duty on the transfer of the business can be exempt and VAT will not be applicable. However, these following conditions must apply.

1. Necessary documents must be filed to local revenue offices within the deadlines.
2. The transferor must be dissolved and the liquidation must be commenced within the same accounting year, in which the transferor transfers the entire business.
3. The transferee shall carry the value of assets as appeared in the account of the transferor on the transfer date. Any asset entitled to depreciation or amortization, shall be depreciated or amortized in accordance with the rules and rates which the transferor applied only for the remaining period and the remaining value of the asset.
4. The net loss of the transferor shall not be claimed as expense in the calculation of net profit or loss of the transferee.
5. Reserve or net profit carried forward from the previous accounting periods, but only the portion that has not paid tax, shall be included as income for the last accounting year period of the transferor. But from December 24, 2013, the reserve or net profit carried forward of a life insurance company, a general and casualty insurance company, a commercial bank, a finance company or a credit foncier company is exempt from income tax insofar the transferee will not claim any deductible expense on the reserve or the profit.
6. If transferor's shareholder receives the cash upon dissolution of the transferor, the shareholder shall be subject to personal income tax at the progressive rates from 0% to 35% or corporate income tax at the rate of 20% on the gain, depending on whether transferor's shareholder is an individual taxpayer or a corporate taxpayer. As explained earlier, with the right planning, the actual income tax burden of transferor's shareholder can be significantly reduced to a lower percentage, but not totally eliminated. If the transferor's shareholder receives transferee's shares upon dissolution of the transferor, the transferor's shareholder shall be exempt from any income tax.

For Shares Deal

In the shares deal, without any tax planning, when a seller simply sells the shares in a target company to a buyer, the seller shall be liable for paying the high taxes on the reportable capital gain. They can be in the form of either personal income tax or corporate income tax, depending on the status of the seller, as well as stamp duty according to the calculation detailed here below.



A. Capital Gain Tax for Individual Taxpayer

If a seller is an individual taxpayer, the Revenue Code imposes personal income tax on a capital gain derived from selling of the shares at the progressive rates from 0% to 35% of the capital gain. Assuming the individual is in the highest tax bracket, which is temporarily cut to 35% from the statutory rate of 37%, the gain will be subject to 35% personal income tax.

$$\begin{aligned}\text{Capital Gain} &= \text{Sale Price} - \text{Cost of Shares} \\ \text{Personal Income Tax} &= \text{Capital Gain} \times 35\% \text{ (or } 37\%) \end{aligned}$$

B. Capital Gain Tax for Corporate Taxpayer

If the seller is a company incorporated in Thailand, the seller is liable for paying corporate income tax at the rate of 20% of the capital gain derived from the sale of the shares.

$$\begin{aligned}\text{Capital Gain} &= \text{Sale Price} - \text{Cost of Shares} \\ \text{Corporate Income Tax} &= \text{Capital Gain} \times 20\% \end{aligned}$$

But when the seller remits the after tax profit to a shareholder as the dividend, the dividend payment is once again subject to 10% withholding tax, so the effective tax rate on this gain for a shareholder in the seller company is 28%. This double taxation places an unwanted penalty on the seller wanting to sell the shares (see the breadwon below).

Capital Gain	100
Less: Corporate Income Tax	$-100 \times 20\% = -20$
After Tax Profit	80
Distribution of Dividend to Shareholder	80
Less: 10% Withholding Tax	$-80 \times 10\% = -8$
Dividend after Withholding Tax	72

$$\begin{aligned}\text{Total Tax Liability for Shareholder} \\ &= 20 + 8 = 28\end{aligned}$$

C. Stamp Duty

Unless the shares in a publicly held company are sold through the Stock Exchange of Thailand, the seller has to affix the stamp duty on a share transfer instrument at the rate of Baht 1 per the sale price of Baht 1,000 or fraction thereof. This comes down to 0.1% of the sale price of the shares.



Tax Planning Strategy for Shares Deal

Despite the high tax imposed on the gain derived from the shares sale, there are actually many strategies that the seller can pursue to minimize the income tax. This is what makes the shares deal more attractive for the seller than the assets deal. Thus, in the shares deal, the structure of the sale is the key in controlling the tax consequences.

Method 1: Sale through Stock Exchange of Thailand

An individual seller selling the shares in any publicly held company through the Stock Exchange of Thailand (SET) is exempt from personal income tax on the capital gain derived from the sale. It is eventually a tax free transaction.

Method 2: Use of Foreign (Overseas) Company

If the seller is a company incorporated in a foreign country, the income tax on the capital gain derived from the shares sale can be reduced to 15% of the capital gain. This is however not applicable for a foreign owned company incorporated in Thailand.

Method 3: Use of Foreign Company with Tax Treaty Exemption

If the seller is a foreign company who is the resident of the jurisdiction having the tax treaty with Thailand that provides the exemption on the capital gain, the income tax on the capital gain derived from the shares sale shall be totally exempted. It is noted that certain conditions of a particular tax treaty may apply.

For easy comparison, the table on the next page provides the summary of the tax liabilities for the seller for each different type of M&A Deal.

Post Closing Obligations and Withheld Amount

Regardless of the deal structure, the buyer may require the seller or target company's specified executives to stay on with the target company for a specified period, such as six months, one year, two years or even longer. This obligation is naturally linked to buyer's payment of the last portion of the sale price that the buyer deducts or requests the escrow agent to deduct. The buyer (or buyer's the escrow agent) will release the deducted fund to the seller only after the seller duly performs the post-closing obligations to the reasonable satisfaction of the buyer. Obviously, in negotiating the transaction, the seller may want to keep the period to the minimal level and request the withheld amount to be held in an escrow account not in buyer's account.

Summary of M&A Tax Liabilities

	Assets Deal			Amalgamation	Shares Deal (Shares Transfer)
	Partial Business Transfer	EBT - Cash Deal	EBT - Share Deal		
Corporate Income Tax (CIT)	20% CIT	Exempt. The transferee carries the remaining value of property as appears on the book of the transferor on the transfer date.	Exempt. The transferee carries the remaining value of property as appears on the book of the transferor on the transfer date.	Exempt. The combined entity carries the remaining value of property as appears on the book of the existing company.	Resident Individual - 0 to 35% WHT Nonresident Individual - 15% WHT Thai Company - 20% CIT Foreign Company - 15% CIT in form of WHT Foreign Company being a resident of the jurisdiction having tax treaty exempting the capital gain tax - 0%
Income Tax for Shareholder of Seller	10% WHT for Dividends 20% CIT 0% to 35% PIT	20% CIT 0% to 35% PIT	Exempt	Exempt	N/A
Loss Carried Forward	N/A	The transferee cannot utilize transferor's loss carried forward.	The transferee cannot utilize transferor's loss carried forward.	The combined entity cannot utilize each existing company's loss carried forward.	Yes
Value Added Tax (VAT)	7% VAT	N/A	N/A	N/A	N/A
Specific Business Tax (SBT)	3.3% SBT	Exempt	Exempt	Exempt	N/A
Stamp Duty	0.5% stamp duty for immovable property transfer, unless SBT is applicable.	Exempt	Exempt	Exempt	0.1% stamp duty on the share transfer instrument.
1% Withholding Income Tax	1%	Exempt	Exempt	Exempt	N/A
Immovable Property Registration Fee	2% fee for property transfer	2% fee for property transfer	2% fee for property transfer	Baht 50 per lot	N/A

Buyer's Guide for Business Purchase

Prior to buying a business from the seller, a buyer should consider the tough questions on how to acquire the business rightly. These are crucial factors that the buyer and its team should take a closer look while looking at the target company's valuation. Note that the following list is not comprehensive because each transaction is unique and encompasses certain issues with respect to facts and circumstances of that particular transaction. Buyer's advisory team should attempt to identify as detailed as possible and put in place devices to protect the buyer's interests and also to minimize the severity of the conflict.



Selecting the Right Type of Acquisition

The buyer has to choose to pursue whether an assets acquisition (EBT or PBT), a shares acquisition or a merger in light of the buyer's circumstance. In an assets acquisition, the buyer will conduct the due diligence only on limited items, whereas in the shares acquisition, a robust due diligence must be implemented to spot any red flags or significant problems in the target company. Pursuing the shares acquisition is viable only if the risk of the undisclosed contingent liability is minimal or can be effectively managed or mitigated. On the transfer process, the shares acquisition is actually simpler than the assets acquisition.

Legal Compliance

The legal compliance is another issue that the buyer should be aware of. If the target company is operating in violation of any law or regulation, the buyer will have to make an assessment on the potential fine liability that may be triggered. To protect this downside, the buyer may require for the indemnity from the seller or make a necessary adjustment to the sale price.

Contingent Liability or Questionable Asset

Any contingent liability or questionable asset spotted during the due diligence should be resolved by the seller prior to the closing. For example, the buyer may request that loans to seller's related persons be repaid prior to the closing, otherwise the sale price will have to be adjusted or the closing must be postponed or canceled.

Restrictions under Articles of Association

Any transfer of the shares in a limited company, a private company, might be subject to the restrictions under the Articles of Association. In this case, a general meeting of shareholders or a board of directors has to grant the approval first to the transfer in order to ensure that the transfer of the shares is legally valid.

Foreign Ownership Restrictions

Thailand protects local owned businesses from foreign competition through a legal mechanism. The Foreign Business Act, B.E. 2542 (1999) (the "FBA") prohibits a foreign owned company from engaging in certain restricted businesses. The restricted businesses under the FBA are classified into three categories: Schedule 1, Schedule 2 and Schedule 3.

The businesses under Schedule 1 are strictly closed to foreign competition, thus a foreign owned company is strictly prohibited from operating the businesses under Schedule 1. The FBA does not allow a foreign owned company to file a foreign business license application for any Schedule 1 business.

The businesses under Schedule 2 and Schedule 3 are not completely closed to foreign competition as the FBA makes it possible for a foreign owned company to apply for a foreign business license to engage in any business under Schedule 2 and Schedule 3. And if the license is granted, the foreign owned company may operate the restricted business under the license.



The manufacture business is not listed in any schedule, so it is largely open to foreign owned companies. The services business is listed as a restricted business under Schedule 3, so a foreign owned company operating services business must apply for a foreign business license. With respect to the land ownership in Thailand, only a Thai owned company may own a piece of land outside an industrial estate.

Understanding these foreign ownership restrictions, the buyer should promptly check when acquiring the shares in the target company engaging in any restricted business(es) or owning the land outside an industrial estate. The buyer must ensure that the target company maintain a Thai-owned status after the closing in order to continue engaging in the restricted business(es) and/or owning a piece of land in accordance with the Land Code. Consequently, the buyer must be a Thai individual or a Thai owned company, also known as a Thai holding company, to acquire the shares in the target company from the seller.

Locking up Portion of Sale Price

For the continuity of the business or to tap on the existing expertise, the buyer sometimes requires certain executives of the target company to stay on the jobs for a specified period after the closing. Other common post obligation requirements are non-competition covenant by the seller and option to lease the real estate from the seller, if applicable. This requirements must be put in the Definitive Agreement with the condition that a portion of the sale price be withheld by the buyer or an escrow agent until the expiration of the period and/or the performance of the post closing obligations.



Fully Booking Acquisition Cost

It is in the buyer's interest to fully book the sale price in the buyer's account. If the buyer accepts to underreport the sale price in the Definitive Agreement, whenever the buyer resells the shares or the business in the future, it has to pay the higher income tax on the capital gain derived.

In the EBT, if the buyer pays the sale price in excess of the book value of the assets as appear on the seller's accounting book, the buyer may only record the book value of those assets as its cost in buyer's accounting book. Any premium (excessive amount) that is commercially paid for the goodwill of the business of the seller cannot be recorded in the accounting book of the buyer.

As a result, if the buyer resells that business in the future, the buyer will have to pay the higher income tax as buyer's cost of the acquisition of the business is not the actual sale price, but the book value of the assets of the seller on the transfer date after being deducted by depreciation and amortization. In other words, seller's corporate income tax is not really exempt in the EBT in the strict sense. Corporate income tax is only deferred for a later date. When the buyer resells the business to any third party, the buyer will end up paying corporate income tax.

For instance, the buyer paid Baht 1,000 Million for the entire business to the seller. But the book value of the entire business is only Baht 500 Million. Assuming no depreciation and no amortization if the buyer turns around the same business and resells for Baht 2,000 Million, for the purpose of computing corporate income tax, the buyer realizes the capital gain of Baht 1,500 Million, not Baht 1,000 Million, on this resale.

$$\begin{aligned}\text{Actual Capital Gain from Resale} &= 2,000 - 1,000 = 1,000 \\ \text{Capital Gain from Resale for CIT purpose} &= 2,000 - 500 = 1,500\end{aligned}$$

Use of the Right Acquiring Entity

In the shares acquisition, if the buyer uses affiliated companies incorporated in Thailand to acquire the shares in the target company, each acquirer must hold at least 25% of the shares in the target company. This is to avoid an economic double taxation when the target company pays the dividends to each acquirer. Any acquirer holding less than 25% of the shares in the target company will not be exempt from 10% withholding tax and 20% corporate income tax upon receipt of the dividend from the target company in the future.



***"It's far better to buy a wonderful company at a fair price
than a fair company at a wonderful price."***

- Warren Buffett

Our M&A Expertise

At NARIT & Associates, we recognize that M&A is a practice niche where the generalist can provide integrated and robust advice than a specialist, and that is exactly what our M&A attorneys offer to support our clients going through the transaction process. Our M&A team has a strong expertise that lays across three pillars of excellence for M&A transactions:

Full Range Legal Advice

As transactional attorneys, we can advise clients on the broad spectrum of corporate and commercial laws related to the M&A deal. Our role as your legal advisor is to educate the clients about the implications of the business sale/purchase, spot any red flags and put in place devices that can minimize the risks.

Strategic Tax Planning

Our professionals have extensive experiences and exceptional skills in crafting creative and proactive tax advice for our clients. Working closely with financial advisors and banking institutions, our lawyers are fully capable of providing individualized tax planning strategy that matches the clients' best interest. We help the clients decide what type of tax planning that is the most cost saving from the early stage of the transaction.

Dispute Perspectives

The advisory role of our lawyers is not only limited to the transactional side of the M&A but also the litigious aspect of it. Having handled countless of litigation matters enables us to give the crucial perspective on potential disputes related to shareholders conflict and M&A deal. Ultimately, our lawyers will try hard to highlight any problems that could lead to an M&A related dispute and advise the clients on how to minimize or eliminate the chance of dispute.



Selected Experiences



Advising one of the world's largest system providers for food and energy processing technology based in Europe, a Frankfurt Stock Exchange listed company, on partial business acquisition from one Thailand listed company who is a leading manufacturer of industrial equipment and machinery and bankruptcy law.

Representing and advising Thai shareholders on divestment of 75% stake in Thai manufacturer of agricultural and vegetable oil to a major Japanese trading corporation and to a top Japanese producer of refined edible oil, both are listed on Tokyo Stock Exchange and structuring the tax planning.

Representing and advising a Thai entrepreneur on sale of a distribution business through a tax free entire business transfer to a Malaysian subsidiary of a Japanese manufacturer.

Representing and advising a group of Thai shareholders on sale of the majority stake in a group of automobile and motorcycles parts distributors/retailers with the total valuation of approximately Baht 1 Billion to a Japanese conglomerate in a tax efficient manner.

Advising a Thai engineering consulting company on post-closing arrangement after the Thai management buys out the Japanese shareholder who is the largest construction consulting firm in Japan.

Representing and advising a group of Swiss majority shareholders on acquisition of the minority stake in a group of transportation and logistic companies from the minority shareholders and corporate restructure.

Representing and advising a Thai shareholder on sale of the 100% shares in online payment companies to a Malaysia-based online payment company in a tax efficient manner.

Representing and advising a Thai shareholder on the sale of 51% shares in one chemical products company, the share purchase agreement with a Malaysian company and the exit.

Contact Us

For further information about our work, services and fees, please contact us at the below:

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