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By DAVID LAI

THE Stamp (Amendment) Bill 2017, which was tabled for the first reading in Parliament recently, would impact companies intending to engage in restructuring exercises.

It is common in the Malaysian business scene for corporate entities to undertake restructuring exercises for various reasons such as streamlining the group structure into separately identifiable business sectors so as to better reflect the group's diverse operations and to achieve a leaner corporate structure.

Such restructuring exercises would invariably involve the transfer of assets or shares or

a combination of both. Various tax implications would have to be taken into account in order to manage the tax cost efficiently. Stamp duty is no exception.

In practice, stamp duty costs on corporate restructuring exercises are typically triggered by execution of instruments of transfer to transfer property (for example real property, debts and goodwill) and/or shares (for example, of companies not listed on Bursa Malaysia ("unlisted shares")).

While there may be a transfer of land and buildings or unlisted shares or a combination of both as part of the restructuring exercise, usually such assets continue to remain within the group of companies.

Recognising such a scenario and that group restructuring is often a necessity in business, there are provisions in the Stamp Act 1949 to accord relief from stamp duty for corporate restructuring which would otherwise have been payable.

In the case of real properties, the stamp duty is currently payable at ad valorem rates ranging from 1% to 3% on the higher of the transfer consideration or the market value while for the transfer of unlisted shares, it would be at

the rate of 0.3% of the higher of the transfer consideration or the market value.

Notwithstanding the above, relief from stamp duty is available under the following two circumstances:

> **Transfer of property between associated companies**

Stamp duty is generally payable by the acquirer on the transfer of property such as land and buildings and unlisted shares.

That aside, where the transfer of the beneficial interest in property is from one limited liability company ("the transferor") to another limited liability company ("the transferee") and the companies in question are associated and the consideration for the transfer is received by the transferor company and in connection with the transfer, the transferor and transferee companies continue to be associated, relief from stamp duty is available under Section 15A of the Stamp Act 1949.

For this purpose, associated means that one is the beneficial owner of not less than 90% of the issued share capital of the other, or a third company with limited liability is the beneficial owner of not less than 90% of the issued share capital of the transferor and transferee companies.

The Stamp (Amendment) Bill 2017, which is expected to be tabled for second reading in the upcoming Parliamentary sitting, seeks to impose additional conditions for the relief application as follows:

(a) The transferee must not dispose of the asset within a period of three years from the date of transfer;

(b) The transferor and transferee companies must remain associated for a period of three years following the date of the transfer;

(c) It has to be shown that the transfer of property between the associated companies is to achieve greater efficiency in operation; and

(d) The transferee company must be incorporated in Malaysia.

The additional conditions are stringent as compared to that currently in place. Transfers to non-Malaysian incorporated companies within a 90% group would no longer qualify for the exemption.

Further, it remains to be seen how the Inland Revenue Board (IRB) would perceive a transfer of property as constituting a transfer "to achieve greater efficiency in operation" as this would be subjective and difficult to prove.

(ii) **Reconstruction or amalgamation of companies**

Relief from stamp duty is also available under Section 15 of the Stamp Act 1949 in the case of reconstruction or amalgamation of companies.

In an established case law decision, reconstruction was referred to as "an undertaking of some kind ... to preserve it in some form ... in some altered form in such a manner as that persons now carrying it on will substantially continue to carry it on."

Essentially, a company is restructured in a way that the business continues to be carried on and by substantially the same persons.

In the same case law decision, amalgamation was referred to as involving "... the roll-

ing ... of two concerns into one. You must weld two things together and arrive at an amalgamation ... a blending of two undertakings."

Essentially, an amalgamation is the merger of the undertakings of two companies into one company.

In connection with the reconstruction or amalgamation of companies, the conditions for the relief from stamp duty involve either a new transferee company being incorporated in Malaysia or an existing transferee company increasing its capital with a view to the acquisition either of the undertaking (i.e. business undertaken by a company) of, or of not less than 90% of the issued share capital of an existing company (the existing company) and the purchase consideration consists of not less than 90% of the shares in the transferee company to be issued to the existing company or the shareholders of the existing company in the case where the undertaking is to be acquired or to the shareholders of the existing company if the shares are to be acquired.

To avoid the withdrawal of the relief from stamp duty, the existing company or the shareholders of the existing company, as the case may be shall not cease to be the beneficial owners of the shares in the transferee company for a period of 2 years. The Stamp (Amendment) Bill 2017 proposes to increase the period of beneficial ownership from two to three years.

It should be noted that where a claim for relief from stamp duty under either of the two circumstances above is allowed and subsequently revoked for reason of breach of conditions for exemption, the IRB has to be notified within 30 days and the relevant stamp duty plus 6% interest per annum shall become payable.

In the event that relief from stamp duty is not available, stamp duty will then feature as a cost in the corporate restructuring exercise.

While the rate of stamp duty for the transfer of unlisted shares remains the same, there is a proposal under the Stamp (Amendment) Bill 2017 to increase the ad valorem rates on the transfer of real properties ranging from 1% to 3% currently to 1% to 4%, the rate of 4% to be levied on the excess of the value of the property over RMmil.

In light of the proposed amendments under the Stamp (Amendment) Bill 2017, corporate entities contemplating undertaking corporate restructuring exercises have to be mindful of the implications of such changes particularly the additional and stringent conditions attached if relief from stamp duty is to be sought.

Consideration may also be given as to whether the corporate restructuring exercise should be accelerated ahead of the enactment of the Stamp (Amendment) Bill 2017.

An article contributed by The Malaysian Institute of Certified Public Accountants (MICPA). Lai is head of tax advisory/executive director at BDO Tax Services Sdn Bhd as well as a member of MICPA.

Impact of key changes in Stamp Bill on corporate revamp

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