Tax Planning for Corporate Mergers & Acquisitions in Thailand

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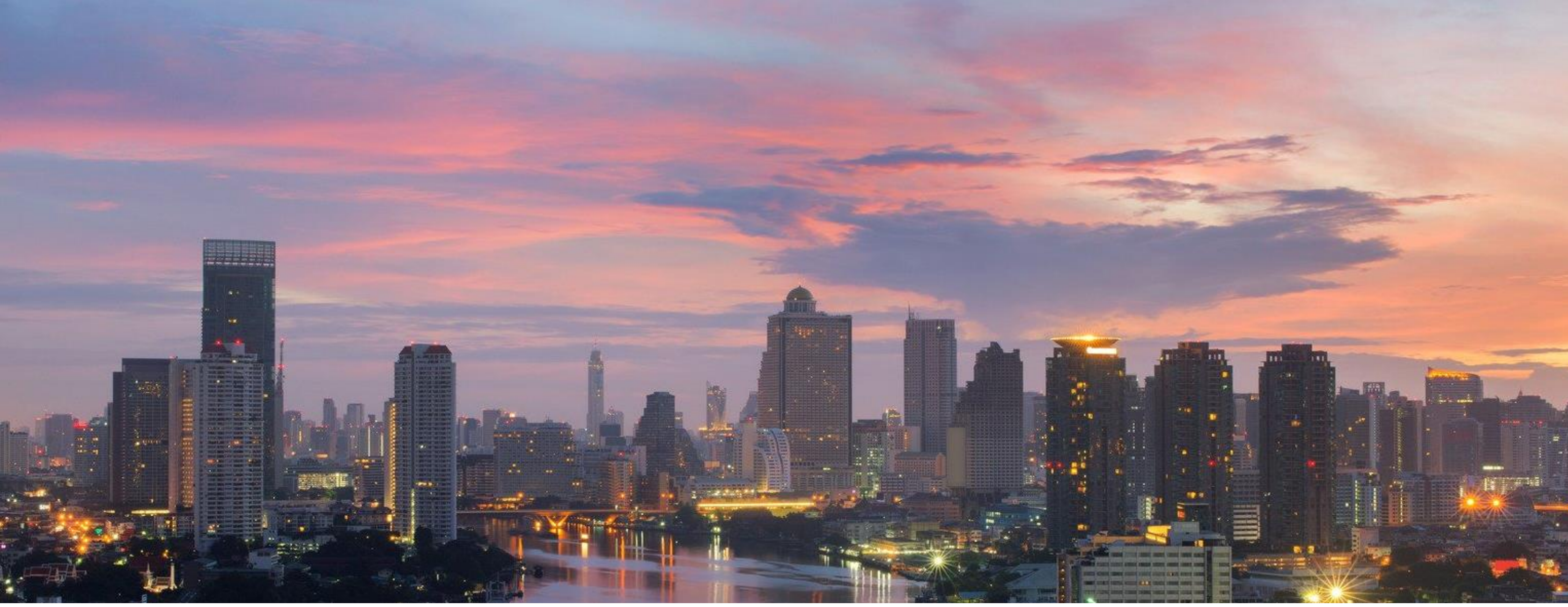


1 Introduction

In this publication, we delve into the tax planning considerations for corporate mergers and acquisitions in Thailand. We provide an overview of the various forms of mergers and acquisitions recognized under Thai law, including share acquisitions, asset acquisitions, entire business transfers, amalgamations, and corporate mergers.

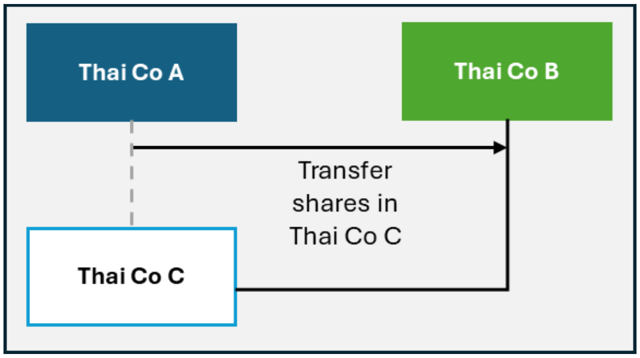
We examine the Thai tax rules applicable to financing, the role of Thailand's tax treaties in mitigating potential tax liabilities, and strategies for structuring acquisitions through holding companies.

2 Types of Corporate Mergers and Acquisitions in Thailand

In Thailand, a corporate acquisition typically involves one company (the acquirer) acquiring another (the target company). This process can be executed through either share acquisition or asset acquisition, which have distinct legal and tax implications.

Understanding the tax consequences of each acquisition type is important, as they can significantly impact an acquisition's overall financial outcomes. Below, we discuss how different acquisition structures in Thailand can have different tax implications, compliance requirements, and potential benefits.

2.1 Share Acquisitions



A share acquisition is when an acquirer directly purchases shares in a Thai target company from its existing shareholders. The consideration can be in cash or other means (e.g., land, building, shares, and other assets that can be valued). A share acquisition results in the acquirer inheriting all the target's assets and liabilities. This can complicate tax considerations for the acquirer, particularly if the target has outstanding tax obligations or significant historical tax risks. A tax due diligence is strongly recommended prior to the execution of a share acquisition to ensure whether the target company has any potential historical tax liabilities.

Thailand does not have a separate tax regime for capital gains. Disposal gains from the sale of shares are subject to corporate income tax of 20%.[1]

If the share purchaser and seller are non-Thai corporate entities, no Thai tax will arise from a transfer of shares in a Thai entity.[2]

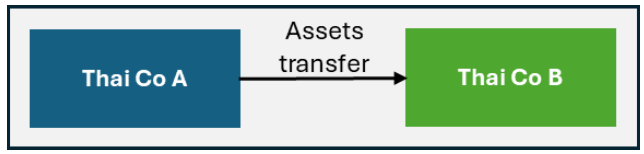
If either the buyer or seller is a Thai entity or a Thai resident individual, Thai tax will apply.

Unlike many countries in Asia, including Vietnam, China, Laos, and Myanmar, Thailand does not have indirect transfer rules that can tax the offshore indirect sale of shares in Thai entities.

For stamp duty, the share transfer documents are subject to a 0.1% stamp duty on the greater of the paid-up value or the selling price, payable within 15 days from the date of execution. The stamp duty is generally payable by the seller. However, it can be agreed between the seller and the buyer who will bear the stamp duty costs. If the share transfer documents are executed outside of Thailand, the stamp duty will not be due until the documents are brought into Thailand.

In a share acquisition, the target company's tax attributes, including tax losses and tax credits, will remain valid after a change in shareholders. Therefore, the acquirer can benefit from the target company's existing tax attributes after acquisition.

2.2 Asset Acquisitions



In an asset acquisition, the acquirer buys specific assets and liabilities of the target company rather than its shares. This structure enables the acquirer to avoid inheriting unwanted liabilities; however, it may result in different tax treatments for the acquired assets.

Gains realized from the sale of assets are subject to corporate income tax of 20%. Value Added Tax (VAT) of 7% is imposed on the selling price of movable assets. Providing that the acquiring company is registered for VAT in Thailand, the VAT from the acquisition of the assets is fully creditable. Any excess VAT credits can be carried forward indefinitely or a tax refund can be requested.

For the transfer of immovable assets, the following taxes will apply:

- a 3.3% specific business tax
- a 1% withholding tax
- a 2% transfer fee

[1] Thai Revenue Code, Section 65 and Section 40(4)(g).

[2] Thai Revenue Code, Section 70

Thailand has special rules for Entire Business Transfers (EBT). These rules provide tax incentives for transferring a whole business, including the assets and liabilities. The details are discussed below.

2.3 Entire Business Transfer Scheme

The "Entire Business Transfer" (EBT) scheme allows one company to transfer all its assets and liabilities to another through an asset sale. The transfer must be conducted at market value and capital gains realized from an EBT are exempt from corporate income tax and VAT.[3] Specific business tax and stamp duty related to an EBT are also tax exempt.[4]

To qualify for the tax benefits under the EBT scheme, the key requirements are as follows:[5]

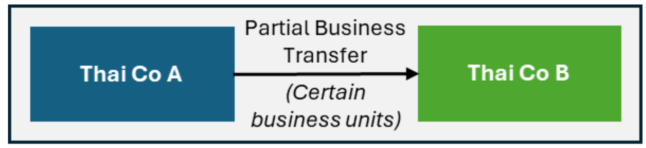
i) Both the transferor and transferee must be a public limited company or a private limited company incorporated under Thai law.

ii) The transferor and transferee must not have any outstanding tax arrears owed to the Revenue Department (RD) unless a bank guarantee or other collateral is provided to the RD.

iii) The transferee must inform the RD of the EBT within 30 days of the transaction.

iv) The transferor must register for a dissolution and enter liquidation proceedings during the same accounting period as the EBT.

2.4 Partial Business Transfer Scheme



Partial Business Transfer (PBT) involves transferring a specific business unit or portion of a company's operations to another company. This differs from the EBT, where the entire business is transferred, and the transferor company is dissolved.

Key characteristics of a PBT include:

- Transfer of a Business Unit: Only part of the business is transferred, not the entire business.
- Business Continuity: The transferee company assumes responsibility for the transferred business unit and continues to operate it in the same manner as the transferor company.
- No Dissolution: Unlike EBT, the transferor company remains intact and continues its operations after the transfer.

[3] Tax ruling no. Gor Kor 0702/5766, dated 11 September 2008.
[4] Royal Decree No. 10/2550, Section 5 Sedecim and Section 6(31).
[5] The Notification of the Director-General of the Revenue Department re: tax exemption for amalgamation of entire business transfer, (19 October 2012).

Under the PBT scheme, tax incentives are provided if the required conditions are met. These incentives include exemptions from VAT, specific business tax, and stamp duty arising from the transfer of business assets.[6] However, capital gains from the transfer of assets are subject to corporate income tax.

To qualify for the tax exemptions provided under the PBT scheme, the key requirements are as follows:[7]

i) Both the transferor and transferee must be incorporated under Thai law and considered "associated companies" under Section 39 of the Thai Revenue Code.[8]

ii) The companies must maintain their associated status for at least six months following the fiscal year in which the transfer occurs.

iii) The transferor and the transferee must provide a restructuring plan and list of transferred assets to the RD before the transfer.

iv) The transferee must continue to use the transferred assets in the same category of business as the transferor.

v) The transfer must be done at market value unless justifiable grounds are provided; and

vi) The transferor and transferee must not have any outstanding tax arrears owed to the RD on the date of the transfer unless a bank guarantee or other collateral is provided to the RD.

The PBT is often used for corporate restructuring, especially when a group of companies anticipates separating a specific business unit from the main company and transferring it to a subsidiary or another entity.

It is important to note that in an asset acquisition (asset acquisitions, EBT, and PBT), any tax losses of the seller are not transferred to the buyer.[9] These tax losses will remain with the original company that incurred them and any tax benefits associated with those losses remain with the seller. Furthermore, any tax credits also stay with the seller. It may be possible for certain tax privileges obtained

[6] Royal Decree No. 516

[7] The Notification of the Director-General of the Revenue Department re: tax exemption for partial business transfer, (27 September 2011).

[8] Associated companies or juristic partnerships under Section 39 of the Thai Revenue Code means two or more companies or juristic partnerships having a relationship in the following way:
(1) More than half of the same shareholders or partners in a juristic person constitute more than half of the number of the shareholders or partners in another juristic person.
(2) The shareholders or partners holding more than fifty percent of the value of the total capital of a juristic person are also the shareholders or partners holding more than fifty percent of the value of the total capital of another juristic person.
(3) A juristic person is a shareholder or partner holding more than fifty percent of the value of the total capital of another juristic person; or
(4) Persons constituting more than one-half of the number of the directors or partners who control the management of a juristic person are also directors or partners who control the management of another juristic person.

[9] Thai Revenue Code, Section 74 (1)(b).

under Thailand's BOI to be transferred to the acquirer with the related assets under an EBT.

2.5 Amalgamations

Thai Co A + Thai Co B = Thai Co C

Amalgamation occurs when two companies combine to form a new entity. This approach requires a complete integration of the assets, liabilities, and operations, which can have significant tax implications. Following an amalgamation, a new company is automatically established, while the two original companies are dissolved by law.

An amalgamation is exempt from corporate income tax, VAT, stamp duty, and specific business tax if the following requirements are met:[10]

i) The transferor and transferee must be a public limited company or private limited company incorporated under Thai law;

ii) Transferor and transferee shall not owe the RD any arrears of taxes on the date of amalgamation unless a bank guarantee or other collateral is provided to the RD; and

iii) The transferee must inform the RD of the amalgamation transaction within 30 days of the transaction.

In an amalgamation, the tax losses and tax credits from both original companies are not transferred to the new entity, and the original companies are dissolved as part of the amalgamation. The tax privileges obtained under Thailand's Board of Investment (BOI) and specific operating licenses can be transferred to the amalgamated company. A notification to the relevant authority may be required depending on the type of license and the investment incentives obtained.

2.6 Mergers in Thailand

Thai Co A + Thai Co B = Thai Co A or Thai Co B

The concept of a merger was introduced in Thai law in February 2023. A merger involves the combination of two Thai legal entities where one of the original companies continues to exist while the other is dissolved by operation of law. This process typically includes transferring assets and liabilities from the dissolved company to the surviving entity.

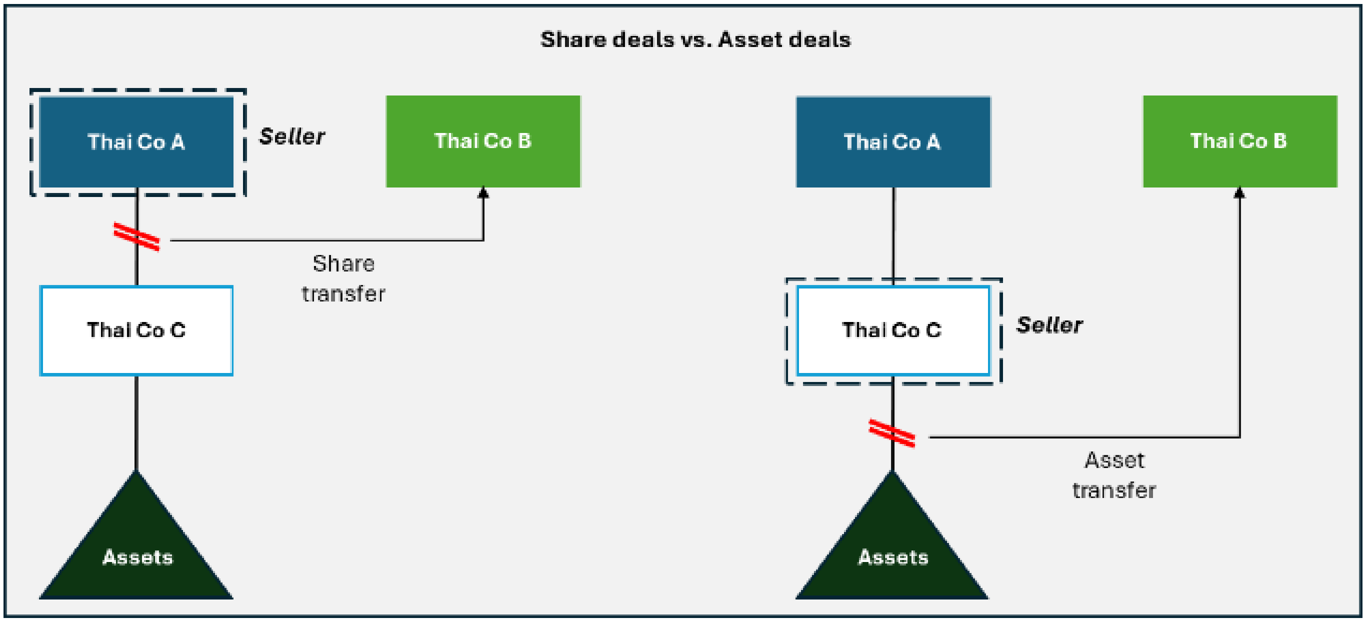
From a tax perspective, mergers are considered an Entire Business Transfer (EBT), and the tax benefits for EBT, as discussed above, should apply provided that all requirements are met.[11] In a merger, tax losses and tax credits in a transferor company will not be

[10] The Notification of the Director-General of the Revenue Department re: tax exemption for amalgamation of entire business transfer, (19 October 2012).

[11] Tax ruling no. Gor Kor 0702/1112, dated 21 February 2024

transferred to the surviving entity. The tax losses at the surviving company will continue to be carried forward.

3 Advantages and Disadvantages of Share and Asset Acquisitions in Thailand



In a share acquisition, the buyer purchases the target company's shares, thus gaining control over the entire entity, including all its assets, liabilities, and operational contracts.

This method can be advantageous for buyers seeking to maintain management and operations, as it often allows for a smooth transition where the buyer takes over the legal entity.

Share acquisitions may be less complex in terms of regulatory requirements, though they carry the risk of inheriting any potential historical liabilities.

Conversely, an asset acquisition enables the buyer to selectively acquire specific assets and liabilities, providing greater flexibility and control over what is included in the transaction. This approach can be appealing when buyers wish to avoid certain liabilities in the target company. Asset deals may involve more complex legal and tax considerations, as well as the need to renegotiate contracts and licenses associated with the assets.

	Share deals	Asset deals
Advantages	▪ The share transfer process is straightforward and is generally not time-consuming. ▪ The seller is not subject to taxable gains on the underlying assets. ▪ The buyer can benefit from any tax attributes (i.e., tax losses carried forward, tax credits, and deferred tax assets) in the target company. ▪ The target company's operations can continue smoothly.	▪ The target company's tax liabilities and risks do not transfer to the buyer. ▪ The buyer can acquire specific assets or parts of the target's business. ▪ If the transaction qualifies as an EBT, taxes incurred would be exempt.
Disadvantages	▪ The buyer will inherit all the company's potential historical tax and risks.	▪ Gains on the transfer of assets may be taxable if not qualified as an EBT. ▪ Tax attributes remain with the seller. ▪ An asset acquisition can be time-consuming.

The decision on which approach to adopt depends on various factors, including the buyer's strategic objectives, the nature of the acquired business, tax implications, and the regulatory environment.

4 Thai Tax Rules for Financing

When considering funding through debt or equity, an acquirer or investor should evaluate several factors.

Interest on loans incurred for share acquisitions can be treated as deductible expenses for corporate income tax purposes.

Thailand does not have thin capitalization rules or limitations on interest deductibility. However, if a company has obtained a Board of Investment certificate, it must not exceed a debt-to-equity ratio of three to one.

Interest payments are subject to the following withholding tax rates:

- Interest payments from a Thai entity to Thai entity – 1% withholding tax [12]
- Interest payments from a Thai entity to Thai individual – 15% withholding tax[13]
- Interest payments from a Thai company to a foreign entity or individual – 15% withholding tax.[14] The withholding tax rate may be reduced under an applicable tax treaty

[12] Tor Por No. 4/2528

[13] Thai Revenue Code, Section 50(2)(a).

[14] Thai Revenue Code, Section 70.

The interest rate on related party loans must be at arm's length.

The Thai Revenue Department has the authority to adjust the interest rate on loans that are not arm's length, which may result in additional tax.[15]

For dividend distributions, a board of directors and shareholder approval are required before the distribution of dividends. A Thai company is not allowed to distribute dividends if it has accumulated losses.

Dividends are subject to the following withholding taxes:

- Paid to a Thai entity – a 10% withholding tax. However, the 10% withholding tax can be exempt if certain conditions are met[16]
- Paid to Thai individuals – 10% withholding tax[17]
- Paid to foreign entities and individuals – a 10% withholding tax[18]

[15] Thai Revenue Code, Section 71 Bis.

[16] Conditions for withholding tax and corporate income tax exemption on dividend income under Section 65 Bis (10) of the Thai Revenue Code and Tor Por No. 4/2528:
- The dividend recipient holds at least 25% of the voting shares in the dividend paying company;
- The dividend paying company does not hold any shares in a company receiving the dividends, either directly or indirectly; and
- The company receiving the dividends must own shares in the company paying the dividends for at least three months before the date of the dividend distribution declaration, and it will not dispose of the shares of the company paying dividends within three months from the date of the dividend distribution declaration.

[17] Thai Revenue Code, Section 50(2)(e).

[18] Thai Revenue Code, Section 70.

5 Impact of Tax Treaties

Thailand has entered double tax treaties with 61 jurisdictions, including the United States, China, Japan, Singapore, the United Kingdom, and all of the ASEAN countries.[19]

Aside from Taiwan, there are no double tax agreements that lower the dividend withholding tax rate below 10%. For Taiwan, the rate is reduced to 5%.

The table below is a summary of the withholding tax rates for dividends and interest under tax treaties between Thailand and several other jurisdictions:

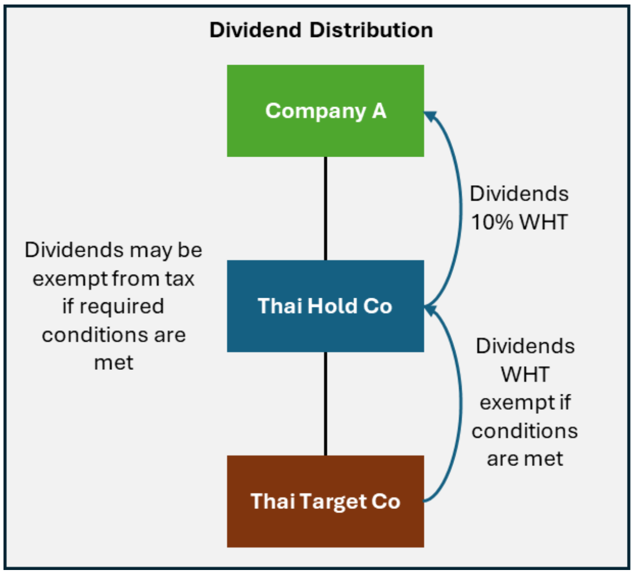
Withholding tax	Dividends	Interest
Non-treaty countries	**10%**	**15%**
Thailand – Indonesia	15% / 20%	10% / 15%/ 25%
Thailand – Vietnam	15%	10% / 15%
Thailand - UK	15% / 20%	10% / 25%
Thailand – U.S.	10% / 15%	10% / 15%
Thailand – Australia	15% / 20%	10% / 25%
Thailand – Hong Kong	10%	10% / 15%
Thailand – Singapore	10%	10% / 15%
Thailand – Japan	15% / 20%	10% / 25%
Thailand – China	15% / 20%	10%
Thailand – France	15% / 20%	3% / 10%
Thailand – German	15% / 20%	10% / 25%
Thailand – Canada	15% / 20%	10% / 15%/ 25%
Thailand – Cambodia	10%	10% / 15%

[19] ASEAN (Association of Southeast Asian Nations) is a regional organization of 10 Southeast Asian countries: Indonesia, Malaysia, the Philippines, Singapore, Thailand, Brunei, Vietnam, Laos, Myanmar, and Cambodia.

6 Acquisition Structuring Using Holding Companies

When considering holding companies for investments in Thailand, popular locations include Singapore, Hong Kong, and low tax jurisdictions such as the BVI.

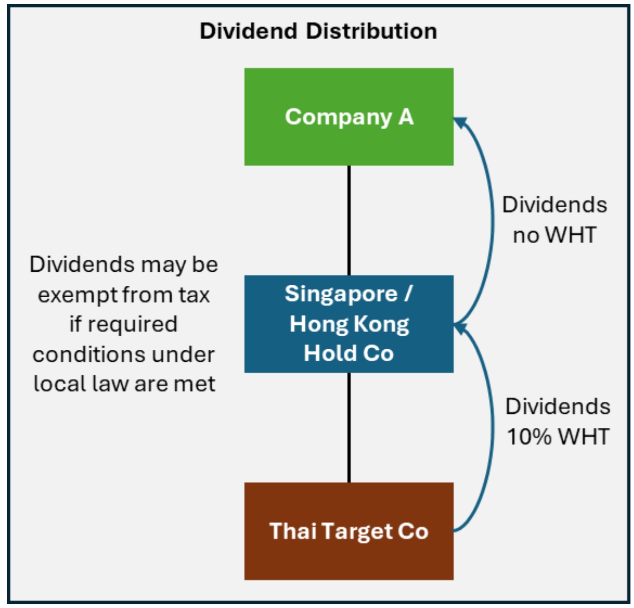
Acquirers and investors may consider using a Thai holding company if they intend to invest in other ventures in Thailand.



Dividends received by a Thai company from another Thai company are generally exempt from both withholding tax and corporate income tax, provided certain conditions are met. When a Thai company distributes dividends to an offshore company, a withholding tax of 10% will apply.

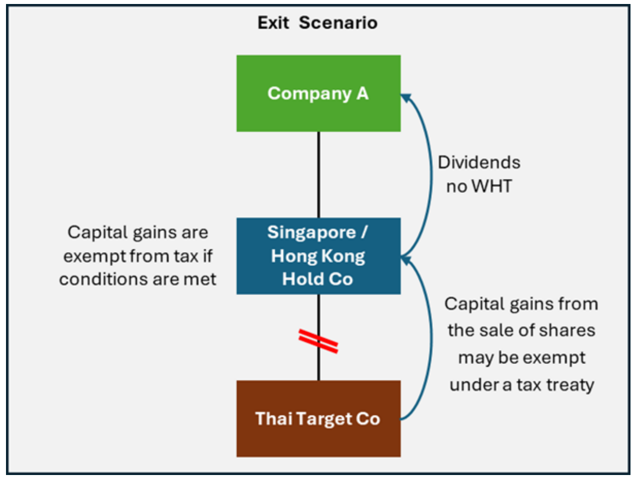
When selecting holding company locations, companies may seek jurisdictions that impose no withholding taxes on payments from the holding company and do not tax certain income received from subsidiaries.

Companies and investors may seek locations without strict capital controls to freely move cash, which rules out many countries in Asia as locations for holding companies.



Singapore, Hong Kong, and low-tax jurisdictions can offer exemptions on dividend income or capital gains from the selling of shares, provided certain conditions are met. In addition, there is no withholding tax on outbound dividend payments from the holding company to the shareholders.

Capital gains from the sale of shares in a Thai entity are exempt from Thai tax if both the seller and the buyer are non-Thai entities, as such transactions are generally considered to occur offshore.



7 Summary

Effective tax planning is an important component of corporate mergers and acquisitions in Thailand, significantly impacting both the financial viability and strategic success of M&A deals.

The various merger and acquisition structures discussed in this publication provide companies with opportunities for successful planning and structuring of transactions.

By evaluating the advantages and disadvantages of different acquisition methods— such as share acquisitions versus asset acquisitions—acquirers and investors can make informed decisions that align with their long-term objectives and operational goals in Thailand.

Moreover, understanding the nuances of financing options and the potential for tax relief under specific frameworks, such as the Entire Business Transfer (EBT) and Partial Business Transfer (PBT) schemes, enhances the ability to navigate the complexities of the Thai tax landscape.

As regulatory environments and tax policies continue to evolve, it is essential to stay updated on these changes and leverage professional expertise.

Ultimately, a well-structured tax strategy can be a key differentiator in achieving a successful outcome in a corporate merger or acquisition in Thailand.

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