Guide to: Choosing an Asset Purchase or a Share Purchase

There are two principal ways a buyer can look to acquire a business, either by way of an asset purchase or a share purchase. There are key differences between the two structures that need to be understood before deciding on the most suitable course to take.

An asset purchase involves the buyer acquiring a bundle of assets and rights, and sometimes assuming responsibility for certain liabilities, relating to the target business.

A share purchase involves the buyer acquiring all of the shares in the company which carries on the target business.

While both a share purchase or asset purchase broadly achieve the same commercial objective, there are fundamental differences in both the legal effect and the tax treatment of the two methods.

An Asset Purchase

The principal document involved in an asset purchase is an Asset Purchase Agreement (APA). The buyer and seller will negotiate precisely which assets the buyer will acquire from the business upon completion. The assets which are not agreed to be purchased by the buyer under the APA will remain with the seller. It is therefore important that the APA is drafted clearly to include only those assets being sold and which the buyer is willing to purchase.

The types of assets which are commonly purchased by a buyer include the business premises, the benefit of business contracts, intellectual property rights, plant and machinery, goodwill and stock. Often assets such as cash, debts and insurance claims may be excluded from the sale.

As an asset purchase involves buying the underlying assets and rights of the target business, rather than the entity which owns them, this transaction structure can be used to acquire an unincorporated business e.g. a business carried on by a sole trader or partnership, or part of an incorporated entity's business.

A Share Purchase

As a limited company has its own legal personality separate from that of its owners, the company as an entity owns its business, assets, obligations, liabilities and rights independently of its shareholders. Therefore, a buyer purchasing the shares of a company essentially also acquires everything owned by that company. The only assets which actually change hands are the shares in the target company itself through the use of a stock transfer form.

The principal document involved in the sale of shares is a Share Purchase Agreement (SPA) which will set out the terms on which the buyer is purchasing the shares. SPAs can often be quite lengthy based on the complexity of the business operated by the company and if the consideration being paid for the business is particularly high.

Share purchase or Asset purchase

The most significant difference between a share purchase or asset purchase is the ability to control what is purchased when buying only the assets, allowing the buyer to choose only the best assets and leave behind any liabilities it does not want. In contrast, when buying the shares of a company, the company's separate legal personality means that the buyer has no control over what is obtained as a result of the purchase transaction.

The flexibility of an asset deal means that this structure is often favoured by buyers. For a business with significant liabilities, the appeal of leaving all these behind can be a major reason for a buyer to want to choose an asset deal. However, there are other considerations which a seller and buyer will also have to consider including the following: –

- Tax treatment – the different structures will have different tax implications for both the buyer and seller. The different tax treatment is outside the scope of this article but it is an important consideration for both buyer and seller.
- The additional complexity of an asset purchase – depending on the nature of the assets being transferred to the buyer, an asset purchase can involve a lot of extra work to identify the assets being sold, dealing with the necessary transfer formalities for each asset and also obtaining any consents which may be required e.g. when leased equipment is involved, or if licences or permits are required for the business.
- Employees – a major unappealing element of an asset deal is the application of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006/246) (TUPE). Where TUPE applies, it protects the employment rights of the employees of the target business and imposes obligations on both the buyer and the seller to inform and, in some cases, consult with representatives of affected employees before the transaction takes place. TUPE does not apply to a share deal.
- Shareholder approval – in order for a buyer to purchase all the shares in the target company, all of the shareholders will need to agree to sell their shares. If there are any shareholders who cannot be located or who are resistant to selling, this can cause issues for the buyer.

Involving advisors

The above are just some of the factors that should be considered when deciding upon a share purchase or asset purchase. If you are buying or selling a business, it is important to involve advisors at an early stage (including both lawyers and accountants) to ensure that careful consideration is given to all the circumstances and that the correct purchase/sale structure is chosen.

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