

Webinar

Getting ready to invest in Vietnam through Mergers and Acquisitions



Date: Wednesday, 29 June 2022



Language: English



Time: 10:00 AM - 11:30 AM



Platform: Zoom



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TAX CONSIDERATIONS IN MERGERS & ACQUISITIONS TRANSACTIONS

29 June 2022

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01.

Vietnam's M&A Market



Key facts

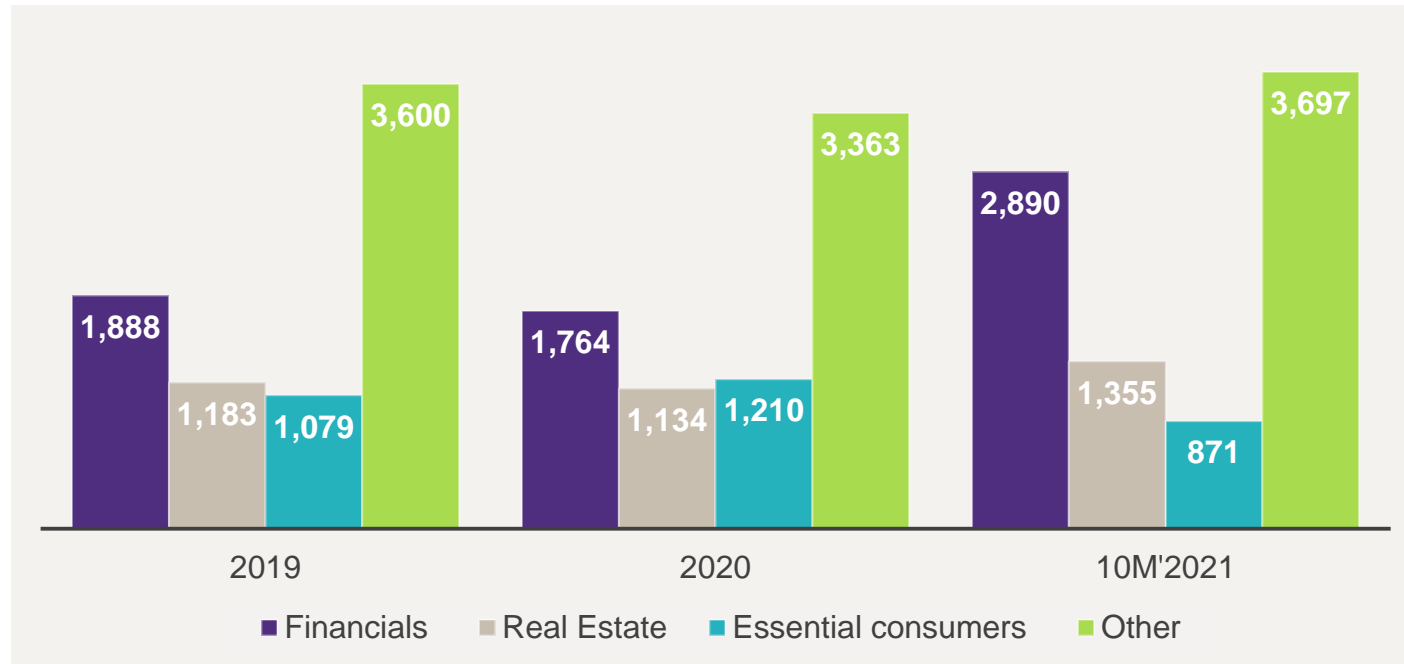
- M&A transactions in Vietnam increased significantly from 2007 to 2017, especially 2017 with total disclosed transaction value amounting to USD10 billion
- In 2018, Vietnam ranked 2nd in term of M&A value in Southeast Asia, but fell back to 3rd place in 2019 after Singapore and Thailand.
- M&A market in Vietnam also suffered from the impact of the pandemic in 2020. Fortunately, Vietnam's M&A market picks up again in 2021.

Source: National Institute for Finance, MPI – Foreign Investment Agency



Key facts

Essential consumer, financials and real estate are favourable sectors for M&A transaction. In which, M&A value breakdown by sector is as follow:



02.

Vietnam Tax Implications on M&A Transaction



Common M&A transaction structures

Assets Deal



- Buyer to purchase assets of the Target, such as equipment, goodwill, inventory, customers
- Seller retains possession of the legal entity; thus, typically retains its debt obligations and liabilities
- Foreign investor must have a Vietnam entity to hold assets in Vietnam

Equity Deal



- Buyer to purchase a target company's capital/ shares from the existing shareholders
- Foreign investor is permitted to own charter capital in a Vietnam entity without being subject to any limits, except those entities in restricted sectors
- Foreign Investor will need to obtain M&A approval from the licensing authority prior to acquiring shares/ capital

Tax implications on asset deals

- The acquisition of assets must be supported by legitimate tax invoices and supporting documents (i.e. VAT invoices, sales contract, non-cash payment evidence, etc.)
- Sale of assets is subject to Value Added Tax (at a standard rate of 10%), which is creditable as input VAT for the buyer.
- The seller of asset is subject to Corporate Income Tax on the gain from the asset transfer at standard rate (20%)

The purchase price of M&A transaction is mutual agreement between the seller and the buyer.

However, the tax authority may reassess the case (based on their internal database) and has the rights to deem values leading to additional tax exposures, if they are of the view that the transaction is not an arm's length transaction.

Tax implications on asset deals (Cont.)



- Acquired goodwill may be amortized over a maximum period of 3 years
- Depreciation of acquired assets is allowed to be deductible for Corporate Income Tax purpose if all of the following conditions are met:
 - It is certain to gain economic benefit in the future from the use of such asset;
 - Having the utilization time of over 1 year; and
 - The value of such asset is at least VND30 million.

Depreciation exceeding the stipulated rate is not deductible for Corporate Income Tax calculation purpose.

- For those assets subjecting to the asset registration tax when transferred, the new registered asset owner is required to pay stamp duty.

Tax implications on equity deals

Equity acquisition is subject to Capital Assignment Tax in Vietnam with the applicable tax regime and tax rate depending on type of entity to be acquired (i.e. Limited Liability Company, Joint Stock Company) and seller (i.e. corporate seller, individual seller)

CORPORATE SELLER

Capital transfer:

- Transfer of capital contribution in Limited Liability Company, Joint Stock Company, etc.
- Capital gains from the sale of capital contribution of the corporate seller is normally subject to CIT at standard rate of 20%
- Buyer is responsible to withhold, declare and pay Capital Assignment Tax to the local tax authority; otherwise, if both seller and buyer are foreign entities, the Vietnam target company is responsible for tax declaration and payment.

Securities transfer:

- Transfer of securities, such as bonds, shares of public Joint Stock Company
- Seller being Vietnam entity is taxed on 20% on gain generating from securities transfer
- Foreign investor selling securities is subject to CIT at a deemed rate of 0.1% on gross proceeds.

Tax implications on equity deals (Cont.)

Equity acquisition is subject to Capital Assignment Tax in Vietnam with the applicable tax regime and tax rate depending on type of entity to be acquire (i.e. Limited Liability Company, Joint Stock Company), seller (i.e. corporate seller, individual seller)

INDIVIDUAL SELLER

Capital transfer:

- Transfer of capital contribution in LLC, partnership, BCC, cooperatives, etc.
- Vietnam tax resident is taxed on 20% on gain
- Vietnam non-tax resident is taxed on 0.1% on gross proceeds.

Securities transfer:

- Transfer of securities, including shares, call options on shares, bonds, treasury bills, fund certificates, and other securities – Law on Securities; shares of the persons in the joint-stock company under Law on Securities and Law on Enterprises
- Both Vietnam tax resident and non-tax resident are taxed on 0.1% on gross proceeds.

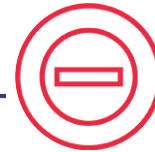
Considerations on Asset vs. Equity deal from tax perspective

Asset deals



Pros

- The purchase price can be depreciated or amortized for tax purposes for the buyer
- No previous liabilities of the Company are inherited
- The asset deals will be preferable for the case that the Target has multiple activities/ assets; whereas, the buyer can be able to decide on the appropriate assets only



Cons

- Foreign investor must have an entity in Vietnam to purchase the assets
- Benefits of any tax incentives and tax losses incurred by the Target company remain with the seller

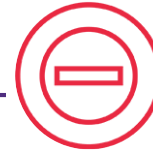
Considerations on Asset vs. Equity deal from tax perspective (Cont.)

Equity deals



Pros

- Buyer may benefit from tax losses and tax incentive of the target company
- Share purchase is not subject to VAT
- Buyer can save time in licensing procedures for setting up the new entity, especially for those conditional sector (i.e. sub-license)



Cons

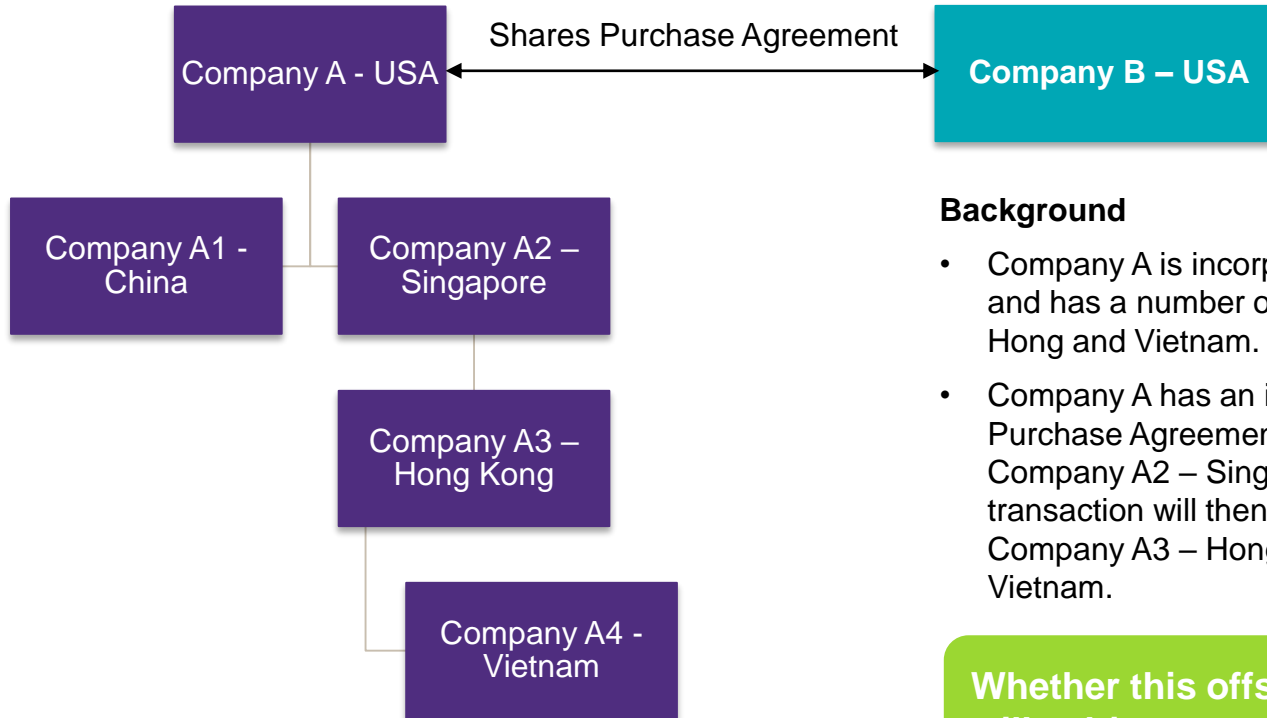
- Buyer is fully responsible for all past/ inherent liabilities of the Target, including current tax and debts as well as any liabilities arising in the future as a result of past activities of the company

03.

Highlights on Vietnam Tax Implications on Indirect Offshore M&A Transaction



Scenario for discussion



Background

- Company A is incorporated under the law of USA and has a number of subsidiaries in Singapore, Hong and Vietnam.
- Company A has an intention to enter into Shares Purchase Agreement to transfer 100% ownership in Company A2 – Singapore to Company B → This transaction will then lead to indirect transfer of Company A3 – Hong Kong and Company A4 – Vietnam.

Whether this offshore M&A transaction will subject to tax in Vietnam?

Vietnam regulations on indirect transfer

- Decree No. 12/2015/ND-CP providing that “3. **Taxable incomes earned in Vietnam by foreign enterprises** prescribed in Points c and d Clause 2 Article 2 of the Law on Corporate income tax are **incomes derived in Vietnam** from provision of services, provision and distribution of goods, grant of loans, payment for copyrights for Vietnamese entities or foreign entities doing business in Vietnam, or **from transfer of capital**, projects of investment, right to contribute capital, right to participate in projects of investment, right to mineral exploration, extraction, and refinement of minerals, **regardless of the location of business premises.**”
- The Corporate Income Tax regulations stipulate that “**Incomes from capital transfer** is income earned from **the transfer of part or the whole of the capital amount** which the enterprise has invested in to one or many other organizations or individuals (including the sale of the whole enterprise). The time of capital transfer is the time of transfer of capital ownership.”
- Vietnam tax authorities also issued several private rulings affirm that the transfer of an offshore entity, which directly or indirectly holds the Vietnam entities, is considered as deriving income from indirect transfer of the Vietnam entities; therefore, **subjecting to tax in Vietnam.**

How is it taxed? Whether the Vietnam regulations provide clear guidance on this?

Thank you

Protections for minority shareholders in M&A transactions

(Mr) Bui Ngoc Hong
Partner

Agenda

- 1 MINORITY SHAREHOLDERS – WHO ARE YOU?**
- 2 KEY TOOLS FOR PROTECTING MINORITY SHAREHOLDERS IN M&A TRANSACTIONS**
- 3 SOME SPECIAL NOTES FOR VIETNAM'S PRACTICE**

1. Minority shareholders – Who are you?

What is meant by “minority shareholder”?

Typical cases of minority shareholders

Characteristics and needs of minority shareholders

1.a) What is meant by “minority shareholder”?

No express legal definition

Minority by thresholds of rights

Minority by **voting power**

1.b) Typical cases of minority shareholders

Financial investors (invest, to exit)

“test-the-water” investors (invest, to expand)

Change from majority to minority
(divestiture)


1.c) Characteristics and needs of minority shareholders

Often, a “**termed**” status (short/
cycle)


Need **to co-live** with majority
shareholders

Often, **financial** protections:
prioritized

2. Key tools for protecting minority shareholders in M&A transactions



- Preventive/ planning tool: due diligence



- Choice of shareholder type



- Vetoing rights (via reserved matters)



- Information right



- Dividend distribution



- Anti-dilution



- Deadlock



- Pre-emptive rights and ROFR



- Call option/ Put option



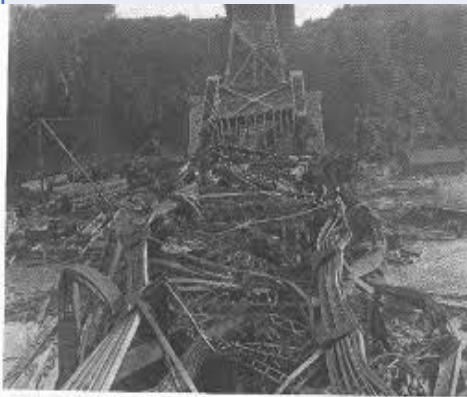
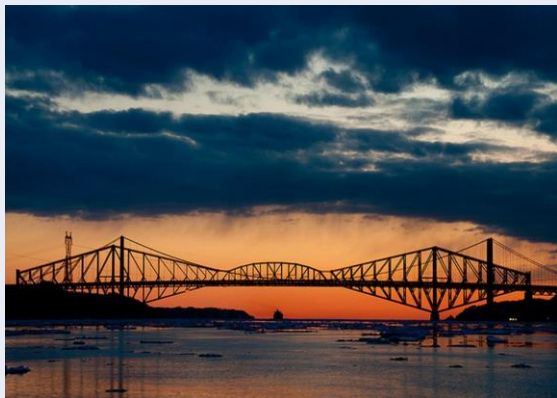
- Drag-along/ Tag-along/ Liquidation preference

2. Key tools for protecting minority shareholders in M&A transactions: due diligence

*“Generally, due diligence refers to the **care** a reasonable person should take before entering into an agreement or a transaction with another party”*

*“An **investigation** or audit of a **potential** investment. Due diligence serves to confirm all material facts in regards to a sale”.*

(Investopedia)



2. Key tools for protecting minority shareholders in M&A transactions: due diligence

Key focus of due diligence in minority shareholder deals:

- a) Shareholder structure: Any *existing* minority shareholder scheme? Quorum and voting rules? Board of Directors - formation and operation?
- b) Corporate governance: transparency and decision making. *E.g. Accounts transparent and reliable? Any related party transaction? Any shadow directorship? Relationships with suppliers and buyers at arm's length?*
- c) Any cross-default clause esp. in borrowing documents?
- d) Any foreign limits?
- e) Managerial talents (and retaining)?
- f) Potential for exits in the future?

→ DD helps with risk mitigation and deal planning.

→ The more you know, the more bargaining power you have.

2. Key tools for protecting minority shareholders in M&A transactions: type of share

- a) Structuring different types of share may change minority shareholder to be majority shareholder.
- b) “Golden share” helps with both decision making and exit preferences

2. Key tools for protecting minority shareholders in M&A transactions: vetoing right/ reserved matters

- a) Why minority shareholders need vetoing right?
- b) Voting rules under the Law on Enterprises are favoring majority shareholders. Vetoing rights have to be negotiated.
- c) What should be included in the reserved matters?

2. Key tools for protecting minority shareholders in M&A transactions: the remaining tools...



- Preventive/ planning tool: due diligence



- Choice of shareholder type



- Vetoing rights (via reserved matters)



- Information right



- Dividend distribution



- Anti-dilution




- Deadlock



- Pre-emptive rights and ROFR



- Call option/ Put option



- Drag-along/ Tag-along/ Liquidation preference

3. Some special notes for Vietnam's practice

Key special notes for better protecting minority shareholders in Vietnam:

- a) Exits may be more difficult
- b) Put option is generally weak
- c) Shareholders' Agreement (SHA) may be controversial
- d) Drag-along and Tag-along: generally enforceable (but needs crafting carefully)
- e) Dispute settlement: should be by non-Court forum
- f) Tax risks (to be GT's topic)

Q&A



“Coming together is a beginning, staying together is progress, and working together is success.”

(Henry Ford)

Thank you



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