Buying share capital vs buying assets

Many buyers of a business are often unclear as to the differences and repercussions of a share purchase versus an asset purchase, yet each type of acquisition involves very different procedural and legal requirements.

In a share purchase or share acquisition, the buyer purchases a company's shares, inclusive of all its liabilities and assets, effectively taking on the company's ultimate ownership.

In an asset purchase or asset acquisition, the buyer selectively purchases the target company's assets. This means the buyer can opt not to purchase certain liabilities, so the risks are much lower for the buyer and the liabilities will remain with the seller.

Share purchases naturally carry a much higher level of risk as the buyer is taking on all of the target company's liabilities, including any hidden liabilities. Due diligence investigations into the company's financial, commercial and legal position must therefore be exhaustive, and the seller's disclosure must be equally detailed and thorough.

Alternatively, in an asset purchase, the buyer faces none of the foregoing risks, as assets can be purchased selectively. The only liabilities automatically transferred by law in an asset purchase are those related to employees. Due diligence and disclosure processes are therefore drastically reduced and far less time-consuming for both the buyer and seller.

To protect the buyer in a share purchase, the contract must be detailed and complex, with extensive warranties and indemnities to address the liabilities uncovered in due diligence investigations as well as any hidden liabilities.

The seller's solicitors must be just as careful, as any misrepresentations or undisclosed liabilities could give rise to legal claims against the seller or price adjustments following completion of the acquisition. However, the sale agreement in an asset purchase is much simpler, with a limited need for warranties or indemnities, as assets are hand-picked and liabilities are inevitably left behind.

Although the contract may be complex in a share acquisition, a simple stock transfer form is all that is needed to transfer ownership of the company's shares. On the other hand, the transfer method is more complicated in an asset purchase, as a variety of documents may be needed for the individual transfer of multiple assets, including deeds of novation and assignments of goodwill, for example.

With respect to Stamp Duty payable on a share purchase and Stamp Duty Land Tax payable on any property acquired in an asset purchase, the rates are far lower for buyers when purchasing shares.

As for tax issues, these can become a point of contention, as in asset purchases, the buyer pays less tax than in a share purchase, whereas the seller typically pays more tax on an asset sale than a share sale.

With the exception of insolvency or cases of redundancy, whether you're purchasing shares or assets, the target company's permanent employees come as part and parcel of the purchase, in line with employment law and Transfer of Undertakings (Protection of Employment) regulations also known as TUPE.

In terms of trading position, with a share acquisition there should be no change to the company's relationships or contractual agreements with customers or suppliers, provided that the agreements do not include a change of ownership clause.

Maintaining the company's trading position in an asset acquisition is typically more time-intensive, as contracts will need to be novated or assigned to the buyer with the consent of the other contracting party, which may also entail the revision of contract terms.

When deciding between an asset or share purchase, it is essential that you do so with the guidance of an experienced and qualified solicitor.

For more information, or for expert advice on business or personal legal issues, call us on +44 (0)20 3475 6751 or via email at info@carterbond.co.uk

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