STEVENS&BOLTON

If you are looking to buy or sell a business carried on by a company there are two common sale structures: the company can either sell its business and assets (asset sale) or the shareholders can sell the shares in the company (share sale). Both structures should be carefully considered with your legal and tax advisors before agreeing the terms of any transaction.

The legal and tax implications of an asset sale are very different from a share sale. Sellers (particularly individual sellers) often prefer a share sale while buyers often prefer an asset sale. Which sale structure is chosen will often be determined by the relative bargaining power of each of the parties.

The legal and tax implications of an asset sale are very different from a share sale. Sellers (particularly individual sellers) often prefer a share sale while buyers often prefer an asset sale. Which sale structure is chosen will often be determined by the relative bargaining power of each of the parties.

The purpose of this article is to consider the principal differences between the two structures. If, having considered this guide, you would like to know more or to discuss you own circumstances in greater detail, please speak to your usual contact at Stevens & Bolton or a contact listed at the end of this guide.

WHAT IS SOLD?

Share sale

In a share sale (assuming it is an acquisition of the entire issued share capital of a company) the buyer acquires ownership of the company which is carrying on the target business. If the buyer is a corporate entity the target company would become its subsidiary.

In buying shares, the buyer will acquire the company “warts and all”, with everything that sits within it. This will be all its assets, liabilities, rights and obligations (including potentially some that the buyer is not aware of). For this reason buyers in share sales often focus even more carefully on due diligence than in asset sales to avoid unpleasant surprises once they have acquired the shares.

The benefit of a share sale is that the buyer can be fairly certain that it is receiving all of the assets necessary to carry on the business, and the seller can be fairly sure that it is divesting itself of its liabilities (albeit that the seller is likely to retain some financial exposure as a result of giving warranties in the sale and purchase agreement).

In certain circumstances the target company may, prior to a sale, transfer or ‘hive out’ certain assets as part of streamlining its business. The buyer may or may not be part of this process depending on the timing of such exercise.

Asset sale

In an asset sale the buyer and the seller specify the assets being acquired and the liabilities to be assumed. This can be done in a generic way, for example “all the assets owned by the seller and used in the business”, or in a more specific way in which the target assets are expressly defined. An asset sale offers the buyer more control to choose which assets are being acquired and, in effect, enables the buyer to “cherry pick”. An asset sale is therefore a particularly useful structure if there are potential significant, unquantifiable liabilities (for example in respect of pension fund deficits, environmental matters or litigation) which the buyer wants to leave behind by clearly excluding them from the sale.

An asset sale also offers a seller the ability to sell off a defined element of its business, for example a non-core division.

TRANSFER REQUIREMENTS AND CHANGE OF CONTROL

It is important to remember that in an asset sale the direct owner of each asset changes, whilst in a share sale it is the ownership of the company (which itself owns the assets) that changes. So on a share sale the only asset that needs to be transferred from seller to buyer is the share capital of the target company.

By contrast, on an asset sale, formalities for the transfer of each separate asset must be addressed and there may be assets for which third party consent to the transfer is required. The transfer of certain assets may also require special registration requirements.

Examples:

- The transfer of a lease of a property used in the business. Landlord’s consent may be required to the assignment and, assuming the lease is registered, the transfer would need to be formally registered with HM Land Registry.
- The transfer of a business contract. Consent to the assignment of the contract may be required from the other contracting party.
- The transfer of assets which are currently charged in favour of a bank or other lender to secure loans to the seller, for example a mortgage over a property. The buyer will expect the seller to deliver those assets free of security so a release of the security will be required which may necessitate the seller repaying a loan or providing replacement security to the bank.

In general terms, on a share sale, because the owner of the assets used in the business does not change, there are no such transfer restrictions or registration requirements. An exception to this is where contracts contain a ‘change of control’ provision. Such provisions may entitle a party to terminate a contract in the event of change in the ownership of the other party to the contract. If the value of the company is dependent on contracts that contain change of control provisions, the buyer may ask the seller to obtain consent to the proposed share sale from the other contracting parties in advance, or as a condition of the transaction. The seller may, understandably, be reluctant to approach its customers or suppliers regarding a potential sale before, at least, a conditional contract has been signed.

Change of control provisions are also commonly seen in finance and loan documentation. If the parties go ahead with a share sale without the lender’s consent then this may constitute a breach of the relevant facility which may result in the facility becoming repayable on demand.

EMPLOYEES

In a share sale there is usually no change of employer because it is the employing company that is sold. There is therefore no requirement to involve the employees in the sale process save to the extent that it is commercially required (for example, to ensure that key employees will remain with the company if it is sold).

In an asset sale, where there is a transfer of a business or part of a business, the employees assigned to such business will automatically transfer to the buyer by virtue of the Transfer of Employees (Protection of Employment) Regulations 2006 (“TUPE”) along with all rights, liabilities and obligations in relation to them. Under TUPE there is a requirement to inform

and potentially consult with representatives of the affected employees prior to the transfer and failing to do so has potentially large financial penalties for the seller. For this reason the implications of TUPE and potential impact on the sale timetable and/or process need to be considered at an early stage.

TAX

Tax considerations often heavily influence the decision whether to structure a transaction as an asset or share sale. The tax implications of any given sale vary depending on the nature of the business and the parties. However, as a general rule, asset sales tend to be less tax efficient for sellers as there is a potential double tax charge involved since the selling company may be taxed on the sale of the assets and then the shareholders of the company may be taxed on any distribution or extraction of the sale proceeds from the company. On a share sale the selling shareholder is subject to tax. However such tax liability may be reduced or set off in certain circumstances.

WHICH ROUTE IS RIGHT FOR YOU?

We have set out in this guidance note some of the key differences between an asset and share sale. These differences, amongst others, will influence the choice of sale structure. It is important therefore to take professional advice at an early stage in the sale process so that both sides fully understand the implications of any proposed structure and any possible alternatives. Failure to do so can result in additional costs and time delays at a later stage if the sale structure needs to be revisited.

KEY CONTACTS

For further information about any of the issues raised in this guide, please contact:

Nick Atkins
Partner
T: +44 (0)1483 401232
M: +44 (0)7525 002012
E: nick.atkins@stevens-bolton.com

Richard Baxter
Senior Partner
T: +44 (0)1483 734213
M: +44 (0)7887 713516
E: richard.baxter@stevens-bolton.com

Jenny Robertson
Partner
T: +44 (0)1483 734204
M: +44 (0)7790 209355
E: jenny.robertson@stevens-bolton.com

Francesca Messina
Senior Associate
T: +44 (0)1483 734238
M: +44 (0)7557 677239
E: francesca.messina@stevens-bolton.com

STEVENS&BOLTON

Wey House, Farnham Road
Guildford, Surrey, GU1 4YD
Tel: +44 (0)1483 302264
Fax: +44 (0)1483 302254
DX 2423 Guildford 1
www.stevens-bolton.com

The information contained in this guide is intended to be a general introductory summary of the subject matters covered only. It does not purport to be exhaustive, or to provide legal advice, and should not be used as a substitute for such advice.

© Stevens & Bolton LLP 2019.

Stevens & Bolton LLP is a limited liability partnership registered in England with registered number OC306955 and is authorised and regulated by the Solicitors Regulation Authority with SRA number 401245. A list of members' names is open to inspection at the above address.

DEPARTMENTAL\13403919v1