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Deal Structure & General Tax Considerations in Mergers & Acquisitions

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Presentation Outline

- Introduction
- Deal Structure
 - Share sale or business sale
 - Allocation of consideration
 - Availability of tax losses etc
 - Transaction costs
 - Branch or local subsidiary
- General Tax Issues
 - Pre-deal structuring
 - Financing
 - Repatriation of Profits
 - CFC Legislation and Transfer Pricing
- Non-Tax Issues



Introduction

- Mergers, acquisitions and divestments
 - should be driven by commercial/ business considerations and not tax considerations
- Commercial/ business transactions have tax consequences
 - risks and opportunities
 - need to be considered and properly managed
 - getting things wrong can lead to additional tax, penalties and surcharges in both:
 - a share sale; or
 - a business sale



Introduction (cont)

- Tax objectives of mergers, acquisitions or divestments
 - buyer: minimise, on a present value basis, the total cost of acquiring, operating and ultimately setting the acquired company or the assets of the company
 - seller: maximise, on a present value basis, the after tax proceeds from the sale of the company or the assets of the company.
 - Buyer and seller should both take appropriate advice in considering how the transaction should proceed.



Deal Structure

- Share sale or business sale?
 - Buyer and seller may have different views on structure
 - Seller may want a share sale to derive a tax free profit
 - Buyer may want a business sale to enable a step up in the cost base of depreciable assets.



Deal Structure (cont)

- Additional tension: allocation of cost of assets e.g.
 - Trading stock: Seller low, Buyer high
 - Goodwill: Seller high (if non taxable), Buyer low (especially if not depreciable eg Australia, India, Singapore, Hong Kong and Malaysia)
 - Identify specific IP eg patents, trademarks, copyrights etc and attribute market price consideration so as to reduce any potential disallowance of deductions through classification as goodwill



Deal Structure (cont)

- Share sale
 - Buyer assumes all existing and contingent liabilities of target company including tax liabilities
 - conduct tax due diligence prior to acquisition to identify undisclosed tax liabilities
 - draft sale and purchase agreement appropriately
 - obtain suitable indemnities and warranties
 - use retention or earn out arrangements
 - Consider availability of unutilised tax losses, capital allowances and imputation credits
 - in some countries these can be lost where there is a substantial change in ownership



Deal Structure (cont)

- Transaction Costs
 - Share sale: stamp duty often applies on share transfer document e.g. Thailand 0.1% of consideration or paid up value whichever is the greater
 - Can it be avoided?
 - VAT/ GST generally does not apply to share sales
 - Exception: Australia
 - GST applies on transfer between Australian entities: treated as input taxed financial supply which may result in the seller losing input tax credits



Deal Structure (cont)

- Business sale
 - VAT/ GST may apply
 - Exemptions may be available
 - Australia and Singapore: transfer as a going concern
 - Thailand: whole of business transfer
 - Land/ building Transfer tax may apply
e.g. Indonesia 5% payable by buyer
 - Other taxes
e.g. Specific Business Tax in Thailand
 - Sale of immovable property 3.3%
 - Reductions may apply at present to 0.1%

Deal Structure (cont)

- Branch or local subsidiary to acquire assets
 - Cases where one may be preferable over the other
 - Hong Kong company may choose to establish a branch rather than a Thai subsidiary
 - Remittance of dividends (sub): 10% withholding tax
 - Remittance of profit (branch): no withholding tax
 - Pursuant to Protocol to Thailand/ Hong Kong Double Tax Agreement



General Tax Issues

Pre-Deal Structuring

Business Transfer

- Transfer to other group companies of assets not being sold
 - this can be achieved tax free in certain countries e.g. Australia, Singapore
 - this may give rise to a tax liability in some countries
 - Thailand would require market value consideration
- Consider where IP is to be located
 - Seller may assist buyer by moving IP to a favourable jurisdiction if gain not taxable
 - Otherwise, may need to be done post deal



General Tax Issues (cont)

Pre-Deal Structuring

Share Sale

- Paying dividends prior to sale may result in lower tax rate than the gain on sale of shares
e.g. Thailand (for Thai taxpayers especially)
Singapore and Hong Kong where share sale is taxable eg in the case of share traders



General Tax Issues (cont)

Financing the acquisition

- Business transfer
 - Often debt is “pushed down” to the target jurisdiction
 - Limited value where business is not profitable unless there are grouping or group loss transfer provisions
 - Any debt: equity rules to limit deduction for interest?
 - Consider withholding tax on interest
 - Generally interest is subject to withholding tax
 - Singapore acquisitions: consider Mauritius as 0% withholding on interest under DTA



General Tax Issues (cont)

Repatriation of Profits

- Treatment of dividends varies around the region
 - No withholding tax in Australia (unless unfranked), Singapore, Hong Kong, Malaysia
 - Consider DTAs to try and reduce dividend withholding tax rate eg use a Hong Kong holding company for China to reduce withholding tax to 5%.



General Tax Issues (cont)

Receipt of dividends by Asian Investors

- A number of countries do not tax foreign dividends (Hong Kong) or exempt dividends from certain countries e.g. Singapore and Thailand
 - Arrange for deferral offshore before remitting back
 - Carefully consider offshore holding jurisdiction eg Hong Kong holding company is not suitable for Thailand



General Tax Issues (cont)

CFC Legislation

Countries such as Australia, Japan and the US have CFC type legislation

- Profits of offshore group companies may be attributed back to home country and taxed currently
 - Exceptions apply in relation to active income or where tax rate is above a certain threshold level



General Tax Issues (cont)

- Transfer Pricing
 - Increasing number of countries in the region have transfer pricing rules eg Australia, China, India, Indonesia, Japan, Korea, Malaysia, New Zealand, Singapore and Thailand.
 - Arm's length pricing of loans, royalties and management fees is generally required to avoid disallowance of deductions.



Non-Tax Considerations

- Exchange control approval for foreign investments required in some countries eg Thailand.
- Investment laws or other laws may restrict foreign participation eg Thai Alien Business Law and Land Code.



Conclusion

- Commercial considerations should drive M&A transactions.
- Careful consideration of the tax issues can avoid adverse tax consequences and tax payments as well as adding value to the transaction.
- Both the seller and the purchaser should conduct tax due diligence to identify any material unrecorded tax liabilities that would impact the transaction.

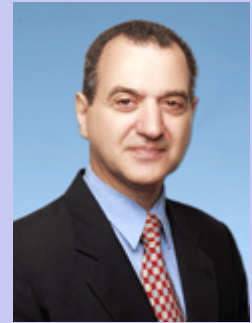


Q & A



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