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A Guide to Doing Business in Myanmar

180 Years of Thai-U.S. Relations

U.S. Outbound Tax and Investment Considerations When Investing in Myanmar

Written by: Jack Sheehan

When investing into emerging markets such as Myanmar, U.S. investors must take note of two important issues: 1) investment protection, and 2) tax optimization planning. These two considerations play important roles in developing an overall investment strategy.

INVESTMENT PROTECTION

U.S. Investors are wary of investment risks, especially nationalization risks. Bilateral Investment Treaties ("BITs") can provide a certain measure of protection against nationalization. Most BITs also prescribe procedures such as international arbitration to settle alleged violations of the rights of the investor. Myanmar and the US have not entered into a BIT. However, Myanmar is a member of the Association of Southeast Asian Nations (ASEAN) and as such investments into Myanmar by other ASEAN Member States ("Member States") are covered by the ASEAN Comprehensive Investment Agreement (ACIA).

U.S. investors may enjoy the protection of the ACIA by using an investment vehicle incorporated in an ASEAN Member State. Among the benefits that the U.S. investor will enjoy by using the ACIA through an ASEAN investment vehicle are:

1. National Treatment: Subject to some reservations made by Myanmar, Myanmar will be required to treat the foreign investor and the investment no less favorably than local investors or investments made by locals;
2. Most Favored Nation Treatment: Subject to some qualifications, Myanmar must treat the investments made by the US investor through the ASEAN investment vehicle no less favorably than those accorded to investments from other jurisdictions;
3. Fair and Equitable Treatment: The ACIA prescribes a long list of rules on the equitable treatment of investments such as protection from arbitrary nationalizations, fair compensation upon nationalization, right to transfer ownership, capital and profits, payment for damages suffered in cases of armed conflicts or civil strife.

Note however that the benefits may be denied by Myanmar if the investment vehicle has no substantive business activities in the state of its incorporation. Positioning an intermediary company in an ASEAN country versus directly investing in Myanmar can serve as an additional "safety net" for U.S. investors in availing of the mechanisms under the ACIA.

TAX OPTIMIZATION PLANNING

There are generally two objectives with the tax optimization of outbound investments by U.S. entities. The first is to optimize the taxes imposed by the investee state such as Myanmar. The second is to delay the imposition of U.S. taxes on the profits from the Myanmar investment.

An investor generally examines minimization of two sets of taxes. The first is the tax on the profits of the Myanmar entity such as the corporate income tax. In Myanmar, this can be done by availing of the incentives offered under the Myanmar Foreign Investment Law.

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The second set of taxes are those imposed on the payments or transfers made by the Myanmar entity to the U.S. investor (withholding taxes) and those that apply to the gains realized when selling the Myanmar entity (capital gains tax). The application of double tax treaties ("DTT") can reduce the applicable withholding taxes and/or capital gains taxes. However, at this time, there is no DTT between the U.S. and Myanmar and as such U.S. investors often look to other jurisdictions to mitigate exposure to double taxation.

Myanmar has entered into DTTs with the United Kingdom, Malaysia, Singapore, Vietnam, Thailand, Korea, Lao PDR, and India. In any case, when planning investment structures, DTTs help not only to lower potential tax exposures, but also clarify the rules on taxing rights and thus avoid international double taxation. U.S. investors must also carefully consider the US Controlled Foreign Corporation (CFC) or SubPart F rules which generally require that the foreign profits of US companies to be automatically taxed in the U.S.

The combination of financial incentives accorded by national tax and investment legislation, a network of DTTs, and the protection under inter-governmental instruments such as ACIA is expected to attract a host of new investments in the ASEAN region, especially in view of launching the ASEAN Economic Community in 2015 as an integrated market of estimated 600 million consumers.

For now, among the ASEAN economies, Myanmar has become the new frontier of inbound investments. With the lifting of sanctions against Myanmar and a country just waking from its stupor, U.S. investors see a wealth of opportunities. Nevertheless, investors should apply prudence before the inevitable leap. ■

Jack Sheehan is Regional Tax Partner at DFDL. He can be contacted at: jack.sheehan@dfdl.com.