Cristal Advocates

Asset Deal or Share Acquisition in Uganda
Indicative legal and tax issues

Cristal Knowledge Series
May 2024

1. Introduction

Business in Uganda can be acquired through an asset deal or share purchase. The choice between these two is fundamental, as each carries distinct legal and tax implications, advantages, and challenges, as discussed in this article.

2. Share Deal

In a share deal, the buyer acquires shares from existing shareholders, resulting in the transfer of ownership of the company, inclusive of all its assets and liabilities. Due diligence in such transactions is typically thorough, aiming to uncover any potential risks or undisclosed liabilities that may transfer to the buyer upon completion of the transaction.

a) Due diligence

It is imperative to evaluate and ascertain outstanding debts, book balances, contingent liabilities, and any pending or potential lawsuits. A deep dive into the corporate structure is essential, as understanding the rights attached to different classes of shares and any shareholder agreements is crucial. These agreements may contain provisions that affect voting rights, dividend entitlements, and restrictions on share transfers, which could impact the buyer's control over the company post-acquisition.

Tax is also a primary area of focus as any historical tax underpayments not reflected in the balance sheet could negatively impact the company's value to the buyer. To mitigate these risks, sellers often provide representations and warranties to the buyer, offering protection against undisclosed past liabilities at the time of transaction closure.

b) Approvals

In share deals, regulatory approvals are critical. Uganda recently passed a competitions law that would invoke the intervention of competition authorities to prevent monopolies. Industry-specific regulations, particularly in sectors like banking, extractives, healthcare, or telecommunications, also necessitate additional approvals. Compliance with these requirements is complex but vital to avoid legal challenges and fines post-acquisition.

c) Other legal issues

Employment matters are important as the buyer inherits the entire company, including its employees under existing contracts. While this ensures stability and retains institutional knowledge, it also means addressing ongoing labor disputes, collective bargaining agreements, and employment obligations.
Similarly, contractual obligations require inspection as the buyer assumes all of the target company's contracts, including supply agreements, customer contracts, leases, and commitments. Some contracts may trigger change-of-control clauses, necessitating negotiation or termination. Understanding and planning for these contingencies is essential to avoid disruptions to operations and financial performance.

d) Tax consequences

Value Added Tax (VAT) is not applicable on share transfer transactions as they are out of scope. Capital gains from share disposals are subject to taxation under the income tax regime, with sellers bearing the tax burden. Gains by companies are taxed at a corporate income tax rate of 30%, while individuals shoulder income tax on graduated scale rates, reaching a maximum of 40%. Please consider that the applicability of capital gains tax "CGT" may be varied by existing Double Tax Agreements (DTAs).

Gains and losses from the disposal or transfer of shares are not considered for CGT purposes if they involve: transfers between spouses; transfers between former spouses as part of a divorce settlement or bona fide separation agreement; involuntary disposals with proceeds reinvested in a similar asset within one year; or the transmission of an asset to a trustee or beneficiary upon the taxpayer's death.

In cases where there's a 50% or more change in direct or underlying ownership, a company is restricted from deducting tax losses brought forward for two years. However, this restriction doesn't apply if the company continues its existing business and refrains from initiating new business or investments solely to utilize assessed tax losses for reducing tax payable on income from such activities.

Deemed disposal in accordance with the law can also arise for significant changes in the shareholding of a company. An enterprise experiencing a 50% or more

change in direct or underlying ownership within three years, is deemed to dispose of its assets and liabilities on the date of the change of control. Following the change, the enterprise is treated as having re-acquired the same assets and liabilities at market value. Any excess of the asset re-acquisition value over the market asset value at deemed disposal results in taxable capital gains considered as business income for the company.

Qualifying transactions may also be eligible for the rollover relief that facilitates asset exchanges and transfers between group companies without the crystallization of CGT. When a resident individual transfers a business asset to another resident individual in exchange for a 50% or more shareholding in the transferee following the transfer, the transaction is not considered a disposal of the asset by the seller but as an acquisition by the buyer of a business asset.

CGT is also not applicable in group company reorganizations where there is no substantial change in the underlying ownership or control of the company or group. In such cases, the Commissioner may permit any resident company involved in the reorganization to treat it as not resulting in the disposal of a business asset or the realization of any business debt.

Share transfers attract stamp duty at the rate of 1.5% of the consideration of the shares but exemptions can apply in eligible business reorganization transactions.

3. Asset Acquisition

An asset deal involves the sale and purchase of identified business assets, with the buyer potentially assuming specific liabilities. However, the buyer can seek to minimize the risk of undisclosed burdens transferring at transaction completion, such as environmental liabilities related to business premises. Asset sales involving multiple properties can be complex, as each asset and liability to be transferred must be clearly defined. Additionally, obtaining third-party consents may be necessary for some asset transfers. Due diligence in asset deals focuses primarily on the properties and liabilities being acquired.

a) Approvals

It is not the case usually that regulatory approvals for asset acquisitions should be sought unless the same are subject to specific regulatory regimes. For instance, acquiring real estate may require compliance with environmental regulations and local zoning laws. Similarly, licenses and permits associated with the assets might need to be transferred or reissued, depending on the regulatory framework governing the industry.

b) Other legal issues

Employment law considerations in asset acquisitions differ from those in share deals. Though less common, the buyer can take on the employees associated with the acquired asset, which would require issuing new employment contracts. This process must comply with employment laws, particularly for the seller, including regulations on severance pay, notice periods, and collective bargaining agreements. The seller must also manage the transition for employees who are not retained, ensuring compliance with legal obligations regarding redundancies or transfers.

Contractual obligations in asset acquisitions require careful handling. Transferring contracts to the buyer may necessitate obtaining consents from third parties, as many contracts include anti-assignment clauses that restrict or prohibit the transfer of contractual rights and obligations. Ensuring business continuity is crucial, so the buyer must negotiate with key suppliers and customers to secure the necessary consents and maintain ongoing relationships.

c) Tax issues

Asset sales are subject to VAT at the standard rate of 18% unless certain conditions are satisfied potentially qualifying for the exemption from VAT as part of the transfer of a business as a going concern. The VAT legislation defines transfer of business as a going concern to include the disposal of any part of the business which is capable of separate operation.

Gains by companies are taxed at a corporate income tax rate of 30%, while individual bear income tax on graduated scale rates, reaching a maximum of 40%. The applicability of CGT may be varied by existing Double Tax Agreements (DTAs).

As already mentioned, gains and losses from the disposal or transfer of assets are not considered for CGT purposes if they involve: transfers between spouses; transfers between former spouses as part of a divorce settlement or bona fide separation agreement; involuntary disposals with proceeds reinvested in a

similar asset within one year; or the transmission of an asset to a trustee or beneficiary upon the taxpayer's death.

Asset sales may attract stamp duty at varied rates but exemptions can apply in qualifying business reorganization transactions.

4. Conclusion

Choosing between a share deal and an asset acquisition involves balancing the risk assumption, complexity, and flexibility each method offers. In a share deal, the buyer assumes all the risks and liabilities of the target company, making comprehensive due diligence crucial to uncover and mitigate potential issues. This approach often simplifies the ownership transfer but requires managing inherited liabilities and obligations. In contrast, an asset acquisition allows the buyer to selectively acquire assets, limiting exposure to unwanted liabilities but necessitating more complex negotiations and administrative efforts to transfer individual assets and contracts.

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Denis is the Managing Partner of the Firm. He is qualified both as a Lawyer and Chartered Accountant with UK training and vast experience serving local, regional and international companies in Sub Saharan Africa. He is recognized as a notable corporate and commercial law practitioner in Uganda.

Before joining Cristal Advocates, Denis spent nearly 10 years at Deloitte, an international professional services firm, where he started his career and rose to senior roles. While with Deloitte, he worked and lived in Uganda, Kenya, Tanzania and the United Kingdom.

Education

a) Master of Laws in Petroleum Taxation and Finance with distinction - University of Dundee, UK
b) Certified Public Accountant (Uganda) - ICPAU
c) Certified Chartered Accountant ("ACCA") – ACCA
d) Post Graduate Diploma in Legal Practice - Law Development Center, Uganda
e) Bachelor of Laws degree - Makerere University, Uganda

John Teira

John is a Partner with the firm but presently on sabbatical leave. Before joining Cristal, he worked as a Private Secretary to the President of Uganda. Prior to this role, he had worked with Shonubi Musoke & Company Advocates and Post Bank Uganda Limited.

John is presently a Member of Parliament representing Bugabula County North in Kamuli District in Uganda National Assembly.

Education

a) Post Graduate Diploma in Legal Practice - Law Development Centre, Uganda
b) Bachelor of Laws (Honours) - Makerere University, Uganda
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Dickens is a Partner at Firm where he also leads the oil and gas practice. Before joining Cristal Advocates, Dicken had served as Company Secretary of the Uganda Refinery Holding Company Limited (URHC) and the Uganda National Oil Company (UNOC) where he played key role in its formation.

Prior to joining the UNOC, Dickens had spent five years as Legal Counsel at the Petroleum Directorate of the Ministry of Energy and Mineral Development, where he evaluated several oil and gas transactions, negotiated contracts, and participated in the preparation of Uganda's oil laws and regulations.

Education

a) Master of Laws in Petroleum Law and Policy with merit - University of Dundee, UK
b) Post Graduate Diploma in Legal Practice - Law Development Center, Uganda
e) Bachelor of Laws degree - Makerere University, Uganda

Bill Page

Bill is a Senior Advisor at the Firm and is a leading global energy and tax practitioner with extensive international experience.

From 1986 to 1998, Bill worked in London with the UK tax authorities and Big Four accounting firms. From 1998 to 2004, he was based in Kazakhstan, working across the Caspian region with Deloitte during a period of major infrastructure development for crude oil production.

From 2004 to 2008, Bill worked in Russia, leading Deloitte's oil and gas industry group and establishing the firm's Sakhalin office. In 2009, he moved to East Africa, where he led Deloitte's energy and resources industry group in Uganda, Kenya, Tanzania, Rwanda, Ethiopia, and Mozambique. Initially based in Kampala, Uganda, he later relocated to Dar es Salaam, Tanzania.

In 2014, Bill returned to the UK to support Deloitte UK teams on projects investing in Africa and remained a key member of Deloitte UK's energy and resource practice until his retirement in September 2018.

Education

Bill is a graduate of Oxford University and completed his inspectors' training with the UK Inland Revenue in 1989.

- **Energy & Infrastructure**
- **Business support**
- **Employment**
- **Banking & Finance**
- **School of Professional Excellence**
- **Tax**
- **Company Secretarial & Trustee Services**
- **Public Law & Policy Advocacy**
- **Dispute Resolution**
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