Tax and legal considerations of M&A in APAC 2023

Webinar summary

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Introduction
Mazars at a glance

Global coverage

1
global partnership

95+
countries & territories

47,000+*
professionals
* 30,000+ professionals in Mazars' integrated partnership, 17,000 via Mazars North America Alliance

1,200+
Partners

These figures are valid as of 1 January 2023.
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Introduction

Foreword

The Asia Pacific region has emerged as a prime destination for M&A activities. But navigating the complexities of deal transactions in diverse APAC markets can be challenging.

In this rapidly evolving business landscape, mergers and acquisitions play a pivotal role in shaping the economic dynamics and strategic growth opportunities across Asia Pacific.

On 24 May, experts from Mazars and LPA Singapore came together to share our perspectives on the current trends, challenges, and opportunities in the M&A landscape of the region. Our panellists from Australia, Hong Kong, Malaysia, Singapore, Thailand and Vietnam provided insights into the macroeconomic drivers and investment patterns within the region.

We delved into critical considerations such as tax and legal implications, documentation requirements, and the formation of consolidated groups. We shared valuable strategies and best practices for navigating complex regulatory environments and optimising deal structures to maximise value.

This summary report aims to capture the essence of the webinar discussions and serve as a valuable resource for executives, professionals, and investors seeking to understand and capitalise on the opportunities presented by M&A in the Asia Pacific region.

We hope that this webinar summary will serve as a comprehensive guide and inspire further exploration and engagement in the exciting realm of M&A in Asia Pacific. We are here to support your journey in navigating the dynamic M&A landscape in the region.

Jonathan Stuart-Smith
Partner, Tax
Mazars in Thailand

M&A webinar
Panel of speakers

Mazars

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Economic landscape for M&A in Asia

Macroeconomics

In line with global trends, M&A activities and the economy in Asia have been disrupted in recent years due to the COVID-19 pandemic. Geopolitical issues have emerged, leading to factors such as inflation and increase in interest rates by central banks. Experts predict that the key macroeconomic indicators in Asia will return to pre-pandemic levels by 2023-2024 with a share of 70% to 80% of the global economic growth.

Taking a closer look at foreign investment inflows and outflows in the region, it is interesting to note that the United States continues to make substantial investments in Asia. China has emerged as one of the top investors and the leading trading partner in ASEAN, surpassing Japan. China's significant presence extends to sectors such as information and communication, construction, transportation, and real estate. On the other hand, since April this year, India's population has surpassed China's. Since 2021, India's GDP growth has overtaken China and is predicted to be at 6% by 2028 while China at 3.4%.

Examining the Asian M&A landscape from a private equity lens, the total deal value in Asia in 2022 fell below $200 billion according to market reports. This decline is attributed to both a decrease in the volume of deals and in average deal size, which averaged around $100 million.

While India and Australia - New Zealand experienced a rise in their share of deal value, China witnessed a decrease due to the impact of COVID-19 and lockdown measures. The number of active investors in China declined by 2% while the top 20 funds accounted for nearly one-third of the total deal value in 2022. In terms of valuation, the average EBITDA multiple declined to around 12x compared to the pre-pandemic level of nearly 15x. Fundraising was impacted, with a 43% drop in capital raised.

In 2022, over 50% of deals in Asia were booked deals, while around 30% were buyouts. Buyouts were prevalent in Australia, New Zealand, and Japan. In terms of total deal values, China ranked first with over $60 billion, followed by Australia with nearly $45 billion, and Japan and Korea with approximately $20 billion each. Southeast Asia reached nearly $15 billion in total deal values.

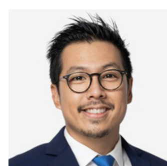
The top three sectors in M&A in 2022 were technology and cloud services, advanced manufacturing and services, and healthcare. Looking ahead, the key drivers for returns on private equity investments in the next five years are expected to focus on top-line expansion, as well as cost and capital efficiency management.

Outbound investments in 2022 differed widely among APAC players, both in terms of destinations and sectors. Japan, South Korea and India made substantial investments in North America; and China, India, and Japan invested heavily in Europe. ASEAN countries directed over 50% of their investments within Asia, with a particular emphasis on infrastructure, healthcare, technology, and software for China and Southeast Asia. Japan and India prioritised tech-enabled businesses and industrials, whereas South Korea concentrated on consumer, technology, software, and industrials.

A noticeable trend across Asia is the increasing importance of digital transformation and M&A activities. This trend is particularly prominent in Japan, China, and to a lesser extent, Southeast Asia. Sustainability and the green transition have gained significant traction, with strong emphasis seen in Japan, China, and South Korea.

Overall, Asia is recovering from the impacts of the pandemic, presenting investment opportunities for strategic and financial investors alike.

"Looking ahead to sector predictions for investments beyond 2023, the landscape appears diverse across Asia. However, key sectors anticipated to thrive include healthcare, infrastructure, computer technology, and software."



Laurent Nguyen
Partner, Financial Advisory
Mazars in Vietnam

Tax considerations in group reorganisations

Australia

Any transfer of assets between Australian group entities will be generally treated as if they occurred at market value. Even if shares are transferred for a nominal amount like $1, they will be deemed to have been transferred at market value, resulting in a taxing event. However, there are ways to navigate these taxing events such as utilising rollover relief or the income tax consolidation regime.

Tax consolidation and roll-over relief

The income tax consolidation regime treats all taxpayers within a 100% owned group as a single taxpayer, effectively making any internal transactions within the group disappear for tax purposes. However, forming an income tax consolidated group can be complex as it requires a reset of the tax assets of all subsidiaries entering the group. Seeking advice early on will help to ensure no adverse tax issues arise during the formation of the consolidated group.

Another aspect to consider is interposition rollover relief, which involves interposing a company above an existing company without triggering any tax consequences if done correctly. This can potentially facilitate the formation of a tax consolidated group and the movement of assets within it.

Stamp duty on transfer of business assets

Transferring assets outside of a tax consolidated group may incur tax consequences at the federal level and the state level, such as stamp duty.

Queensland, Western Australia, and the Northern Territory, still impose stamp duty on the transfer of business assets. However, potential restructure relief may be available in certain circumstances. If any of the entities involved in the transaction own land, all states impose duty on land transfers. Additionally, depending on the value of the land and the size of the shareholding transfer, there may be a potential occurrence of land holder duty.

Transfer of intangibles

The Australian authorities are focused on the transfer of intangible assets, especially intellectual property (IP), offshore. The Australian Tax Office has issued taxpayer alerts advising it will scrutinise schemes involving undervalued transfer of IP offshore. It's important to be aware of the multinational anti-avoidance law, which can significantly increase penalties in such cases.

Moreover, a recent bill introduced to Parliament aims to deny deductions for royalties paid on intangibles in low-tax jurisdictions. These factors must be carefully considered when contemplating the movement of intangibles. Seeking professional advice is crucial to ensure compliance and avoid potential issues.

"For any group reorganisation, and certainly an international one, it is critical to get all the advisors in the room. It's really important for everyone to understand where the transaction is heading, so that you can eliminate any potential tax issues early on. It is essential to have proper documentation for every aspect of the transaction, whether it involves transferring shares or assets."

Jamie Towers
Partner, Tax
Mazars in Australia

Tax considerations in group reorganisations
Hong Kong and Malaysia

Hong Kong

Foreign-sourced Income Exemption (FSIE)

In the past, Hong Kong did not impose taxes on dividends or capital gains, making it an attractive location for multinational enterprises. However, under the new FSIE regime, which came into effect on 1 January 2023, offshore dividends and disposal gains received by Hong Kong entities within a multinational group will be subject to taxation. The standard tax rate is 8.25% for the first 2 million and 16.5% for the remaining amount.

There are two exceptions: economic substance requirements and participation requirements. If the taxpayer meets these criteria, no tax will be imposed on offshore dividends and capital gains. Clients are advised to enhance the substance of their Hong Kong entities, as shell companies are no longer sufficient. Taxpayers may also explore outsourcing economic activities to other entities within Hong Kong, which are permissible under the economic substance requirements.

Stamp duty - s.45 relief

The transfer of Hong Kong stock is subject to a stamp duty of 0.13% on the transaction value, applicable to both the buyer and the seller. However, if the buy-sell transaction of Hong Kong stock is conducted between associated body corporates that meet certain criteria, they may apply for intra-group relief under Section 45 of the Stamp Duty Ordinance. To enjoy this relief, the relationship between the transferor and transferee must be maintained for at least 2 years after the completion of the transaction.

Indirect transfer of a China company

It is a common practice to utilise Hong Kong companies as holding entities for Chinese entities. Consequently, a question often arises: Is it feasible to transfer shares at the level of Hong Kong entities instead of Chinese entities to avoid capital gains tax in China? The answer is no.

China has regulations concerning indirect transfers, which means that if the tax authorities determine that the Hong Kong entity lacks business substance, the arrangement lacks a reasonable commercial purpose, or the capital gains primarily arise from the value of the Chinese entity, the tax officer has the authority to reclassify the indirect transfer as a direct transfer of the Chinese entity and impose China tax accordingly.

Malaysia

In Malaysia, business acquisitions are typically structured as:

- Share deal: the buyer acquires a certain percentage of the shares of the target company.
- Asset deal: the acquirer purchases tangible or intangible assets and include certain operating assets of the business such as working capital, equipment, etc of the target.

In a share deal, buyers must conduct tax due diligence to identify potential tax risks inherited from the target. In cases where certain costs are not covered in the indemnity and warranty provisions of the share purchase agreement, the buyer would need to bear these costs themselves.

In contrast, asset deals offer less complexity for the buyer, as they would not inherit any historical tax liabilities, as the tax liabilities would remain with the target. The buyer may selectively take over the healthy operating business or specific valuable assets, without assuming all of the target's liabilities.

Stamp duty

In asset deals, stamp duty ranging from 1% to 4% is applicable to the transfer of properties such as land, building contracts, and goodwill.

In share deals, the transfer of shares in a private limited company attracts a stamp duty of 0.3%, which is determined by either the net asset value or the net tangible assets, whichever is higher.

Real property gains tax (RPGT)

Additionally, RPGT in asset deals is based on the disposal of land and varies depending on the holding period. It ranges from 10% to 30% for durations of one to five years.

Income tax

In an asset deal, the transfer of assets may have different tax consequences based on the type of assets acquired. Assets are typically valued at fair market value, allowing buyers to claim higher capital allowances and effectively reduce the tax burden.

In a share deal, the tax treatment of the gain on the disposal of shares by the seller depends on the classification as either capital or revenue in nature, typically determined by a trade analysis. However, the government has indicated plans to introduce capital gains tax on disposal of shares of unlisted companies sometime in 2023.

Malaysia (cont'd)

Tax balances

In asset deals, unutilised tax losses or capital allowances cannot be transferred to the new company. In share deals, these tax attributes can continue to be carried forward as long as the company is not dormant at the time of the share transfer and where the target is dormant, it does not undergo a significant change in shareholding of over 50%. The carry-forward period for unutilised tax losses is limited to 10 years.

Tax liabilities

In terms of inheritance of past tax liabilities, asset deals generally do not entail any transfer of tax liabilities, whereas such liabilities remain with the target company in share deals.

Singapore

Share transfers

In Singapore, a stamp duty of 0.2% applies to share transfers based on the higher value between the consideration or the fair market value of the shares. The buyer is typically responsible for paying the stamp duty, unless agreed otherwise. However, relief from stamp duty may be available for qualifying transfers between associated companies. Generally, no GST is applicable to share transfers.

In a share deal, it's important to note that the legacy tax liabilities of the transferred companies remain with them. Buyers should negotiate tax indemnity provisions to protect themselves. However, any existing capital allowances and donations of the transferred companies will be forfeited if there is a more than 50% change in the ultimate shareholding.

Business and asset transfers

For business or asset transfers, GST is typically applicable unless certain conditions for a qualifying transfer of going concern are met. Capital allowances on remainder tax written down values of fixed assets can be claimed by the buyer in cases where the transfer of assets is between two related parties and and an election is made to treat the transfer as not a disposal for the seller, thereby avoiding tax charges.

Stamp duty applies to the transfer of certain instruments such as shares, real properties, leases, and mortgages. A stamp duty ranging from 1% to 6% is imposed on the transfer of immovable properties.

Sellers may also be subject to stamp duty ranging from 4% to 12% if the properties are sold within three years of ownership.

Stamp duty is imposed based on the market value or sales price of the transferred properties, whichever is higher. It is advisable to allocate the sales price in an asset deal in a commercially justified manner, as this can help minimise challenges from tax authorities regarding price allocations.

In a business transfer agreement, it is crucial to consider the implications of the transfer for each type of asset, as the tax consequences can vary. It is important to note that goodwill transfer is generally not deductible for buyers. Tax attributes such as unutilised tax losses and capital allowances cannot be transferred to the buyer in an asset deal.

Statutory voluntary amalgamations

Statutory voluntary amalgamations approved under the Companies Act may have specific tax implications. In such cases, the tax consequences of the continuing business apply to the surviving company. For instance, unutilised tax losses of an amalgamating company can be transferred to the surviving company if certain conditions are met.

"In Singapore, it is essential for all restructurings to be conducted at arm's length. We can efficiently structure your transactions by evaluating the availability of domestic and tax treaty reliefs that can defer capital gains tax and exempt transaction taxes. By considering these factors, we can mitigate potential tax risks during the restructuring process."

Elaine Chow,
Partner, Tax
Mazars in Singapore

Tax considerations in group reorganisations
Thailand

Share transfer vs asset transfer

In Thailand, acquisitions are typically executed through the purchase of shares in a company, rather than acquiring the business or assets of the target company. This preference for share transfers is primarily influenced by higher taxes associated with asset acquisitions, making them less attractive to sellers.

In addition to the corporate income tax rate of 20%, a transfer of assets is also subject to a 7% value-added tax (VAT). Additionally, if the transfer involves immovable property, a specific business tax of 3.3% and a transfer fee of 2% would apply.

In the case of share transfers, the seller may opt to distribute a portion of the dividend separately. By doing so, the dividend can be either tax-exempt or subject to a lower tax rate in the hands of the seller. This approach also helps reduce the capital gain on the disposal. Another advantage of share transfers is that unused tax losses remain valid even after a change in ownership of the target company.

On the other hand, business transfers may not be preferable if goodwill is involved. In most cases, the revenue department disputes the existence of goodwill and disallows the buyer from claiming its value as a tax deduction or depreciation. While the buyer may eventually be eligible for a tax deduction when selling the business, they must provide justifiable evidence of the goodwill's value.

Holding companies

Many MNEs establish holding companies in jurisdictions with lower tax rates, such as Singapore, Hong Kong, or Mauritius, to enjoy tax benefits. However, Thailand has been updating its tax laws to comply with the inclusive framework developed by the Organisation for Economic Cooperation and Development (OECD). Consequently, setting up a foreign holding company with minimal substance has become more challenging than before.

In cases where foreign ownership restrictions prevent majority ownership, a Thai holding company may be necessary. An alternative to a holding company in Thailand is an International Business Center (IBC), which offers both tax and non-tax incentives. Tax incentives for IBCs include a reduction of corporate income tax from 20% to rates ranging from 3% to 8%, depending on local expenditures.

When exiting from a Thai holding company, any capital gains are subject to a 15% withholding tax. Some tax treaties provide exemptions for capital gains tax. For instance, the treaty between Thailand and Singapore offers an exemption if the target company is not a listed company, thereby enhancing the tax benefits available for business combinations.

Tax benefits for business combinations

Thailand now provides tax benefits for business transfer options, including Entire Business Transfer (EBT), amalgamation, and merger.

- EBT

In an EBT, all business assets and liabilities of a company are transferred to another company. The transfers are exempt from corporate income tax and VAT. However, all assets and liabilities must be transferred at a fair market value and the transferor must be liquidated in the same fiscal year in which the transaction takes place. The transfer of goodwill requires careful consideration due to scrutiny from the revenue department. Hence, it is advisable to obtain a proper valuation report.

- Amalgamation

In the case of amalgamation, where two or more companies combine to form a new company, no taxes are imposed on such transactions. Furthermore, it is also exempt from the land transfer fee. However, tax losses in either of the amalgamated companies will be forfeited.

- Merger

A new measure allows for the merger of two or more companies, with one company becoming the surviving entity while the others are dissolved. The surviving company assumes the resources, assets, and liabilities of the merged companies. This concept is still relatively new in Thai corporate law, and Thai tax laws have yet to address the tax implications of such mergers. However, it is expected that these transactions should be exempt from taxes, similar to EBT and amalgamations.

It is important to be aware that all of these transactions are subject to tax audits when the transferror is dissolved.

Tax implications of various financing instruments
Australia

When considering financing arrangements in Australia, one of the first questions that should be asked is whether it should be debt or equity.

At a high-level, debt interests give rise to interest expenses in the hands of the borrowing entity, which is generally deductible for Australian income tax purposes where the relevant deductibility criteria are satisfied.

This deductible interest, in turn, reduces the taxable profit of the borrowing entity and may result in lower tax bills. Returns paid on equity interests (i.e., dividends), are not deductible for Australian income tax purposes.

However, Australian resident companies may be able to pay franked dividends to shareholders whereby the shareholders benefit from corporate taxes paid by the company in the form of franking credits attached to the dividends.

At a high-level, Australian resident taxpayers receive the main benefit of franking credits, broadly receiving a dollar-for-dollar credit for corporate tax paid with the franking credits they receive.

Non-resident shareholders also receive some benefit from franking credits attached to dividends they receive. However, this benefit is limited to an exemption from dividend withholding tax applying to the dividend payment.

Some organisations prefer a mix of debt and equity, requiring proper advice and calculations to ensure the optimal capital structure.

Transfer pricing

Another key aspect in Australia's financing landscape is the transfer pricing rules. Ensuring that the interest rate charged on debt instruments aligns with an arm's length interest rate is crucial.

The Australian Taxation Office places significant focus on this area, as even slight differences in interest rates can have a substantial impact on the overall tax bill.

To avoid potential disputes with the Australian Taxation Office, it is critical to establish an appropriate interest rate and maintain proper documentation.

Thin capitalisation rules

While interest on debt instruments is generally deductible from an Australian tax perspective, taxpayers need to be mindful of the thin capitalisation rules, which impose a cap on the maximum amount of interest (and other borrowing costs) a taxpayer can claim as a tax deduction.

Draft legislation has been released by the Australian Government to largely overhaul Australia's thin capitalisation rules (including the removal of the safe harbour maximum debt calculation for non-financial entities), which are proposed to be effective for income years commencing on or after 1 July 2023.

Given the proposed changes are still in draft, taxpayers are encouraged to consider both the existing thin capitalisation rules, as well as the proposed changes, when contemplating their financing arrangements in Australia.

Hybrid mismatch arrangements

When engaging in cross-border transactions in Australia, it is crucial to be aware of the hybrid mismatch rules, which also apply to financing instruments.

For instance, if a hybrid financing instrument leads to a deduction in Australia but is treated as a non-assessable dividend in the recipient country, the hybrid mismatch rules can deny the interest deduction to the Australian taxpayer. Similar denial can occur if both Australia and another country claim deductions for the same interest costs.

Finally, the targeted integrity rule can apply if funds borrowed from overseas are funnelled through a low-tax jurisdiction, resulting in the denial of interest deductions from an Australian tax perspective.

Withholding tax rules

Broadly, Australian residents paying interest to overseas recipients are required to deduct withholding tax at a rate of 10% from the payment and remit the withheld amount to the Australian Taxation Office.

Tax implications of various financing instruments
Australia

Withholding tax rules (cont'd)

In this regard, it is noted that some exemptions to the interest withholding tax rules may be available, however the rules governing the exemptions are complex and require careful consideration. In addition, the interest withholding tax rate may be reduced under a double tax agreement.

Dividend payments, unless they are fully franked, may be subject to dividend withholding tax at a rate of 30%. However, if Australia has a double tax agreement with the recipient country, the withholding tax rate might be lower.

Taxation of Financial Arrangements

Broadly, the Taxation of Financial Arrangements rules apply to taxpayers in groups with a turnover of A$100 million or more (or where the taxpayer has financial assets of A$100 million or more, or assets of A$300 million or more). Where these rules apply, they govern the timing and recognition of gains and losses on financing instruments for Australian income tax purposes.

"Overall, it is essential to consult with professionals to navigate the complexities of the taxation system."

Robert James
Partner, Tax
Mazars in Australia

Tax implications of various financing instruments
Vietnam

In Vietnam, we primarily focus on two key instruments: equity and hybrid instruments like convertible loans. However, these instruments have separate tax systems, so we can address them individually. Similar to Australia, the key difference between debt and equity lies in how we generate income from them. For debt, it's through interest payments, whereas for equity, it's through dividends or capital gains when selling the equity.

No thin capitalisation rules

There is currently no specific thin capitalisation rule in place in Vietnam. However, in practice, the interpretation of the law varies among different provinces. Some provinces adhere to a debt-to-equity ratio of 20:80, while others follow a ratio of 30:70 unofficially. Moreover, for medium- and long-term loans exceeding 12 months, registration with the state bank is required. Regarding interest payments, local law stipulates a 5% corporate income tax (CIT) rate without any value-added tax (VAT).

Although using double tax treaties may provide tax exemption benefits for interest income paid overseas, most treaties have a 10% cap, which doesn't offer significant advantages compared to the local 5% CIT rate. A special tax treaty exists between Vietnam and France, which provides special treatment for interest income. Moreover, interest income may be exempt from tax in Vietnam if the overseas lender has no Permanent Establishment in Vietnam.

When subscribing to shares, there is no immediate tax obligation, but costs will be incurred when selling the equity in the future. Dividends, unlike interest payments, are not subject to withholding tax. Therefore, capital gains tax becomes the focal point when dealing with equity transfers.

Capital or share transfer

If the seller is an individual and non-resident, a flat rate of 0.1% is applied to the total sales value of the transfer. If the seller is a resident, the tax treatment depends on whether the target company is a joint stock company (JSC) or a non-JSC, such as a limited liability company.

For JSCs, the capital gains tax rate is 0.1% on sales, similar to non-resident individuals. However, for non-JSCs, the tax rate on capital gains is 30%. Consequently, it is common to see potential buyers negotiating with individual sellers who own an LLC, considering converting the company to a JSC to optimise the tax implications.

In the case of the seller being an organisation, the tax treatment is based on the seller's status. If the seller is a Vietnamese entity, the standard tax system applies, resulting in a 20% tax on capital gains.

On the other hand, if the seller is an overseas company, two options come into play. If the target company is a public company, the securities transfer tax rate of 0.1% applies. However, if the target company is a non-public company, the tax rate on capital gains is 20%.

The tax payment deadline is typically within 10 days after the share transfer. The responsibility for tax filing falls on the seller if they are a Vietnamese company. If the seller is an overseas company and the buyer is Vietnamese, the buyer assumes the responsibility for tax filing and payment. However, if both the sellers and buyers are overseas entities, the Vietnamese target company is responsible for filing and paying the tax.

Tax exemptions

In internal group restructuring scenarios where no gain is derived from the transaction, no tax is usually applicable based on local laws and guidelines. However, the practical application may vary, subject to the interpretation of different provinces.

Another option for tax exemption is to refer to double tax treaties. Most treaties employ a ratio of immovable property to total property of the target company in Vietnam as a determining factor. Detailed financial statements need to be examined to ensure compliance with the specified conditions.

Additionally, it's important to note the recent attention given to indirect transfers. In such cases, where a French company sells a holding company in Hong Kong, which in turn owns substantial assets and subsidiaries in Vietnam, tax authorities may challenge and attempt to impose taxes on the transaction. Although guidelines on valuation and profit allocation in cases involving the sale of an entire global group are lacking, ongoing discussions with tax authorities aim to address these concerns.

Common tax issues to consider in SPA negotiations

Australia and Singapore

Australia

Tax due diligence lock-out clause

This is an increasingly common tactic that aims to shift the risk to the purchaser. The clause states that any issues related to specific financial matters disclosed during the due diligence period are excluded from the warranties. Purchasers are advised to push back on such clauses, as unforeseen issues beyond their control can arise, leading to significant financial implications.

Warranty and indemnity periods

Australia generally follows a four-year tax statute of limitations for revenue matters, although it can be unlimited in certain cases, so we recommend a minimum warranty period of four years. A common issue arises when a transaction spans multiple tax periods, with the transaction completing in the middle of a new month. It becomes crucial to determine and negotiate who bears responsibility for filing straddle tax returns, which can include income tax and indirect taxes. While the purchaser typically assumes control at that point, the previous owner often seeks review rights to ensure the accuracy of the returns and avoid potential warranty issues.

GST and other taxes

If the target company is part of an existing income tax consolidated group or GST group, all taxes are typically paid and credits claimed by the head company. While any member of the group becomes responsible for the head company's taxes in case of default, a tax clearance is available upon exit from a group. It is crucial in the SPA to enable tax clearance and a 'clean exit' from the group at settlement.

In a GST group, available input tax credits based on underlying expenditures are generally claimed by the head company. However, if the target company incurred those expenses, there should be a provision in the SPA to ensure repayment.

Indemnity protection for incoming directors

Australia has a director penalty notice regime, whereby if a company fails to address certain taxes within a specific period, the Australian Tax Office can issue a director penalty notice, making directors personally liable for those taxes. Protecting incoming directors from potential director penalty notices is critical. It is recommended to include specific indemnity protection not only for the company as a whole but also for incoming directors.

Singapore

We must consider the tax implications pertaining to direct and indirect transfers and integrate them into the SPA negotiations.

Tax warranty and indemnities

It is important to address findings from the tax due diligence as well, particularly if there are any potential material legacy liabilities. These findings may affect the negotiation of tax indemnities and warranties and may even necessitate requests for specific indemnities to seek protection against significant tax exposures of the target for the buyer.

As a buyer, you may also be obliged to withhold a certain amount of the seller's capital gains tax from the purchase price in respect of certain indirect transfers.

Common tax issues to consider in SPA negotiations

Thailand and Vietnam

Thailand

In Thailand, it is important for the SPA to encompass all significant tax issues identified in the deal. Here are a few key points to consider specifically for Thailand.

Firstly, the statute of limitations for:

- income tax is 5 years,
- VAT is 2 to 5 years
- general statutory limitations under Civil and Commercial Code is 10 years.

We typically recommend including warranties and indemnities covering a minimum of 5 years, even if the review period is shorter.

Next, the buyer may address certain issues as conditions precedent, allowing non-compliance matters to be rectified before the deal's closing to avoid penalties and surcharges. For instance, ensuring the submission of required transfer pricing documentation.

Pending tax disputes

Another important aspect to highlight is pending tax disputes and tax audits with the tax authorities. Warranties and indemnities should cover such situations, and the seller must ensure the availability of supporting tax documents. The buyer should be protected from any taxes associated with ongoing tax audits. It is common practice to include in the SPA a provision requiring the seller to ensure that all supporting tax documents from the past five years are in order and that the tax treatment for the transactions is clearly addressed.

The SPA should specify who will be liable for the tax treatment, taking into account relevant factors. For example, if there is no exemption, the buyer may deduct a 15% withholding tax on capital gains. In case the seller claims tax exemption, the SPA should guarantee the seller's eligibility for the exemption and establish their liability for any penalties if the exemption is later challenged by the revenue department.

Vietnam

Tax due diligence is a critical aspect. It is essential to determine whether the target company has complied with tax laws and assess any potential risks for the buyer. Typically, buyers, especially in Vietnam, will request a tax audit of the target company before concluding the SPA.

Although a tax audit can provide some assurance, it does not guarantee full compliance, as different opinions may arise from subsequent inspections conducted by higher-level tax authorities or state auditors. It's important to note that tax audits are not mandatory, even if requested by the company. Therefore, meticulous warranties and indemnities must be included in the SPA. In Vietnam, the statutory limitation for tax collection is 10 years from the transaction date.

Timing for CGT filing and payment

The timeline for transferring ownership and completing the equity transfer in Vietnam is not clearly defined. Normally, after completing due diligence and meeting all conditions, the SPA becomes effective, giving the buyer ownership of the shares. However, the registration of the buyer's name in the business license is still required.

This ambiguity leads to the consideration of having two SPAs. The first is the comprehensive agreement between the parties, while the second is a simplified version submitted to the authorities. This approach helps determine the deadline for tax declaration, providing clarity for both parties and the authorities.

Tax exemption by virtue of DTA

The application of double tax treaties for tax exemptions in Vietnam is often explored by buyers and sellers. Sellers see the opportunity for tax exemption and may apply for it. Buyers, however, may perceive risks associated with this approach.

In Vietnam, the tax authority must respond to the application under the new tax administration law and provide a certificate of tax exemption. While obtaining the certificate offers some level of assurance, it is not a perfect guarantee, as the tax authority only evaluates the submitted dossier. If a tax inspection occurs later, their opinion may differ. However, having a certificate provides a measure of safety for both buyer and seller. It is advisable to include specific provisions in the SPA to address this matter.

Legal considerations regarding asset deals and equity deals

LPA Singapore

Overview of a share deal

In a share deal, the transfer of ownership occurs through the transfer of shares issued by the target company.

To execute a share deal, the parties need to enter into a SPA. Additionally, ancillary documents, such as resolutions from directors, members, or shareholders, may be required to approve the transfer.

Certain restrictions, such as rights of first refusal or offer, and consents from non-exitting shareholders, should be considered.

In Singapore, the transfer is achieved through filing with the Accounting and Corporate Regulatory Authority (ACRA) or similar authorities in APAC countries.

Overview of an asset deal

In an asset deal, the purchaser is interested in acquiring specific assets rather than the entire company. This results in multiple transactions as each asset transfer requires specific documents.

Typically, a Business Transfer Agreement or Asset Transfer Agreement is used, accompanied by corporate and shareholder resolutions.

Depending on the nature of the assets, novation agreements, assignment agreements, or termination agreements may be necessary. Parties must pay attention to existing encumbrances on the transferred assets, such as mortgages or charges.

Obtaining third-party consents becomes more complex in asset deals, particularly when transferring agreements, receivables, or intangible assets, as counterparties' consent is often required.

Pros and cons

- Share deals

A share deal offers a simplified transaction process since it involves only the transfer of shares. This is especially advantageous in jurisdictions like Singapore where the process is straightforward.

Share deals also ensure business continuity, as the buyer acquires the entire company, allowing contracts to proceed without interference or the need for counterparty consent, except in cases where change of control provisions exist.

Moreover, share transfers provides tax efficiency, particularly in Singapore, where capital gains are not taxable.

However, there are some downsides to consider. Acquiring a company through a share deal means assuming all past and potential liabilities, which increases the level of risk for the purchaser.

Due diligence becomes crucial in assessing these risks, such as past non-compliance or potential disputes that may arise post-completion. Share deals also tend to include a price premium due to acquiring the company's goodwill.

- Asset deals

Asset deals offer greater flexibility for purchasers to select and acquire specific assets, thereby reducing risks associated with unknown liabilities.

The due diligence process becomes more manageable as the transaction perimeter is well-defined.

However, implementing an asset deal is more complex. Agreeing on a single effective date for multiple transfers can be challenging, especially when counterparties' consent is required.

This complexity often leads to a longer process. Government authorities and landlords may also need to provide approvals for licensed assets and lease agreements, respectively.

Determining the proper perimeter for asset deals can be difficult, especially when certain contracts or employees straddle multiple activities.

To address this, transition periods and transition services agreements are commonly employed to ensure business continuity during the transfer.

Legal considerations regarding asset deals and equity deals

LPA Singapore

Here are two interesting cases where an asset deal would be more relevant than a share deal:

1. Party B is interested in acquiring Company A, but during due diligence, material liabilities are discovered that could jeopardise the transaction. Party B may then choose to mitigate the risk by purchasing only the core business assets of Company A instead of acquiring the entire company.
2. Company A is engaged in multiple businesses, but Party B is only interested by one of the activities carried out by Company A. Party B will therefore require that Company A carves out the relevant business and brings the assets of that business into a new entity. Once the activity has been contributed to that entity, Party B will acquire the shares of the entity allowing Party B to carry out the contributed business while Company A will continue running its other pre-existing businesses.

"The choice between a share deal and an asset deal depends on various factors, including the level of risk tolerance, desired flexibility, tax considerations, and the specific circumstances of the transaction. It is crucial to seek legal advice to navigate the complexities of M&A transactions and make informed decisions."

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