Structuring Investments into Myanmar

By Jack Sheehan

Since opening to foreign investment and the suspension of US and European sanctions, Myanmar has attracted the attention of international investors looking for the newest ASEAN tiger economy.

Investing into Myanmar takes careful consideration of the numerous tax implications as well as risk factors affecting the investment. An investment structure must consider the investors existing operations and strategic plans, and examine the possible option of setting up a Special Purpose Vehicle (SPV) for the investment in Myanmar. Key considerations for foreign investors will be access to tax treaties, investment treaties, availability of tax holidays, deductibility of expenses and transfer pricing issues.

Holding companies are often used to structure investments into countries for various tax and investment planning reasons such as reducing withholding taxes on dividends, royalties, service fees and financing costs, and reducing or exempting capital gains tax. The location of the holding company can have a great impact on the viability of the investment.

Below is a summary of some of the considerations when deciding on the holding company location for an investment in Myanmar:

Myanmar has signed double tax treaties with a number of other countries including UK, Singapore, Thailand, Malaysia and Korea. However, Myanmar and Australia have not yet initiated discussions for the signing of a tax treaty between the jurisdictions.

Dividends paid by a Myanmar company are not subject to any withholding tax in Myanmar. In both Singapore and Thailand dividends received are generally not subject to tax providing certain conditions are met. Additionally, dividends paid by a Singapore company to its shareholders are not subject to withholding taxes. However, dividends paid by a Thai company to a non-resident shareholder are subject to a withholding tax of 10 per cent.

Financing a Myanmar investment from Singapore or Thailand will normally result in interest or financing charges payable to the lender. Normally interest payments paid by a Myanmar entity to a non-resident are subject to a withholding tax of 15 per cent. However, the tax treaties with Thailand and Singapore offer relief to 10 per cent. In the case of Singapore, an additional reduction is available to Singaporean financial institutions and banks to 8 per cent.

Royalties paid from Myanmar to Singapore are subject a withholding tax of 10 per cent in respect of consideration for the use of, or the right to use, any patent, design or model, plan, secret formula or process, or for the use of, of the right to use industrial, commercial or scientific equipment, or for information concerning industrial, commercial or scientific experience and 15 per cent in all other cases.

Royalties paid from Myanmar to Thailand are subject to a withholding tax of 5 per cent of the gross amount of the royalties for the use of, or the right to use, any copyrights of literary, artistic or scientific work and 10 per cent of the gross amount of the royalties for the consideration for any service of a managerial or consultancy nature, or for information technical services concerning industrial, commercial, or scientific experience, and 15 per cent of the gross amount of the royalties in all other cases.

The capital gains provision of a tax treaty, often referred to as the "exit-option", is often very important to tax planning strategies. Under Myanmar tax law, capital gains tax is payable on the sale or transfer of shares in a Myanmar company.

This is of particular concern for foreign shareholders holding shares in Myanmar companies as the capital gains tax rate for non-resident shareholders is 40 per cent. This rate is increased up to 50 per cent for foreign companies in the oil and gas sector.

However, relief from Myanmar capital gains tax is available under the tax treaties signed with Thailand and Singapore as follows:

- The Thailand tax treaty provides that gains from the sale of shares in a Myanmar company, where the company consists principally of immovable property (real estate) which is situated in Myanmar may be taxed in Myanmar. And gains from the sale of shares other than those mentioned above representing a participation of 35 per cent in a company which is a resident of a Myanmar may be taxed in Myanmar. Thus, capital gains from the sale of shares in a Myanmar company which does not hold immovable property and represents a participation of less than 35 per cent is not taxable in Myanmar.
- The Singapore tax treaty provides the same provision in respect to shares in that companies that hold immovable property may also be taxed in Myanmar. The Singapore treaty also contains a 35 per cent participation rule in determining when Myanmar can tax the gains. However, the Singapore tax treaty also provides that in all cases the Myanmar capital gains tax is capped at a rate of 10 per cent. This provides a significant advantage over the Thailand tax treaty.

Foreign capital gains received by Thai companies are generally subject to Thai corporate income tax at 20 per cent. However, Singapore does not generally tax capital gains and therefore gains received from selling shares in a Myanmar company will not be subject to tax in Singapore. Myanmar tax planning does not stop at the Myanmar domestic level, but also continues to the level of the holding structure as shown below:

Singapore's favorable territorial tax system makes Singapore a regional hub for ASEAN and an efficient location for structuring investments into Myanmar. However, before deciding on a location for a holding company, investors will also need to consider general anti-avoidance rules and requirements for obtaining residency certificates to claim tax treaty relief.

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DFDL established a permanent presence in Bangkok in November 2005 to better serve its growing client base in Thailand, especially related to Thai-based financial institutions and businesses investing in Cambodia, Lao PDR, Vietnam, South Asia and Bangladesh.

Since then, DFDL has expanded and established a real estate practice with offices in Samui and Phuket; a corporate and commercial practice group; an energy, mining and infrastructure practice; a tax practice; and labor law and commercial litigation and arbitration practice groups.