SHARE TRANSFERS IN CAMBODIA, LAOS, MYANMAR AND VIETNAM: CAPITAL GAINS TAX PERILS, REGISTRATION PITFALLS, AND OFFSHORE INDIRECT TRANSFERS

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Divesting of or purchasing a shareholding in a local company is always a pivotal moment in the investment cycle. Commercial negotiations, practical implementation, and tax considerations need to converge into a workable and timely plan that meet both the buyer's and the seller's objectives. Often, requirements imposed by commercial registration and tax efficiency or compliance are "**hard issues**" which cannot be changed, and which shape the whole transaction structure and sequence.

In this contribution, we explore the issues that too often come up only after the negotiations on the deal have been finalized and the focus of the parties turns to how to implement the transaction. We touch upon a wide range of issues, some modest and practical, others complex and strategic. Is the capital gains tax ("**CGT**") situation clear and beyond any debate, especially in terms of how much and who is responsible for payment? Or is the buyer, through the local target, the one who ends up with a somewhat undetermined tax liability? Can the share transfer be registered immediately or are there practical impediments, such as signatures required from people who are offshore (a concern in the COVID era and beyond) or local approvals that are likely to cause delays? How straightforward is the calculation of the stamp duty on the share transfer? If this turns out to be (much) more than planned, will it delay the deal? We also look into the CGT exemptions the parties may want to claim based on the double taxation agreements ("**DTA**") in the region. Finally, we explore if our focus countries set forth a predictable tax treatment when local shareholdings are the subject of an offshore, indirect transfer (through the transfer of shares of the local company's offshore special purpose holding vehicle ("**SPV**")).

These and other legal and tax issues are the subject of the below contribution, exploring direct and offshore indirect transfers of shares in Cambodian, Lao, Myanmar, and Vietnamese companies.

Some pitfalls in registering an offshore sale of shares in a Cambodian company

In Cambodia, share transfers need to be registered with the Ministry of Commerce ("**Cambodia MOC**"), which maintains an online registry of commercial companies. Most day-to-day corporate changes can be registered online, without human intervention, but not share transfers. The documents for a share transfer need to be reviewed by the authorities, and they may have additional queries. Processing a transfer of shares may take between four to six weeks, in normal cases, and that is assuming all goes smoothly.

A share purchase agreement that is signed overseas poses additional practical problems. For a share transfer signed onshore, the Cambodia MOC expects a document certified by a Cambodian lawyer if the transferor shareholder cannot be physically present at the MOC to execute the share transfer documents. In the case of an instrument that is signed overseas, perhaps by counterparts, the authorities might ask for additional assurances that the instrument has indeed been signed by the person who claims to have signed it. In our practical experience, this sometimes triggers unforeseen delays at crucial moments, with the local authorities asking to see a notarization or certification of a signature that was already placed weeks ago. The fact that this is a case-by-case requirement adds to the uncertainty.

Similar practical problems stem from shareholders' or directors' resolutions issued in the country of the selling or even the buying shareholders. The Cambodian officials might ask for notary or legal certification of such documents in the company's country, which is not always feasible or which was not originally foreseen. For example, at times we have had problems with non-BVI-resident shareholders of BVI companies holding shares in Cambodian companies. These non-residents cannot easily obtain certification in the BVI, where they don't live and maybe never travel to, since they cannot present themselves in person in the BVI.

Should the Cambodian target company hold an investment license, a so-called qualified investment project ("**QIP**"), then the investment regulator, the Council for the Development of Cambodia (the "**CDC**") will need to approve the share sale before it can be processed by the Cambodian MOC. This process also unavoidably involves human intervention, since the CDC requires submission of the application documents in hard copy. The work can usually be completed within 10 weeks from the date complete documentation is submitted to the CDC. Within 15 days of the CDC's approval, the applicant must process the share transfer with the MOC by submitting the share transfer application documents in both hard copy as well as through the MOC's online system.

In summary, even a done deal may take weeks or even months to really implement in Cambodia, especially when it involves a company with a QIP. The longer it takes, the greater the risk that some dissatisfied supplier, former shareholder, or employee will block the transfer. In some special and important cases, the time needed can be shortened, which reduces the risk.

Frequent disputes on the 0.1% stamp duty for share transfers in Cambodia

After registration of the share transfer by the Cambodian MOC, it must be registered with the Cambodian tax authority (the "**Cambodia GDT**"). The process usually takes between six to eight weeks to complete. Applications and the share sale and purchase agreement ("**SPA**") are required to be submitted to the Cambodia GDT, and stamp duty of 0.1% of the "**market value**" of the shares being transferred must be paid. The issue of the "**market value**" of the shares frequently becomes a point of contention between the taxpayer and the Cambodia GDT, since there is not much detail on how such a value is determined.

Luckily, however, stamp duty and disputes thereon do not delay the commercial share transfer registration.

As a rule, the buyer has the primary tax liability for this duty.

Uncertainties about future capital gains tax on the transfer of shares in a Cambodian company

Cambodia prepared its Law on Taxation to provide for a CGT as far back as 2006-2007, but implementation had to wait until 1 July 2020 under Prakas No. 346 MEF.Prk. The entry into force of the application of CGT has been set for 1 January 2022. Once in force, a gain on the sale of shares in a Cambodian company will be taxed at a rate of 20%.

Nevertheless, the GDT officials have not sat on their hands in the meantime when it comes to taxing share transfers. Lacking a solid general legal basis for taxing offshore shareholders of Cambodian companies on their share transfers prior to Prakas No. 346, the Cambodia GDT has turned to a somewhat creative interpretation of taxes on profit distribution. It has often held that the gain derived from selling a company with retained earnings can be equated to a profit distribution to the seller, triggering a withholding tax liability. Withholding tax on dividends, a concept that is indeed rather broadly defined, is set at 14% for dividends paid to non-residents (reduced under a DTA). This interpretation, if it even can be accepted, would in any case not hold water in relation to the assessment of capital gains when there are no retained earnings at the time of sale.

Cambodia's DTAs do not always offer many benefits when it comes to realizing a gain on Cambodian shares. First of all, Cambodia's tax treaty network remains limited. At the time of writing, Cambodia has only nine tax treaties that are presently in force, with Brunei, China, Hong Kong, Indonesia, Malaysia, Singapore, South Korea, Thailand and Vietnam.

These DTAs generally follow the OECD Model with respect to capital gains on shares. For shares of Cambodian companies in general, subject to the exceptions below, the DTAs provide that only the country of the seller of the shares may tax the gain. So for example, the Singaporean shareholder of a Cambodian company realizing a gain on those shares, may not be taxed in Cambodia.

There are two main exceptions to this: (i) Cambodia has the right to tax when a foreign shareholder realizes a gain

on shares of a Cambodian company if the shares derived a certain percentage (often 50%) of their value directly or indirectly from immovable property situated in Cambodia; and (ii) the DTA with Thailand, which allows Cambodia to tax the gains on Cambodian shares in all situations. Please note that an advance approval from the Cambodia GDT is required before the reliefs and exemptions under the relevant DTA can be applied.

Registering a sale and purchase of shares in a Myanmar company is usually straightforward

In Myanmar, the Directorate of Investment and Company Administration (the "**DICA**") must be notified of any share transfer or change in shareholding through the submission of Form C-3 via the DICA's online MyCO system within 21 days of when the share transfer is entered in the company's register. If as a result of the share transfer, the company has either become, or ceased to be, a "**foreign company**" (i.e. a company where more than 35% of its shares are held by non-Myanmar nationals), the notice must state this.

In practice, the process is easy and fast. You sign a form online, submit it, and wait for approval. That approval usually comes after just a day or two. The transfer is not instantaneous, although the Myanmar Companies Law does provide that the entry in the shareholders' register is determinative when it comes to the transfer of the title to a share.

Within 28 days after the share transfer is entered in the company's register, the company will have to complete and have ready for delivery the certificates of all shares transferred, unless the conditions of issuance of the shares provides otherwise.

Stamp duty for transferring Myanmar shares remains a problem

Myanmar imposes stamp duty on the share transfer instrument at the rate of 0.1% of the value of the transferred shares. Stamp duty should be affixed either before or on the day the share transfer instrument is signed, otherwise a penalty of either MMK500 or three times the overdue stamp duty may be imposed at the discretion of the stamp duty collector. Therefore, it is better to stamp the instrument first and then sign it rather than vice versa to avoid any risk of exposure to penalties.

It is noteworthy that the party responsible for payment of the stamp duty can be agreed under the share transfer instrument. In the absence of an agreement, the Myanmar Stamp Act stipulates that the person executing the instrument is responsible for payment. However, in practice, the buyer usually bears the stamp duty costs.

Under a government assessment process, the instruments are submitted to the stamp offices and the stamp duty collector will review the instrument and determine the applicable stamp duty. The stamp duty collector will either affix stamps on the instrument with the official endorsement on the stamps or issue a payment voucher (a *chalan*) of that value, which is required to be deposited in the stamp office's bank account at a designated Myanma Economic Bank.

The stamping process takes about two to three days, including the time taken by the stamp duty collector to review the agreement to assess the applicable stamp duty. The stamp duty collector may request a Myanmar version of the share transfer instrument for their understanding, even though it is not a requirement under the law.

Additional regulatory approval requirements in Myanmar

Pursuant to the Myanmar Investment Rules, an investor holding an investment license (a permit or endorsement) from the Myanmar Investment Commission (the "**MIC**") must seek its approval for a transfer (or series of transfers) that would result in an unaffiliated entity acquiring a majority ownership or control of the investor, or more than 50% of the assets. In reality, such approvals are required for any percentage transferred, even minority stakes.

Does this mean that the sale of shares of an offshore holding company, which owns a Myanmar subsidiary, also requires the approval of the MIC? This remains a debated issue. The reference to "control" in the regulations strongly suggests that an offshore indirect transfer also counts as a transfer. In practice, this interpretation is not consistently followed by the authorities.

Once the MIC gives its approval, the actual transfer is performed by way of a written agreement and is notified to the company, which in turn notifies the DICA as above.

In addition, specific approvals from the relevant ministry will be required in some sectors. For example, a transfer of shares in a company that has a power purchase agreement with the Electric Power Generation Enterprise may require an approval from the Ministry of Electricity and Energy subject to the provisions under that agreement. A company that holds a telecommunications license, such as an NFSI, NFSC, NS, or AS issued by the Post and Telecommunications Department ("**PTD**") under the Ministry of Transport and Communications is required to obtain prior approval from the PTD for the share transfer.

Capital gains tax on selling shares in a Myanmar company

In Myanmar, CGT is imposed under the Myanmar Income Tax Law 1974 ("**ITL 1974**") and is applicable to both residents and non-residents deriving a profit for the sale, exchange, or transfer of capital assets, which include land, buildings, vehicles, shares, bonds, securities, and similar instruments, and work-related capital assets.

Taxable capital gain is calculated as the sale proceeds less the tax book value of the asset and the expenses incurred in the sale of the asset. For share transfers, CGT would be imposed on the sales value of the shares less the original value of the shares and the expenses incurred in selling the shares (including advisory fees and legal fees related to the transfer of the shares).

The CGT rate is 10% for both residents and non-residents as per the Union Tax Law 2020, which is enacted on a yearly basis to revise the tax rates in Myanmar. Capital gains are taxed at progressive rates ranging from 40%, 45%, and 50% for entities engaging oil and gas exploration and production activities (i.e. upstream oil and gas operators) in Myanmar.

Therefore, a foreign-based seller of shares in a Myanmar company will be taxed on any gain, unless the non-resident is a tax resident of a country that has a DTA with Myanmar, reliefs or exemptions are provided under such DTA, and a prior approval from the Internal Revenue Department is obtained for application of such reliefs or exemptions. Myanmar has a DTA in force with eight countries – India, Laos, Malaysia, South Korea, Singapore, Thailand, the UK and Vietnam. The majority of these DTAs provide taxing rights to Myanmar if a certain minimum shareholding threshold is reached. For example, under the Singapore-Myanmar DTA, Myanmar will have taxing rights only if the Singaporean tax resident owns at least a 35% share in the Myanmar company and the total shares transferred during the fiscal year is at least 20% of its total shareholding in the company. It is also noteworthy that the Singapore-Myanmar DTA is the only DTA in force that has a capped CGT rate of 10%.

It is useful to know that in Myanmar, the CGT is payable by the entity deriving the gains, i.e. the seller. The CGT return must be filed within 30 days from the date the sale or transfer agreement is signed, even if no gain is realized.

Future CGT on the transfer of shares in a Myanmar company

Myanmar announced a draft Income Tax Law ("**draft ITL**") back in 2020, which will repeal the ITL 1974. Taxing of gains realized from the transfer or sale of an asset is more complicated and challenging, as only gains realized from a chargeable asset will be subject to CGT.

Under the draft ITL, a Myanmar asset is clearly defined as (i) immovable property situated in Myanmar; (ii) membership interest in a company if such company derives more than 50% of the membership interest directly or indirectly via one or more than one legal intermediary from immovable property situated in Myanmar owned by such company; (iii) membership interest in a resident company or interest in a professional partnership; (iv) an option over or the right to acquire an asset referred to in items (i) to (iii).

It is also interesting to note that no capital gains or losses will be realized from the transfer of assets between related resident companies in a corporate group restructuring. In other words, no CGT will be imposed in a restructuring of related resident companies, which gives flexibility in terms of changing the local ownership structure.

There are specific new CGT provisions regarding farm-out transactions for the upstream oil and gas and mining sectors under the draft ITL, which even captures capital gains on indirect transfers of petroleum and mining rights. A non-resident will be subject to CGT in Myanmar if: (i) they derive gains from the sale of a membership interest in a company; and (ii) more than 50% of the membership interest is derived directly or indirectly from minerals, mining, or petroleum rights held by the licensee; and (iii) such gains are Myanmar-sourced income.

However, under the draft ITL the CGT rate is set at 10% for all sectors, including the upstream oil and gas sector, which currently has progressive rates ranging from 40%, 45%, and 50%.

Registering a sale and purchase of shares in a Lao company

In Laos, the formalities required for a transfer of shares are fairly extensive. The procedure and authorities differ somewhat depending on the company's activities, roughly divided into three groups: (i) controlled business activities (such as mining, media, and hospitality); (ii) concession business activities (such as plantations, electricity generation, and telecommunications); and (iii) general business activities (basically all others).

For general business activities, the transfer documentation must be submitted to the Notary Public Office of the Ministry of Justice for notarization and to the State Assets Management Department of the Ministry of Finance for registration, after which various documents are filed with the enterprise registry office at the central, provincial, or district level, depending on where the business is registered.

For the transfer of shares of companies investing in controlled business activities or concession business activities, after notarization by the Ministry of Finance, the transfer documentation is submitted to the Committee for Investment Promotion and Management at the Ministry of Planning and Investment or the provincial or capital office of planning and investment or district or city offices of planning and investment depending where the business is registered.

As per the Enterprise Law 2013, ownership passes from the seller to the purchaser upon registration of the share transfer with the enterprise registry office.

These processes take between two to six months, depending on the type of activity and various other factors.

In our experience, a recurring pitfall that may delay a share sale registration is pending litigation. Claims, whether well substantiated or not, may trigger extra delays and scrutiny. A frequent practical issue is the translation of the transaction documents from English into Lao, which is quite time consuming.

Capital gains tax on selling shares in a Lao company

Laos has changed its tax regime on gains on shares repeatedly in the past decade. The Lao Income Tax Law of 2011 imposed CGT at the rate of 10% on the gains realized from the transfer of capital assets, including shares. Starting from 2015, a separate category of income tax of 2% of the share transfer price was introduced specifically for the transfer of shares that lacked supporting documents, such as a share transfer agreement and financial statements. It is noteworthy that CGT at the rate of 10% was still imposed on gains realized from the transfer of other capital assets under the Income Tax Law of 2015.

However, recently, the Income Tax Law of 2019 abolished CGT but kept the 2% income tax on the share transfer price and expanded it to apply to all share transfers, not just those without supporting documents. This poses a considerable burden on sellers who actually do not realize a gain in the first place, but are then taxed on income they did not earn.

Normally, the party who earns the income, the seller, is responsible for paying the 2% income tax on the sale of shares. However, the Instructions of the Income Law of 2019 require that

the enterprise whose shares are being transferred must calculate, withhold, and pay the income tax through its registration on behalf of the seller within 15 working days from the date the tax is calculated and withheld.

Laos has DTAs in force with 14 countries – Belarus, Brunei, China, Indonesia, Kuwait, Luxembourg, Malaysia, Myanmar, North Korea, Russia, Singapore, South Korea, Thailand and Vietnam. The majority of the DTAs do not include specific capital gains provisions regarding the transfer of shares, which means that Laos would not have any right to impose income tax on a seller resident in the other DTA country, even when selling shares in a Lao company. A few of the DTAs provide taxing rights to Laos if a certain minimum shareholding is reached. As an example, under the Laos-Myanmar DTA, Laos can tax gains derived by a Myanmar tax resident company if such company owns at least 25% of the shareholding in the Laos company.

The separate 2% tax impost triggers a debate on the application of the DTA's CGT regime. The tax authority might be unsure that the DTA provides protection to the taxpayer for the 2% tax impost, which is distinguished from the 10% on net gains Laos used to have. In our view, that would not be the correct interpretation of tax treaty law. As long as the 2% is any form of income tax, low or high, based on revenue or on net gain, the DTA applies and Laos can only impose its domestic tax within the borders allowed by the DTA.

Therefore, our Laos tax team is working closely with the tax authority to discuss the application of capital gains provisions under the DTA in relation to gains derived from the sale of shares so that a seller from the DTA country should be entitled to enjoy the tax reliefs in accordance with the DTA provisions. As long as there is no official confirmation of the tax authority's point of view, tax relief under the DTA remains rife with uncertainties. Seller and buyer will not be certain if that 2% is due, and when this risk might expire.

Registering a sale and purchase of shares in a Vietnamese company

In Vietnam, share transfers that involve foreign investors will, at least to some degree, involve the Department of Planning and Investment ("**DPI**"), the investment regulator that also oversees the company registrar. There are formal requirements for shares in companies that are active in conditional or sensitive sectors, and for majority stakes in companies, but in reality, even minority share blocks will need at least some facilitation by the DPI. The depth of the review by the DPI depends on the sector, but it may extend to substantial rather than purely formal issues, such as the financial capacity of the buyer. Several rounds of back-and-forth discussions are often needed. Nevertheless, in most cases, as long as regulations and conditions are met, the transfers are approved, although this may take a few months rather than the statutory period of 15 days.

The target company where the foreign investor intends to make a capital contribution or share acquisition will file the registration dossiers to the local DPI for assessment. The dossiers will include a copy of the SPA. In practice, this is interpreted as being a full executed version of the SPA, rather than an unsigned version or a memorandum of understanding. This triggers issues for the buyer, as discussed in the tax section below.

In certain cases where the investment by the foreign investor is subject to strict conditions or sensitive sectors, the DPI may need to obtain various non-objection opinions from various ministries (e.g., the Ministry of Planning and Investment, Ministry of Finance, Ministry of Industry and Trade), which can delay the registration process. During this assessment, the foreign investors may have to amend the registration dossiers many times to meet the requirements of the licensing authorities.

After securing the approval, the target company will conduct the legal procedures to update the shareholder registry, business registration certificate, and investment registration certificate.

Note also that if a share acquisition transaction meets the threshold of economic concentration, the National Competition Committee will have to be notified and the transaction will require its approval before it can proceed.

Capital gains tax on selling shares in a Vietnam company

When it comes to transferring shares, Vietnam distinguishes between (i) the transfer of a "capital contribution portion" (taxed at 20% of the net gain) and (ii) a securities transfer (taxed at 0.1% of the transfer price). Generally, individual portfolio investors buying shares listed on the stock market are buying securities, strategic investors selling a stake in their Vietnam subsidiary LLC are transferring capital. There are some grey areas, but we can safely assume that strategic sales between foreign corporate shareholders are usually taxed at 20% of the net gain.

Vietnam does not have a separate CGT but rather taxes income from the transfer of capital and securities as a class of "other taxable income" under corporate income tax (for corporate sellers) and personal income tax (for individual sellers).

Resident buyers have the obligation to withhold, declare, file, and pay the tax on behalf of the seller. In case the buyer is also a non-resident, the target company whose shares are being sold has the obligation. In terms of tax declaration filing, the current rule provides that "the tax declaration must be submitted within 10 days from the day on which

the competent authority approves the capital transfer *or the transfer date agreed by all parties in the transfer contract* (if the transfer is not subject to approval)" (Circular 151-2014). This is a problem. Under the Law on Investment 1996, the rule clearly stated that "The transfer of capital shall be effective *only after the agency performing State management over foreign investment approves the capital transfer contract*." This rule no longer exists under the Law on Investment 2005, 2014, and now 2020; hence, an issue arises, as it is conceivable that DPI registration might not yet be completed and could even still be rejected, while the tax would be due to be declared and settled.

Is there a tax exemption for the capital gain based on the Vietnam DTAs?

In the DTAs that Vietnam has concluded, there are many different arrangements. There are four possible scenarios (always assuming an offshore seller transfers shares in a Vietnamese company to another offshore buyer):

1. Vietnam may levy the 20% tax on the net gain without any limitation, in all cases. An example of that can be found in the DTA with Thailand (Art. 13 (4) as below): "*Gains from the alienation of any property, other than those referred to in paragraphs 1, 2 and 3 shall be taxable only in the Contracting State of which the alienator is a resident. Nothing in this paragraph shall prevent either Contracting State from taxing the gains or income from the sale or transfer of shares or other securities.*" Other examples are the DTAs with New Zealand (*"5. Nothing in this Agreement affects the application of the laws of a Contracting State relating to the taxation of gains of a capital nature derived from the alienation of any property other than that to which any of the preceding paragraphs of this Article apply."*) and the Philippines *("4. Gains from the alienation of shares of a company, and interest in a partnership or trust may be taxed in the Contracting State of which such company, partnership or trust is a resident.")*.
2. Vietnam may only tax the company issuing the shares if it principally holds immovable property. This solution is found, for example, under the DTA with the US, Art. 13 (2.b) which reads: "*gains from the alienation of shares of capital stock of a company, or of an interest in a partnership, trust or estate, the property of which consist directly or indirectly principally of immovable property (real property) situated in Viet Nam may be taxed in Viet Nam. For the purposes of this subparagraph (b), "principally" in relation to ownership of immovable property (real property) means the value of such immovable property (real property) exceeding 30 percent of the aggregate value of all assets owned by the company, partnership, trust or estate*". Other examples are the DTAs with Hong Kong and Singapore.
3. Vietnam may only tax the gain on shares issued by an entity that is a resident of Vietnam if the shareholding exceeds a certain limit, for example: Art. 13 (5) of the DTA with Hong Kong reads that "*Gains derived from the alienation of shares, other than the shares referred to in paragraph 4, of not less than 15 per cent of the entire shareholding of a company which is a resident of a Contracting Party may be taxed in that Contracting Party.*"
4. The last possibility is the one where Vietnam may not tax any gain on shares at all. In this case, the treaty provides that only the other treaty-state is allowed to tax gains on shares realized by one of its residents, not the state where the company that issued the shares that are being transferred is located. This was originally found in the DTA with Singapore: *"4. Gains from the alienation of any property other than that referred to in paragraphs 1, 2 and 3 shall be taxable only in the State of which the alienator is a resident. [Para 1,2,3 refers to immovable property, movable property and ships/aircraft."*

However, this was amended and replaced with a new clause under the second protocol dated 12 September 2012 as follows:

> *"4. Gains derived by a resident of a Contracting State from the alienation of shares, other than shares of a company quoted on a recognized stock exchange of one or both Contracting States, deriving more than 50% of their value directly or indirectly from immovable property situated in the other Contracting State may be taxed in*

that other State.

5.Gains from the alienation of any property other than that referred to in paragraphs 1, 2, 3 and 4 shall be taxable only in the State of which the alienator is a resident."

Another example where Vietnam cannot tax share transfers at all is under the DTA with Laos, which reads: "*4. Gains from the alienation of any property, other than that as mentioned in paragraphs 1, 2 and 3 shall be taxable only in the State of which the alienator is a resident. [Para 1,2,3 refers to immovable property, movable property and ships/aircraft."*

In Vietnam, a DTA exemption or reduction is not automatically applied. Taxpayers (normally the target company) must file a notification to the local tax authorities at least 15 days prior to the transfer.

Offshore indirect sale of a shareholding in a local company through an SPV

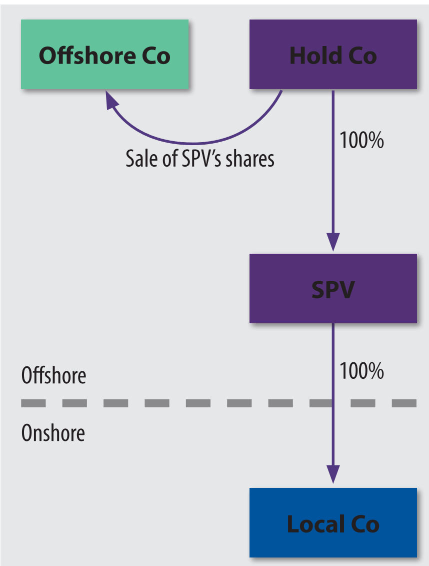
An offshore indirect share transfer, for example by means of transferring the shares in a foreign SPV which in turn holds the shares of the local company, is the traditional and probably most usual way of transferring shares of local companies. Investors typically have set up an offshore SPV when initiating their investment in the local company. This allows them to divest of some or all of the shares in the SPV, which owns the local company, and avoid a direct transfer in local shares. More often than not, the purpose is to steer clear of local taxes and to avoid having to secure local approvals or registrations.

Under **Cambodian** tax laws and regulations, as was mentioned above, presently CGT on directly selling shares is not yet in effect, let alone on offshore indirect sales. As far as we are aware, there have been no attempts at taxing offshore indirect share transfers. However, the language of the new law does not make it clear that offshore indirect transfers are, or are not, taxable. It all comes down, once again, to one question: can we treat the offshore sale of the foreign shares as if it is a sale of the underlying local shares? Cambodian tax law does not provide a conclusive answer for that at this point in time.

In **Myanmar**, the general tax rules leave it open as to whether an offshore indirect transfer would trigger Myanmar taxes. The ITL 1974 provides that "if a non-resident foreigner has received income by any of the following means, that income received shall be deemed as income received inside Myanmar and income tax shall be assessed accordingly: [...] income received from *any capital asset inside Myanmar*." From this it is unclear whether the shares of a foreign SPV could be "a capital asset inside Myanmar," or if one could argue that the non-resident has received income from the local shares through the sale of the overseas shares. The matter is somewhat clearer in oil and gas, where the Myanmar asset is held through a branch of a foreign SPV. Regulations in that sector clearly identify the sale of those foreign SPV shares as a taxing trigger.

In **Laos**, there does not seem to be much precedent taxing offshore indirect transfers of shares in an offshore SPV that holds shares in a Lao company. The primary focus remains on the direct shareholder or investor. The reason being is that only the direct shareholders are registered in the enterprise registrar's database, and therefore, any changes in the offshore shareholding are not taken into account. The laws and regulations are written, however, using general source terms, so one cannot exclude that a more expansive interpretation may be developed by the tax authorities in Laos.

In **Vietnam**, there have been a few cases of offshore indirect acquisitions being taxed, as the transactions came to the attention of the public and the tax authorities. The Vietnamese GDT has taken the position in several advance tax rulings that an offshore indirect share sale may very well have domestic tax consequences in Vietnam. For example, the Vietnamese GDT issued official letter No. 766/TCT-DNL dated 29 February 2016 in response to a question from a taxpayer on the tax implications of an offshore sale at the Hong Kong level and the conclusion of the letter confirmed that the transaction is subject to tax in Vietnam under domestic law. With the same interpretation, the Ho Chi Minh City Tax Department, in replying to a question from an international school in Vietnam on its tax obligations if its top parent company (a UK resident) transfers its SPV (in the BVI) that in turn holds



100% of the capital. The tax authorities confirmed that the transaction is subject to tax in Vietnam. This is based on a rather broad, or perhaps more, an "economic" interpretation of the general source principles, which state that non-residents are taxable in Vietnam on "incomes derived in Vietnam from […] from transfer of capital, projects of investment, right to contribute capital […] , regardless of the location of business premises" (Decree 12/2015). So in some ways we could say that the Vietnamese GDT's reasoning is that as there is no exception for offshore indirect share transfers in the source rules, they must be deemed taxable.

Though we can safely assume that the Vietnamese GDT will seek to levy corporate income tax on indirect offshore share transfers, we are still far from having a predictable tax treatment. One of the tax rulings concerned an SPV that had nothing except the 100% shareholding in the Vietnamese subsidiary. What if there are two or three different participations, in different countries? Or what if we are talking about a distant takeover, where the Vietnamese subsidiary is 3, 6, or 8 levels away from the transaction? Furthermore, there is no guidance on how to calculate the gain in case many local shareholdings over different countries are sold at the same time by means of a sale of the holding company.

Total number of DTAs in force for each country

	Cambodia	Myanmar	Laos	Vietnam
DTAs in force	9 countries	8 countries	14 countries	75 countries

Taxing rights on the capital gains in each country under DTAs with Singapore and Hong Kong

DTA country	Cambodia	Myanmar	Laos	Vietnam
Singapore	• Cambodia may only tax gains on the sale of shares of an immovable property company.	• Myanmar may tax if the Singapore resident holds at least 35% of the shares (directly or indirectly) in the Myanmar company AND transfers 20% or more of their shareholding (in a 12-month period). • The CGT rate is capped at 10%.	• Laos may not tax any gain on the sale of shares.	• Vietnam may not tax any gain on the sale of shares except for the shares of an unlisted company holding mainly immovable property.
Hong Kong	• Cambodia may only tax gains on the sale of shares of an immovable property company.	• No DTA with Hong Kong.	• No DTA with Hong Kong.	• Vietnam may tax gains if a Hong Kong resident transfers a shareholding of 15% or above, or shares in a company holding mainly immovable property.

Overview Table

	Cambodia	Myanmar	Laos	Vietnam
How long does it take to register a share transfer, assuming no approvals are needed from special ministries?	Four to six weeks for normal companies assuming no challenges from the authorities. An additional 10 weeks for QIP companies.	One to two days.	Two to six months assuming no pending litigation.	Generally, 15 working days. In practice, it might be longer if there are many requests for amendments of the registration dossier from the licensing authorities.
Can the process be completed at a distance or online?	It cannot, as the documents will be reviewed in hard copy format by the authorities.	The process can be completed online.	It cannot, as the transfer documentation must be submitted for notarization.	It cannot, as the registration requires submission of a hard copy dossier.
Is there a stamp duty or equivalent?	Yes, 0.1% of the "market value" of the shares, payable by the buyer.	Yes, 0.1% of the value of the transferred shares; the party responsible for payment can be agreed under the share transfer instrument. Usually, the buyer pays.	No.	No.
Is there a domestic capital gains tax?	CGT at 20% on net gains will come into force only on 1 January 2022. However, in the meantime, the GDT taxes 14% WHT on the retained earnings that belong to the portion of the shares sold.	Yes, 10% CGT on net gains calculated as the sales value of the shares less the original value of the shares and the expenses incurred in selling the shares.	Yes, income tax of 2% of the transfer price applies.	Yes, 20% on net gains; the gains are treated as "other income" under the taxable income definition of corporate income tax.
Who needs to pay this CGT and when?	CGT is payable by the seller and it is required to be paid to the GDT within three months after the gain is realized.	CGT is payable by the seller deriving capital gains within 30 days from the date the share transfer instrument is executed. In addition, the CGT return is required to be lodged within 30 days.	The enterprise whose shares are being transferred must withhold and pay the income tax through its registration on behalf of the seller within 15 working days from the date the tax is withheld.	The buyer has the obligation to withhold, declare, and pay the tax on behalf of the seller. If the buyer is also a non-resident, then the target company (where the seller holds the shares) will have such obligation. The tax must be declared and settled within 10 days from the effective date of the transfer.
Are there exemptions applicable under DTAs?	Yes, for a few countries given the limited treaty network, and only with advance approval by the tax authorities. No exemptions when >50% immovable property. No exemption for Thailand.	Yes, based on a limited treaty network and subject to the prior approval of the tax authorities.	A handful of DTAs are in force but it is unclear whether the authorities agree that the DTA applies to this type of tax.	Yes, various exemptions are available under an extensive treaty network.

	Cambodia	Myanmar	Laos	Vietnam
Are offshore indirect transfers taxed?	Not so far. It's unclear if there is a legal basis, but the new CGT law might shake things up.	Not so far. It's not impossible under general source principles, and it has been discussed by the authorities.	No. The focus is on the direct shareholder.	The tax authorities have confirmed several times that they view an offshore indirect transfer as taxable.
Some key points to watch out for	• No immediate, automatic share transfer registration. • Signatures placed overseas may trigger unpredictable requirements on a case-by-case basis. • A new CGT is coming which might rock the boat.	• Fast, 1-day, share transfer registration. • Commercial disputes and claims might trigger delays in obtaining approvals. • Some risk that tax authorities might turn to taxing offshore indirect transfers.	• Share transfer registration only after a rather long waiting time for approvals. • Long delays might occur for translations of documents. • Litigation and disputes may derail your timetable for approvals.	• Only certain scenarios are required to be registered under the law. However, in practice, any share acquisition involving a foreign buyer will have to be registered. • Could be long delays for sensitive business sectors due to assessment by multiple authorities. • Tax may have to be declared and paid while there is a risk that the transfer will not be approved.

CONTACT

Cambodia

No. 33, Street 294 (corner of Street 29)
Sangkat Tonle Bassac
Khan Chamkarmorn
Phnom Penh 120101
T: +855 23 964 430~434
F: +855 23 964 154

Indonesia

The Cityloft Sudirman, Suite 1119
Jalan K. H. Mas Mansyur Kav. 121
Jakarta, 10220
Tel: +62 21 2555 6611

Wisma Amex, Level 3
Jl.Melawai Raya No.7
Jakarta 12160
T: +62 21 718 3415

Laos

Level 4 Kolao Tower II
23 Singha Road, Nongbone Village
Saysettha District
Vientiane
T: +856 21 454 679
F: +856 21 454 674
M: +856 20 5552 8680
+856 20 5555 5103

Myanmar

Level 10, Unit 01-05
Junction City Office Tower
Corner of Bogyoke Aung San Road and
27th Street, Pabedan Township
Tel: +951 9253752~6
Fax: +951 9253758

Vietnam

Level 16, Unit 1638
Bitexco Financial Tower
2 Hai Trieu Street, Ben Nghe Ward
District 1, Ho Chi Minh City 700000
T: +84 708 283 668