

The logo for BDO, featuring the letters 'BDO' in a bold, dark blue, serif font. The letters are set against a white background and are framed by a red L-shaped border that forms a partial frame around the text.

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Tax Planning Considerations for Foreign Investors Undertaking Acquisitions in Thailand

Andrew Jackomos

Senior Partner
BDO Richfield Advisory Limited
Tax & Legal Services

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BDO Richfield Advisory Ltd
Tax & Legal Services

Introduction

- Tax Due Diligence
- Legal issues affecting foreign investment
 - Alien Business Operations Act
- Tax implications of a share deal
- Tax implications of an asset deal
- Tax planning opportunities after acquisition
- Summary



Tax Due Diligence

- Carry out regardless of whether a share deal or an asset deal
 - asset deal: bad practices can be carried over by continuing employees
 - share deal: unrecorded liabilities remain with the company acquired
- Taxes reviewed
 - Corporate tax
 - VAT
 - Withholding taxes
 - Employee tax (PND1)
 - Domestic (PND 3, 53)
 - International (PND 54)



Tax Due Diligence (cont)

- Specific Business Tax
 - Customs Duty
 - Excise Tax
 - Stamp Duty
- Report issued highlighting potential exposures
 - Outcome of review may affect:
 - price
 - structure
 - the whole deal itself



Legal Issues

Alien Business Operations Act (ABOA)

- Regulates ability of foreigners (or a Thai incorporated company majority owned by foreigners) to conduct business in Thailand
- Regulated businesses divided into 3 lists:
 - List 1: Businesses foreigners are prohibited from operating for special reasons e.g. newspapers, radio or TV station businesses, trading in land



Legal Issues

ABOA (Cont)

- List 2: Businesses involving national safety or security, culture, natural resources and the environment e.g.
 - manufacture of firearms, ammunition, gun powder and explosives
 - manufacture of armaments, military ships, aircraft or vehicles.
 - domestic land, water or air transport, including domestic aviation business
 - mining



Legal Issues

ABOA (Cont)

- List 3: Businesses Thais not ready to compete with foreigners e.g.
 - Accounting, legal, architectural and engineering businesses
 - Construction (with certain exceptions)
 - Retail and wholesale of goods of all kinds (with certain exceptions)
 - Advertising
 - Hotel business except for hotel management service
 - Sale of food or beverages
 - Other service businesses



Legal Issues

ABOA (Cont)

- Ability of foreigners to carry on business in the 3 lists
 - List 1: totally prohibited
 - List 2: prohibited unless permission of Minister of Commerce with the approval of the cabinet is granted.
 - Maximum foreign ownership generally 60% of the capital
 - Foreign ownership can be up to 75% if permitted by the Minister of Commerce with the approval of the cabinet provided at least 40% of the directors are Thais.



Legal Issues

ABOA (Cont)

- List 3: prohibited unless permission is granted by the Director General of the Department of Business Development with the approval of the Business Operations Committee
 - Maximum foreign ownership 100%



Legal Issues

ABOA (Cont)

- Who is a “foreigner”?
 - Section 4 of the ABOA inter alia
 - (1) a person not of Thai nationality
 - (2) a company incorporated outside Thailand
 - (3) a company registered in Thailand having the following characteristics:
 - 50% or more of its shares constituting its capital are held by a person under (1) or (2) above or 50% or more of its total capital is invested by a person under (1) or (2) above.



Legal Issues

ABOA (Cont)

- (4) a company registered in Thailand with 50% or more of its shares constituting its capital held by a person under (1), (2) or (3) above or persons under (1), (2) or (3) above invest 50% or more of the total



Legal Issues

- What is “capital”?

Section 4 defines “capital” as:

“registered capital of a limited company or paid up capital of a public limited company...”

- Present law does not look at control i.e. voting rights
 - Many Thai incorporated companies carrying on businesses subject to ABOA lists 1 to 3 structured as follows:
Foreigner 49% Ordinary shares - full voting rights and dividend rights
Thais 51% Preference shares – limited voting and dividend rights

Foreigners control the company through voting rights but company is still Thai for the purposes of the ABOA



Legal Issues

ABOA (Cont)

- Section 36 of the ABOA prohibits a Thai national or Thai company from holding shares for a “foreigner” so as to enable a “foreigner” to operate a business in evasion or violation of the ABOA.
 - No definition or rules as to when shares are to be considered to be held for a “foreigner”.



Legal Issues

Proposed Changes to ABOA announced on 9 January 2007

- Amendment of definition of "foreigner"
 - Thai incorporated company to be a "foreigner" where a foreign national or a foreign incorporated company have the power by law, articles of association or agreement, to exercise 50% or more of the total voting rights of that company
- If amendment is enacted many Thai companies currently considered "Thai" would be regarded as "foreigners"



Legal Issues

Proposed Changes to ABOA (Cont)

- Effect of change of status
 - Companies impacted by change of definition of “foreigner” would need to :
 - notify the Director General of the DBD within one year of the Amendment Act coming into force to obtain a certificate to continue to operate affected businesses.
 - After certificate obtained company can continue to operate the business as follows:
 - List 1 or 2: for a period of 2 years from the date Amendment Act comes into force
 - List 3: until business ceases



Legal Issues

Proposed Changes to ABOA (Cont)

- No clarification as to when shares are to be considered to be held for “foreigners”



Tax Implications

Share Deal

- Stamp Duty: 0.1% of consideration or paid up value of shares whichever is greater
- Thai “Target” company
 - Corporate Tax
 - Deductibility of prior year tax losses unaffected by change in shareholding
 - No change in cost base for assets
 - VAT and SBT no impact



Tax Implications

Share Deal (Cont)

- Current Shareholder
 - Thai individual
 - Gain: taxable except where shares sold on the SET which are exempted
 - Foreign individual
 - Gain: not taxable unless paid from Thailand which would result in a 15% withholding tax but a DTA may apply to exempt the gain from tax. Gains on shares sold on SET exempt from tax.



Tax Implications

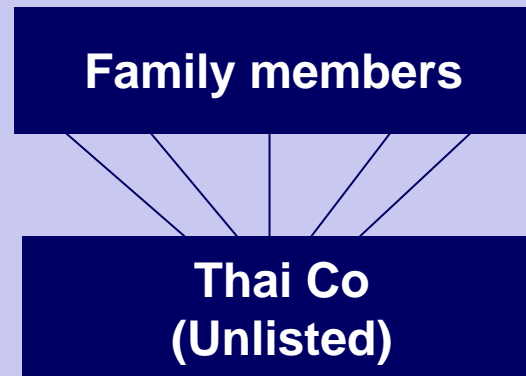
Share Deal (Cont)

- Thai company
 - Gain: taxable
- Foreign company
 - Gain: Not taxable unless paid in or from Thailand. If taxable, DTA may apply to exempt gain from tax.



Tax Implications

Example: Sale of shares in Thai family company



Family proposed to sell 49% of Thai Co to a Foreign investment company for Baht 100,000,000.

Cost base of 49% to be sold: Baht 4,900,000

How could the family reduce the tax payable on the gain of Baht 95,100,000?



Tax Implications

Asset Deal

Thai Selling Company

Corporate Tax

- Gain on disposal taxable
 - Can be offset by available prior year tax losses
- Withholding tax would apply to:
 - Sale of land: 1% of consideration or government appraised value whichever is higher. This is a creditable tax.
 - Sale of intellectual property such as patents, trademarks, formulas, customer lists etc: 3% of consideration. This is a creditable tax.



Tax Implications

Asset Deal (Cont)

VAT

- Imposed on sale of tangible and intangible assets (excluding immovable property) at 7%.
- No VAT if entire business is transferred and transferee is registered for VAT.

SBT

- Imposed on sale of immovable property: 3.3% of consideration or government appraised value, whichever is higher. Exempt if entire business is transferred, and transferor registers its dissolution in the same accounting period as the transfer.



Tax Implications

Thai Acquiring Co

- Corporate Tax

Capital assets: depreciable based on consideration paid i.e. a step up in basis can be achieved

- Recommend that assets be listed in the sale agreement and consideration allocated

Interest paid on funds borrowed to finance acquisition: deductible (subject to any assets not being ready for use)



Tax Implications

Thai Acquiring Co (Cont)

- VAT:
VAT paid on acquisition of business is available as an input tax credit
 - Should not be a cost but there may be a timing issue
- SBT: no impact
- Stamp duty:
Sales of business agreement not subject to stamp duty

Assignment of Lease for land and building subject to stamp duty: 0.1% of rental payable under lease agreement. Exempt where entire business is transferred and transferor registers its dissolution in the same accounting period as the transfer.
- Land transfer fee: 2%



Tax Planning Opportunities After Acquisition

- Charging of management fees
 - Withholding tax of 15% under Revenue Code
 - Applicable DTA could eliminate Thai tax subject to no part of the fee constituting a royalty.
 - Tax deduction in Thailand (subject to arm's length fee) for services actually rendered.



Tax Planning Opportunities After Acquisition

- Charging of royalties for intellectual property
 - Withholding tax of 15% under Revenue Code
 - Applicable DTA could reduce withholding depending on the type of royalty and the particular DTA e.g. Cyprus
 - 5% for copyright
 - 10% for payments for industrial, commercial or scientific experience



Tax Planning Opportunities After Acquisition

Funding

Debt has a lower tax cost than equity

- Interest tax deductible
 - Subject to withholding tax of 15%
- Dividends not deductible
 - Subject to withholding tax of 10% but effective Thai tax rate 37% (assuming corporate of 30%)

Revenue Code has no thin capitalisation rules

- Therefore, maximise debt funding



Tax Planning Opportunities After Acquisition

Consider new Capital Reserve rules

- if loan is provided in Baht no reserve requirement
- if loan is provided in foreign currency 30% reserve requirement unless
 - loan is a term loan which is fully hedged through an FX swap or cross currency swap with an onshore financial institution in Thailand; or
 - loan is a term loan for more than one year and is fully hedged for at least one year.



Summary

- Foreign investors need to do their homework
 - They need to understand the Thai legal and tax framework
- Conducting tax due diligence is essential on a target to discover unrecorded tax exposures which may adversely impact the deal or result in its restructuring



Summary

- The structure of a deal, asset sale or share sale will depend on the position of the parties
 - Seller may wish to have a share sale to derive a tax free capital gain rather than have the profit taxed as a result of an asset sale
 - Sometimes a share sale is the only option e.g. where a non-transferable licence is involved
 - Sometimes the purchaser will want an asset deal to avoid potential tax or other exposures in the company or to gain additional deductions to reduce Thai tax liability.



Summary

- Foreign investors should consider holding shares in low tax jurisdictions with favourable tax treaties with Thailand
 - Subject to home country tax rules
- Maximise debt in Thai operating company and extract profits through management fees, royalties and other fees
- Foreign investors willingness to invest in Thai businesses likely to be affected by the changes to ABOA and capital reserve requirements.



Q & A



BDO Richfield Advisory Ltd
Tax & Legal Services

Andrew Jackomos



Email :
andrew.jackomos@bdo-thai.com
Tel : +66 2 260 7290
Fax : +66 2 260 7297

Andrew is a Senior Tax Partner with BDO Richfield Advisory Limited and is based in Bangkok. He has 30 years of tax consulting experience of which 22 years have been in Asia (Hong Kong, Singapore and Thailand).

Andrew has a Bachelor of Commerce degree from the University of Melbourne and is a Fellow of the Australian Society of Certified Practicing Accountants.

Andrew has extensive experience in developing tax effective financing arrangements and in advising clients on cross border transactions, transfer pricing, corporate reorganisations and financial restructuring and mergers and acquisitions. In addition, he has advised numerous clients on establishing operations in Thailand as well as carrying out tax due diligence assignments for potential investors in a wide range of industries.



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