ASSET SALES, MERGERS, CONVERSIONS AND OTHER ACQUISITIONS

BUYING A BUSINESS IN NEVADA

Proper planning should make buying a business in Northern Nevada inexpensive, quick and understandable. Here are a few basic tips:

Sellers generally want to sell an ownership interest, such as stock or a limited liability company membership interest – buyers beware undisclosed liabilities, sellers beware tail liability.

Buyers generally want to buy assets, thus avoiding exposure to past acts and current liabilities – sellers beware the tax ramifications of liquidation, buyers beware difficulties possibly encountered with obtaining replacement licenses and permits.

Mergers, Conversions, Domestications and Share Exchanges – Nevada has a "hub and spokes" style statute governing mergers, conversions and share exchanges, Nevada Revised Statutes Chapter 92A.

Merger – A buyer may wish to form a new business entity into which it will merge the target company. A merger is a transaction in which two companies are combined, with one ceasing to exist as a separate entity and the surviving company continuing as the successor to the assets and liabilities of both companies.

BEGINNING A BUSINESS IN NEVADA

When beginning a new business in Northern Nevada, it is not always necessary to organize an entirely new company. For example, a business entity formed in another state may qualify to do business in Nevada as a foreign corporation, foreign limited liability company, etcetera and obtain the necessary local business licenses. Nevada also permits a company formed in another state to simply transfer its existing organization to Nevada using the domestication process, in which the foreign company may become a Nevada entity of the same type, without liquidating or forming a new type of business entity.

The process of conversion also allows a company using one form of business entity, say for example, a corporation, to convert to a different type of business entity, like a limited liability company. The owner should be careful not to inadvertently trigger a liquidation of the original company for tax purposes.

A thoroughly written and negotiated agreement for the acquisition or merger is a must. Sometimes business owners avoid some of the difficult terms, in order to avoid conflict and get the deal done. Our experience has been that business transactions more often fail because the parties have either not thoroughly considered or not thoroughly documented their understanding. A short and non-exclusive list of examples of terms that should be negotiated and documented, but often are not covered well or at all are: (a) the authority to make certain allocations of the purchase price of tax purposes; (b) post-closing purchase price adjustments; (c) security interests to secure the payment of the purchase price; (d) releases of lease and loan guarantees; (e) responsibility for and insurance to cover contingencies such as environmental contamination, litigation risk and intellectual property claims. Due diligence terms, discussed below, for the buyer are helpful.

WRITTEN AND NEGOTIATED AGREEMENTS AND COVENANTS

Covenants not to compete are treated differently in Nevada than in some other places. In Nevada, such agreements may be strictly interpreted in favor of allowing a person to be gainfully employed, but they are enforceable, when appropriately limited. This is unlike California, for example, where a covenant not to compete in the employment context cannot be enforced, but may be enforced in the context of a business sale.

DUE DILIGENCE INVESTIGATIONS

It may be helpful to consider the following factors, when discussing due diligence investigations in connection with a business purchase:

Buyers wish to obtain representations and warranties from the seller and the seller will try to limit the items that might come back to haunt them.

Buyers will want sufficient time to examine pertinent records and to hire independent contractors, such as environmental engineers and accountants to do their work.

Evaluation of accounting and tax information is often problematic. Most closely held or family businesses do not possess audited financials, which are a must for public, reporting companies.

Relevant tax liens and Uniform Commercial Code (UCC) filing locations, courts and agencies and customarily searched. Corporate good standing is also usually verified.

Licenses, leases and intellectual property agreements are often reviewed.

Employee contracts and manuals should be reviewed, particularly by buyers who will depend upon key employees. Sellers will normally wish to hold back on any contact with employees until a deal is very well documented and certain to occur.

Customer lists and vendor lists are sore subjects, the access to which can involve a tricky negotiation at the letter of intent stage. Sellers often do not want to disclose this information, particularly to a potential competitor. This and other issues discussed here can sometimes be alleviated through a nondisclosure agreement. Such agreements are customarily used and enforced in Nevada.

Financial capability and financing contingencies come up regularly. There are many instances in which the seller will ask for assurances and financial representations from the potential buyer and should carefully review such information. Particularly if the acquisition involves future payments, the seller also evaluate not only the buyer's financial stability, but also its management team, business acumen and business plan.

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