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Mergers and acquisitions of BOI projects: 'Well planned the first time?'

M&A is like a high-stakes poker game because you have no second chance to sort things out if it is not done right the first time.

If your deal is in process, it would be worthwhile if you can work out the right solution, whether the choice is a spin-off or merger or acquisition or otherwise. Most of the deals start with due diligence of those target companies and trying to win them over quickly. Many things need to be prepared, especially if your target is a company promoted by the Board of Investment (BOI).

Not only must the financial issues be considered so the management can make an informed decision, there are also other important legal and tax issues that management must take into account.

These issues become even more important if the target company holds an investment promotion certificate from the BoI, because of the tax and non-tax incentives provided. A merger and acquisition would cut off those privileges and lead to the loss of the privileges if the transferor and acquirer of the project are not aware of them.

In principle, mergers and acquisitions can take place in various kinds of transactions, such as share purchases, asset purchases and amalgamations. Share purchase and asset purchase are derived from an agreement between the transferor and acquirer, while amalgamation is required by law pursuant to the Civil and Commercial Code of Thailand (CCC). In the latter case, all rights and liabilities will be transferred by the operation of law. However, this will not happen automatically in respect of BOI privileges provided under the BOI certificate.

From the BoI's viewpoint, any action relating to the merger and acquisition of a BOI project will be deemed a transfer of the BOI certificate from the promoted company to the acquiring company and it will not be transferred by operation of law even in the case of amalgamation under the CCC.

Section 56 of the BOI Act stipulates that a BOI certificate is valid for three months following the transfer date agreed upon by both parties, and the acquirer has to submit an application to the BOI within that period.

All benefits mentioned in the transferred certificate would remain equal to those granted to the original promoted person. This means that the acquirer needs to follow procedure to acquire the BOI certificate before it can assume the right thereto and obtain the privileges thereupon.

Under the BOI regulation, enjoyment of BOI privileges will face some problems in practice, because both the currently promoted person and the acquirer have to wait until the BOI certificate is issued. Both parties can agree to set the effective date of the merger and acquisition, but neither party can control the BoI's approval date. This will create issues around the BOI privileges utilisation gap:

- 1 When the BOI certificate is issued before the date of transfer or amalgamation but the assets have not yet been transferred, the acquirer has the right to use the BOI privileges but can't use the BOI assets until the date of transfer or amalgamation;
- 1 When the BOI certificate is issued after the date of transfer or amalgamation, the assets have already been transferred to the acquirer under the agreement, but the acquirer cannot utilise the BOI privileges. All goods produced by the assets will be subject to corporate income tax.

These matters are of huge concern when a BOI certificate has to be transferred to another company, and there is no clear direction regarding this practice.

Such concern also applies to other BOI privileges such as import duty exemption for raw materials and machinery, because the acquirer has to undertake a further process with the BOI by creating its own account at the Investor Club (IC) before the data under the old BOI certificate can be transferred and used for the exercise of the BOI privileges.

The acquirer has to bear the liability of import duties until the IC completely transfers all data to the new account, although the import duties paid can be claimed back later.

It would be better if all privileges could be transferred to the acquirer automatically once the BOI certificate is issued and another implementation process is required for this case. However, for the time being, the transferor and acquirer can reduce the gap if careful preparations are made in advance, with good planning.

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