TRAIN THE TRAINER VIRTUAL COURSE

26TH – 30TH OCTOBER 2020

RESPONDS FROM MALAYSIA

Session 5(a):

Session 5:

a. Does your country have special rules to address taxation of capital gains arising from the sale of shares/assets, when such sale takes place directly vs. when such sale takes place indirectly by selling an intermediate holding company?

ANSWER:

Malaysia **does not tax capital gains from the sale of investments or capital assets other than those related to land and buildings**. Capital gains are generally not subject to income tax in Malaysia. However, real property gains tax (RPGT) is levied on chargeable gains arising from the disposal of real property situated in Malaysia, or on any interest, option or other rights in or over such land, as well as the disposal of shares in real property companies.

Main differences among acquisitions made through a share deal versus an asset deal in Malaysia

SHARE DEAL

In a **share deal**, losses and capital allowances not used in a YA can be carried forward indefinitely, provided the company is not dormant. If the company is dormant, it must satisfy the IRB that more than 50 percent of its shareholders (no substantial change) on the last day of the basis period in which the losses or capital allowances arose are the same as on the first day of the basis period in which the unabsorbed losses or capital allowance are to be used.

Unused business losses may be set off against income from any business source. However, unused capital allowances may only be set off against income from the same business source in which the capital allowances arose.

If the target company has been granted tax incentives, the incentives can continue to be enjoyed by the target company unless there is an approval condition attached to changes in shareholders.

Gains arising from the sale of shares in a real property company or real property (for example, land and buildings) will be subject to real property gains tax.

Main differences among acquisitions made through a share deal versus an asset deal in Malaysia:

ASSET DEAL

In an **asset deal**, where the acquiring company buys certain assets from the selling company, the selling company will be subject to a tax adjustment by way of a balancing allowance or a balancing charge where capital allowances have been claimed on the acquired asset. A balancing charge (taxable item) arises where the sales proceeds for the asset exceed its tax residual value. Conversely, a balancing allowance (deductible item) arises where the sales proceeds is lower than the tax residual value.

However, this provision does not apply in a controlled transfer where the seller has control over the acquirer or vice versa, or where the seller and the acquirer are controlled by another person. In a controlled transfer, no balancing charge or balancing allowance will arise to the seller and the acquirer can continue to claim capital allowances on the transferred asset, subject to the tax residual value of the asset.

No tax deduction is available for the amortization of acquisition goodwill to the buyer.

Unabsorbed tax losses, unutilized capital allowance, any tax incentive or exemption may not be transferred to the acquiring company.

SUMMARY OF DIFFERENCES

Items	Shares deal	Assets deal
Profit on sales	Unless seller is in the business of dealing in shares, no capital gains tax applicable	Land & building: subject to Real Property Gains Tax Trading stocks: Section 4(a) Business Income Fixed Assets: Not subject to income tax but transactions between unrelated parties would be subject to balancing adjustments.
Distribution of profits	With sufficient retained earnings, the cash proceeds received from the sale of shares can be distributed as dividend to shareholders	With sufficient retained earnings, the cash proceeds received from the sale of assets can be distributed as dividend to shareholders
Tax Losses	Allowed to carry forward accumulated tax losses to be set off againts the future business income, except for dormant company or substantial change in shareholders (>50%)	May not be transferred
Capital allowances	Allowed to carry forward unutilised capital allowances to be set off againts the future business income, except for dormant company or substantial change in shareholders (>50%)	May not be transferred
Tax Incentives	Allowed to continue, subject to conditions attached regarding change in shareholders	May not be transferred. Buyer need to submit a new application.
Transaction costs	Not deductible	Not deductible
Stamp duty	0.3% on the consideration paid or market value of the shares (WEH)	Ranging from 1%-4% on the market value of the dutiable properties

Share Deal

SHARE PURCHASES	
ADVANTAGES	**DISADVANTAGES**
No capital allowance or balancing charge clawbacks on seller and no withdrawal of RA	Buyer may acquire historical tax and other liabilities
Buyer may be able to use and benefit from unused tax attributes and, tax incentives of the target company	No deduction or depreciation allowances (capital allowances) are available for the purchase cost of shares
Lower stamp duties payable on the transfer of shares compared with other physical assets	No re-basing of underlying assets
Target company may continue to enjoy tax incentives	Buyer may not be able to use the unused tax losses or capital allowances available in the target company where there is a substantial change in shareholders. However, this only applies to dormant companies
	Deductions for interest incurred to fund the acquisition of shares subject to restriction

Asset Deal

ASSET PURCHASES	
ADVANTAGES	**DISADVANTAGES**
The purchase price of qualifying assets (or a proportion) may be depreciated for tax purposes in the form of capital allowances	Possible clawback of capital allowances claimed by the seller in the form of a balancing charge
Liabilities and business risks of the seller company are not transferred	Clawback of RA, if the qualifying asset is disposed of within 5 years from the date of acquisition
Possible to acquire only certain parts of a business	Higher stamp duties on the transfer of certain assets
Interest incurred to fund the acquisition of plant, equipment and other assets that will be used in the trade or business is generally tax-deductible	Benefits of any losses or unused tax attributes remain in the seller company
Buyer may claim RA if it has incurred qualifying capital expenditure for the purposes of a qualifying project and has operated in that business for at least 36 months	Benefits of incentives remain in the seller company
Where the asset is disposed of within a period of 5 years from the date of purchase of the asset, the RA claimed by the seller is clawed back. Where the assets for which the RA has been claimed are acquired under a controlled transfer in which the transferor has previously claimed RA, the buyer cannot claim RA on the same assets	Possible need to cancel and apply for various indirect tax licenses

Session 5(b):

Session 5:

b. If yes, describe the existing rules and also provide explanation of any additional administrative guidance.

ANSWER:

STAMP DUTY:

Though capital gain is not generally not taxable, from a stamp duty perspective, the sale of shares in a Malaysian incorporated company will be subject to stamp duty at the rate of 0.3%. Sale of assets such as land and receivables will attract stamp duty at rates ranging from 1% to 4%. Nevertheless, relief from stamp duty is available for reconstructions or amalgamation of companies, or for transfer of property between associated companies, subject to fulfilling certain conditions.

REAL PROPERTY GAINS TAX:

For real property gains tax ranging from 10% - 30% (time basis).

Session 5(c):

Are there any interesting judicial or administrative cases involving such transactions in your jurisdiction? If yes, present the facts and the key issues of such cases.

ANSWER:

NONE.

THANK YOU

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