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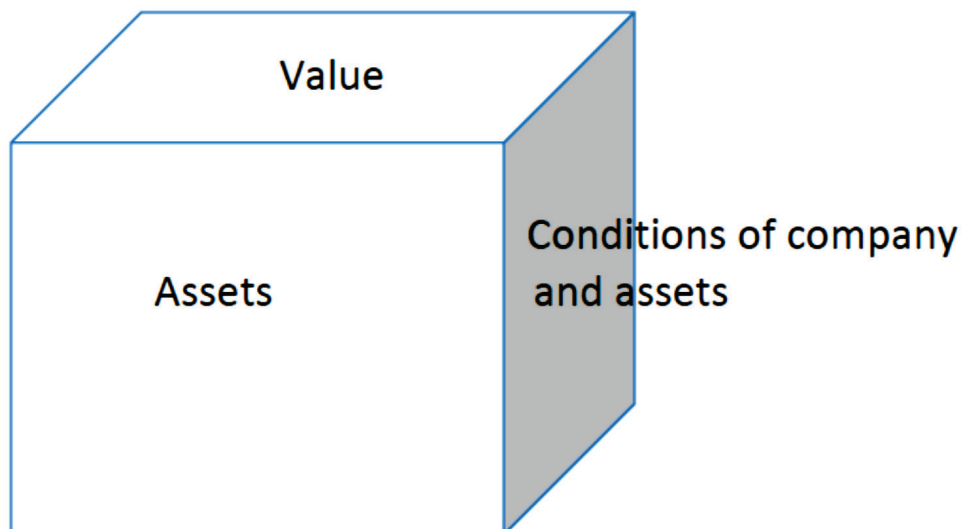
Acquisition – A Four Dimensional Approach

Important Notice: This article is for general reference only and does not constitute legal advice in relation to any specific case.

Introduction

Corporate growth/ owner's exit is often achieved by way of a sale and purchase of business. The sale may be a sale of the business together with business assets, or by way of sale of all the shares in the company through which the business is owned and operated. The seller provides information of the business and the company to the buyer. The parties negotiate the terms of sales. A sale and purchase agreement (the "SPA") is prepared and signed by the parties. The SPA sets out the basic terms like price, procedure of transaction, etc. The core part is in to clearly define what is to be sold and bought.

This is very easy when we define the subject matter of sale on a three-dimensional basis:

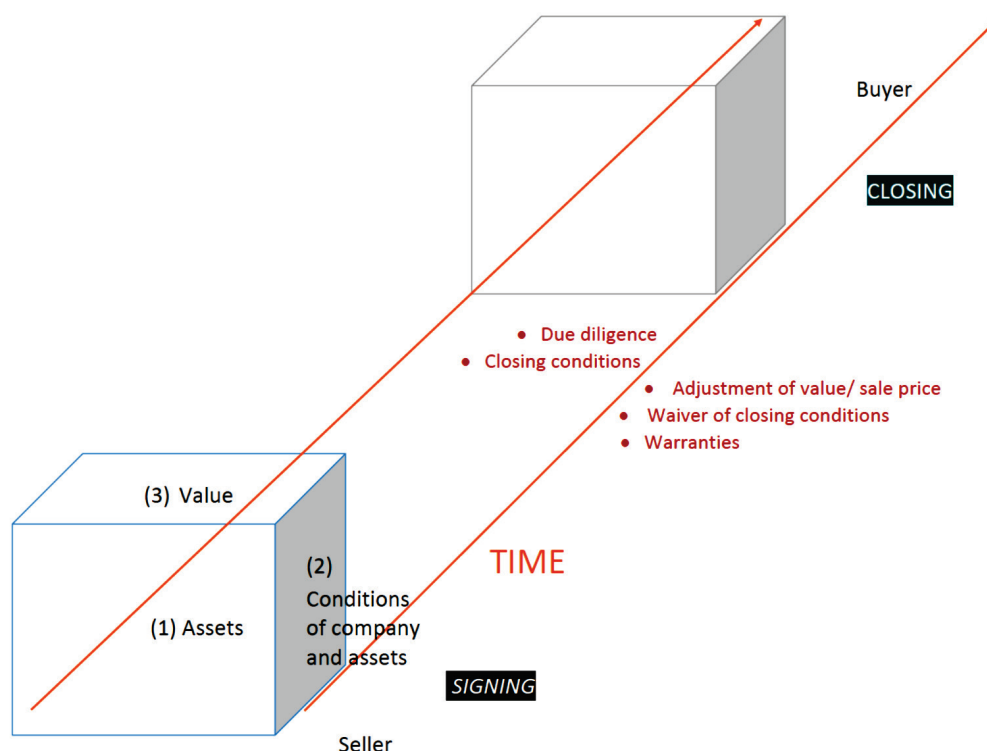


However, the above concept has omitted the element of time. The matter becomes more complicated when the subject matter of sale



is, unavoidably, defined on a four-dimensional basis.

The four-dimensional concept helps parties and their professional advisers to handle a company/ business sale with less misunderstanding and close the gap of expectations between the parties. In practical terms, the parties can truly agree upon what is being sold and bought only on a four-dimensional basis. The following diagram illustrates why:



The SPA

The SPA of course gives the basic definition of the subject matter of the sale on a three-dimensional basis:

- The company/ shares in the company
- The company's businesses and assets
- The conditions of the company, its businesses and assets

However, what is being sold and bought is actually *four-dimensional* in nature. We must add the element of time to the formula. The parties therefore need to deal with these things in the SPA:

- All the three-dimensional matters will remain the same as at the actual transfer of the company (closing) and, for some matters for a



certain period of time (eg that a certain critical government licence remains valid for at least 2 years after closing; that the IRD will not go after the company after closing).

- Changes from the date of the SPA (or an earlier accounting reference date) to closing that affect the value of the assets of the company (eg drop in inventory level) will be reflected by way of adjustment of the sale price stated in the SPA.
- The seller has to do certain things before closing (eg to dissolve a dormant subsidiary or transfer a particular asset the Seller wants to keep).

The CPs

The SPA therefore requires the satisfaction of certain “conditions precedents” (“CPs”) before closing takes place. The following are the typical types of CPs for the sale of a private company:

- The warranties given in the SPA (as qualified by the seller’s disclosure letter) are repeated as at the date of closing. As regards how the seller may protect itself from liabilities for breach of warranties by qualifying the warranties, see our article on the “*disclosure letter*”. In effect, the SPA and the disclosure letter, together form the core “sale document”.
- Where some warranties are not qualified by the disclosure letter and are not satisfied (or are “breached”) at the time of closing, but yet the buyer chooses to proceed to close the deal, the buyer may waive such warranties (with or without conditions). The conditions upon which the waiver is given, if to be satisfied before closing, are in effect also CPs.
- Third party approvals, eg consent from a landlord, must be obtained before closing.
- Problems must be gone - eg disposal of an ongoing court case.
- Things must go on – eg maintenance of the current business operation from signing of SPA till closing, renewal of business licence, etc.
- Calculation of the asset value as at closing and adjustment of purchase price.
- Other matters that the parties need to take care of before closing, e.g. the successful signing for a substantial sales contract by the company.



Concluding note

The sale and purchase of a company is a dynamic, four-dimensional process. With a clear understanding of this nature, parties to the deal and their professional advisers will find it much easier to handle the process efficiently and effectively.

TAP has handles sale and purchase of companies in various industries. We handle the client's transaction with in-depth understanding of the buyer, the seller and the subject company, its people and its industry, providing quick, practical and effective solutions on the one hand, and safeguarding and maximising the client's interests on the other.

For enquiries, please contact us.

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