Ian M. Berkowitz

Difference between stock sale and asset sale

This week was a very wild week for buying and selling businesses for my clients. In my office, I represented buyers and sellers, buying and selling both stock and assets.

For those who are a bit rusty with the differences of acquiring a company through a stock sale versus an asset sale, the difference is clear. In a stock sale, the buyer buys and the seller his or her ownership rights to the business and company by a method of transferring or selling the stock or interest in the company to the buyer.

In an asset purchase sale the buyer buys and the seller sells the assets of the company which might include all or some of the following: personal property, furniture, fixtures, equipment, intellectual property, business name, real estate, customer accounts and information, accounts receivable, or a lease.

You might ask yourself, what do I want to buy assets or stock? As an experienced business transactional attorney, my answer is that it depends on who you are -- the buyer or seller. As a seller, you want to "sell out" which probably means that when you are no longer in the business you don't want to be open to or exposed to any downs or liabilities related to the business.

In addition, you probably don't want to trigger some provisions in certain agreements that will require a new owner to jump over various hoops to get approved for credit or leasing your rented space.

Most often, stock sales work for sellers because they create almost a seamless transition for the seller and the new buyer. In a stock sale, you, the seller, are selling both, the good and the bad, the assets and liabilities. The entity, your business, does not change at all but only the person who owns the stock. The rest of the world, customers, creditors, vendors, employees won't really see the new ownership change the way an asset sale will end up.

A caveat to a stock sale is to pay attention to some specific approvals that may be required for some creditors or landlords if your company changes ownership by more than 51 percent.

If you are the buyer, you move right to the asset sale and never look back. As a buyer, you never want to be in the position of finding out that the seller had an old or unknown liability that you are now responsible for because you own the company. With an asset sale you get the assets of the seller, which is the value of the business, and not the seller's liabilities. It also provides you with an opportunity to begin your business with a nice clean company without any of the negative baggage.

A caveat to an asset sale is that creditors, landlords, and suppliers may require you to prove that you are as good of a credit risk in order for them to continue to do business with you, the new business owner.

Another thing that you should be aware of in an asset sale is that you need to make sure that the assets you are buying are free and clear of any liens or encumbrances. If there are any creditors or lien holders on those assets make sure they are being paid off at closing or immediately afterwards and that they release any interest that they have on those assets.

Ian M.
Berkowitz

Overall buying and selling businesses are big transactions for all of us. They often are dealing with hundreds of thousands if not millions of dollars and should be taken very seriously. Your agreements and how you structure the deal will have an effect on the past, present and future of both the buyer and seller. Hire an attorney and make sure that you have someone representing you during the entire process. Unfortunately, in the business world deals can often go south and you don't want to be on the downside of the deal that went in that direction.

Ian M. Berkowitz is a former attorney/advisor with the United States Small Business Administration in Washington D.C. During his tenure with the Federal Government he specifically worked in the areas of disaster relief for homeowners and businesses and government contracting. He is currently a practicing business and real estate attorney in Boca Raton. In addition to his law degree, Ian also holds a Masters Degree in Government from The John Hopkins University.