SPEAKMAN LAW

Restructuring Issues...

Groups of companies often strive for simplicity through the disposal of unwanted companies. How is that done?

Commonly this is achieved by way of an amalgamation. The Companies Act establishes a straight forward mechanism for implementing amalgamation of group companies. Essentially all that is required is appropriate notice and a resolution of the respective boards of the amalgamating companies. Upon completion of the amalgamation, the two (or more) companies become one and the amalgamated (continuing) company simply inherits or takes over the assets and liabilities of the companies involved in the amalgamation. All companies other than the continuing company simply disappear.

Obstacles that may stand in the way of an amalgamation are solvency and tax losses. Amalgamation is not possible unless the board of the amalgamating company certify that it will be solvent upon completion of the amalgamation. Sometimes this will require shareholder loans to be capitalised. Where that is required, care needs to be taken not to trigger enquiry by Inland Revenue as to whether this amounts to tax avoidance. As between a wholly owned subsidiary and its parent company this will not be an issue. In other situations it may be. Contact me for further advice on this if this is an issue for you.

The existence of tax losses can be an obstacle because they will be lost upon the amalgamation unless the requisite 66% commonality of shareholding in the amalgamating companies existed whilst the losses were incurred. The amalgamation must also preserve that 66% (or more) economic ownership in the continuing company in the hands of the same people.

Where either solvency or tax losses are an obstacle, an alternative to group restructuring is a transfer of the business to the intended continuing company followed by liquidation of the selling company. That liquidation can usually be achieved by way of a short form liquidation under section 318(1)(i)(d) of the Companies Act. The advantage of a short form liquidation is the absence of any need to appoint a liquidator and is a simplified, less costly, process.

Again tax considerations may stand in the way of this. To the extent that the assets of the selling company are capital assets this path carries the risk of triggering a related party capital gain that will ultimately result in a tax liability on distribution. This liability could readily have been avoided by taking appropriate steps at the outset. For example, a better option may be to liquidate the company that owns the capital assets first, and the assets distributed to the shareholders in the course of that liquidation. The shareholders may then contribute the assets to the appropriate "purchasing" company as capital.