In the case of an M&A, can the surviving company succeed a repatriation status of the other company and be eligible for assistances under the Act on Assistance to Korean Off-shore Enterprises in Repatriation?

Invest Korea provides a summary of the government’s authoritative interpretation on how foreign investment-related laws and regulations should be actually applied. The interpretations are the advice of the Ministry of Government Legislation on questions or conflicts regarding the meaning and interpretation of such laws and regulations.

Q.

In the case that company A merged with company B, which had been selected as a repatriating enterprise eligible for assistance under Article 7 of the Act on Assistance to Korean Off-shore Enterprises in Repatriation (hereafter ‘the Act’), and company A became the surviving entity, can company A succeed company B’s status as a repatriating enterprise eligible for assistance and receive assistances under Articles 11-14 of the same Act such as tax reduction and exemption?

A.

If company A merged with company B and company A became the surviving entity, company A can succeed company B’s status as a repatriating enterprise eligible for assistance and receive assistances prescribed by Articles 11-14 of the Act such as tax reduction and exemption.
In a business combination, two or more companies merge to form one new company under a contract (i.e., consolidation), or one company takes over another company and becomes the surviving entity (i.e., merger). As a result of the combination, the companies other than the newly established company or surviving company cease to exist, and the extinguished companies’ assets as well as its employees or shareholders are transferred to or taken over by the newly established or surviving company. Where businesses are merged or consolidated, all of the rights and responsibilities of the merged or consolidated companies under both public law and private law are succeeded by the newly established or surviving company, with the exception of the rights and responsibilities that are not permitted to be transferred due to their nature.

According to the Act, a company that intends to be selected as a repatriating enterprise eligible for assistance should prepare a repatriation plan in regard to the liquidation, downsizing of the overseas place of business and the establishment or expansion of the domestic place of business, etc. and file an application for selection with the Minister of Trade, Industry & Energy (refer to Article 7 (2) of the Act). Upon receipt of an application, the minister can determine if the company is qualified by taking into consideration whether the company downsized its overseas place of business in accordance with the criteria prescribed by Ordinance of the Ministry of Trade, Industry & Energy, etc. and verifying if the company received assistance in accordance with other laws, and decide whether to select the company as a repatriating enterprise eligible for assistance (refer to Article 7 (1) of the Act and Article 6 of the Enforcement Decree of the Act). If a company falls under certain cases such as failing to submit the repatriation plan, the Minister of Trade, Industry & Energy may revoke the company’s eligibility for assistance (refer to Article 8 of the Act).

If so, it can be said that the matters regarding the selection of a repatriating enterprise eligible for assistance are transferable as they are determined based on objective facts such as whether assistance is provided by other laws and an overseas place of business's repatriation to Korea. Therefore, company B (the extinguished entity)'s status as a repatriating company eligible for assistance is succeeded by company A (the surviving entity).

Also, as recognizing the succession of the status as a repatriating enterprise eligible for assistance encourages A's succession of B's plan for repatriating the overseas place of business after the merger, such interpretation shall be in line with the purpose of legislation of the Act, which is the facilitation of repatriation of Korean offshore enterprises.

- Interpretation No. 17-0020 from the Ministry of Government Legislation
- Issued on: Mar. 27, 2017

Source: Ministry of Government Legislation, Translation: KOTRA

The Ministry of Government Legislation's statutory interpretation provides an authoritative opinion on the interpretation of statutes, and does not have the binding force of a final court ruling. Therefore, the competent government authority may not adopt the interpretation in its entirety. If a final court ruling contradicts the Ministry of Government Legislation's statutory interpretation, the court ruling shall prevail.