

CLOSING DOWN A COMPANY: DO IT LEGALLY AND WISELY

Business activity is on the rise in Thailand. The Business Development Department reports an escalating number of newly incorporated companies and, at the same time, an increasing number of company closures and dormant/defunct firms.

However, closing a company is more complicated and time-consuming than is incorporation. To close a firm successfully, the owner must prepare well and be informed. This article covers the end stages of the life of a business during a voluntary closure: (1) pre-dissolution; (2) dissolution; and (3) liquidation.

Pre-dissolution: Prior to initiating the dissolution process, a business owner should determine, to the best of his or her ability, whether the company has sufficient assets to meet its liabilities. The owner should also ascertain whether the company is involved in any pending litigation or ongoing criminal proceedings, especially if the company is named as a defendant. All lawsuits must be completely resolved prior to closure of the firm. In addition, dissolution should be delayed until receipt of any pending tax refunds.

Dissolution: The dissolution process starts with holding a shareholders' meeting to pass a resolution dissolving the company. Such a resolution must be adopted by not less than 75% of the votes cast unless a higher ratio is fixed in the articles of association. Shareholders must also appoint one or more liquidators who are current directors unless otherwise provided by the articles of association. Liquidators replace the directors, assuming their authority and powers. Similarly, liquidators have no liability except in the event of fraud, misconduct or negligence.

The dissolution must be registered with the Business Development Department (the date of registration is referred to as the "dissolution date"). It must be subsequently announced in a local newspaper and notification sent by registered mail to all the company's creditors. Liquidators must work with the company's auditor immediately to produce an audited financial statement as of the dissolution date. They must

also organise another shareholders' meeting to approve the audited financial statement and other documents, including liquidation papers for submission to the department.

In the case of a value-added tax (VAT) payer, the dissolution application must also be registered with the Revenue Department within 15 days after the dissolution date. The company's original VAT certificate, copies of all tax and VAT filing forms and financial statements for the past two years must also be submitted to the Revenue Department, which will then normally initiate an examination or tax audit of the company's income tax and VAT.

Liquidators and the company's auditor bear an important responsibility to monitor and resolve any tax issues with the revenue inspector. The investigation can include a review of up to five years worth of financial transactions. If any irregularity or extra tax burden is found, the Revenue Department may request that the Business Development Department hold off completing the liquidation.

Liquidation: The liquidation process begins immediately after the dissolution date, during which time the company is deemed to exist only for purposes of liquidation.

The liquidator's principal tasks are to settle the affairs of the company, distribute assets, pay off all debts and refund any remaining capital to the shareholders.

During liquidation, there could be numerous tasks to perform — notifying suppliers and customers, canceling the office lease, terminating employees, closing bank accounts, and cancelling

any licences and registrations with the relevant Thai authorities. Under employment law, voluntary dissolution is not a justifiable cause of termination, thus some funds must be allocated for severance pay to each employee. Employees are entitled to one month's advance notice or an extra month's pay.

The liquidators must take all necessary action to satisfy all of the creditors. If the available funds are not sufficient, then the liquidators must pursue the company's accounts receivable and auction or otherwise liquidate the company's assets. If the liquidators find the company's debts can never be fully satisfied, he or she must file for bankruptcy on behalf of the company. No liquidator would want to undergo a bankruptcy proceeding unless it is inevitable. A common practice is to ask creditors affiliated with the company to forgive any debts to help the company avoid bankruptcy. Note that forgiven debts are regarded as taxable income.

The liquidation time line will differ

from one company to another. A short and simple liquidation normally takes only a few months. Sometimes, liquidation is prolonged, in which case liquidators must file a status report with the registrar at the Business Development Department quarterly and organise a shareholders' meeting yearly for the purpose of updating reports.

When the liquidation is complete, liquidators must prepare a report of liquidation and organise the final shareholders' meeting to approve the completion. The shareholders' resolution must then be registered with the Business Development Department, followed by the return of the company's tax ID card to the Revenue Department, at which point the process ends and the company ceases to exist. Nevertheless, any unsatisfied creditor is given an extra two years to file a claim with the court against the company, shareholders or liquidators.

This article was prepared by Kobkit Thienpreecha, an attorney-at-law in the Corporate and Commercial Department at Tilleke & Gibbins. Please send comments to Andrew Stoutley at andrew.s@tillekeandgibbins.com