

PwC Tax Newsletter

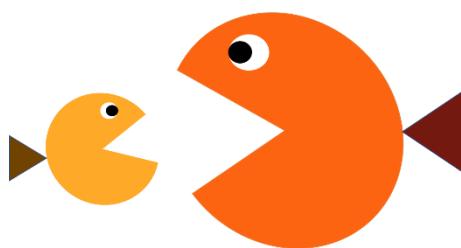
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A New M&A Tax Regime

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New amalgamation law and its tax consequences



PwC Thailand is pleased to present an update on the new law relating to the amalgamation of two or more companies that was recently introduced into the Civil and Commercial Code (CCC). In this newsletter, we will focus on the key issue of 'tax losses carried forward' and briefly discuss the potential change in the tax treatment resulting from the change in the amalgamation law.

Background

Thailand's existing landscape for amalgamation

Under Section 74(1)(b) of the Revenue Code, the accumulated loss of an amalgamating company cannot be carried forward by the amalgamated company to offset against its future profits since, prior to its amendment, the CCC required a new company to be incorporated as a result of the amalgamation and the amalgamating company to be dissolved and liquidated.

However, in all other respects, the new amalgamated company is considered to be a continuation of the predecessor companies.

"The amendment of the amalgamation law will affect M&A tax in practice"

The new amalgamation regime

Thailand introduced a new amalgamation law in the CCC on 8 November 2022.

The new law recognises "merger" as a form of business combination. Under a merger scheme, one or more companies will be merged into another company, and the merging companies will be dissolved while the other merged company will survive. The new merged, or surviving, company will take over all the assets, liabilities, rights, obligations and responsibilities of the other companies in the merger.

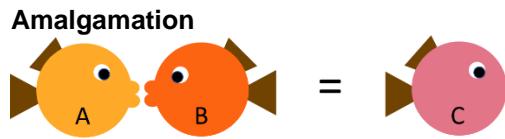
Merger and acquisition and amalgamation scheme under new law

Merger scheme 1



Merger scheme 2





The definition of amalgamation

'Amalgamation' means the merger of one or more companies with another company or the merger of two or more companies to form one new company. The company so merged being referred to as an amalgamating company.

General principle of amalgamation

The law of succession is applicable to the amalgamation scenario, meaning that the successor will be put in the shoes of the predecessor. Therefore, all rights and liabilities of the amalgamating companies before the amalgamation become the rights and liabilities of the amalgamated company.

The issues

With reference to the amalgamated company, Section 74(1)(b) of the Revenue Code currently states "... and in no case shall the net loss of any original company or partnership be treated as expenses in computing net profits or losses..."

There is therefore no opportunity under the present tax law for companies and their shareholders to obtain any tax benefits from tax losses carried forward.

This means that the business loss of an amalgamating company cannot be carried forward for five years, as permitted under Section 65 ter (12) of the Revenue Code, and offset against the profits of the amalgamated company. Thus, it can be said that a disadvantage of amalgamation under the Revenue Code is that a taxpayer will lose of the opportunity to utilise all available tax losses.

The question?

Under the new amalgamation law, will the Revenue Code be amended to

permit the amalgamated company to carry forward its accumulated losses existing at the time of the amalgamation?

Tax loss carry forward definition

Tax loss carry forward or a net operating loss computed for tax purposes is a tax provision that allows companies to carry forward its losses from prior years to offset against future profits.

International theory of tax loss carry forward

Ideally, the Revenue Code should allow companies to carry their losses forward without any time limit. However, some OECD country with a standard corporate income tax system allows the limited carry forward of tax losses only.

Definition of loss and accumulated loss

Losses are divided between capital losses and business or investment losses.

- I. **A capital loss** typically arises on a disposition of a capital property when the sale proceeds are less than the taxpayer's cost of the property and any expenses of disposition
- II. **A business or investment loss** generally arises in a particular year when the expenses associated with the business or investment during the year exceed the income generated.
- III. **Accumulated loss** means the loss of the predecessor company (which can arise from a capital loss or a business loss) before merging into the amalgamated company. In theory, it would have been entitled to carry forward these losses and offset against future profits under the provisions of the Revenue

Code if the reorganisation of the business or amalgamation had not taken place. Unfortunately, the carry forward of losses under an amalgamation is prohibited under Section 74(1)(b).

It is also not yet clear whether the Revenue Department would be willing to allow the use of losses carried forward under the new amalgamation law.

PwC's comments

Generally, tax losses in the surviving company should be retained. However, this issue needs to be clarified in the Revenue Code.

Our observation on the new amalgamation law

The tax treatment under the new merger law should be changed from the previous amalgamation scheme as the amendment of the CCC would affect the existing merger tax rules.

Based on our discussion with a member of the Revenue Department's legal team, we understand that they are considering amending the Revenue Code to follow the CCC although no timeline has yet been set. However, they anticipate that there will be developments later this year.

Consideration of the following M&A tax issues and consequences are still pending and need to be followed up for the response and interpretation from the Revenue Department:

- **New provision for M&A tax is required in the Revenue Code:** Section 74(1)(b) of the Revenue Code should be amended to conform with the CCC.
- **Utilisation of tax losses carried forward:** Tax losses should be transferred to the amalgamated company.
- **The method:** Tax losses brought forward in the amalgamated

company should be available to be offset against the profits derived from the business acquired from the amalgamating company.

- **Period for carry forward:** In some jurisdictions, tax losses are allowed to be carried forward for an unlimited period of time. However, in Thailand, tax losses can be carried forward for five years only under Section 65 ter (12). Therefore, losses of the amalgamating company should be available for carry forward for five years after the amalgamation.
- **Time to exercise tax loss carry forward:** The amalgamated company should be deemed to have acquired the tax losses of the amalgamating companies at the time of the amalgamation for the purpose of any future tax deductions or allowances in respect of the losses.
- **Conditions:** Typically, the Revenue Code should provide the conditions for the utilisation of tax losses of an amalgamated company. However, there is no special guidance on this matter at present.
- **Same trade rules:** Generally, tax losses brought forward from an amalgamating company can only be used to offset against the profits of an amalgamated company that are derived from the same business as that acquired from the amalgamating company. However, the Revenue Code does not mention this principle. We need to observe further developments on this matter.

Next steps

The Revenue Code should be amended to provide guidance and clarity on the issue of tax losses carried forward, including whether the losses are available for offset in the hands of the amalgamated company.

We are following up and coordinating with the Revenue Department's legal team to clarify these issues. We will keep you posted if we have any further update thereon.

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