

CHAPTER 27

TRANSFER OF A GOING CONCERN

27.1 Introduction

VAT is normally charged on the sale of goods or services in the course or furtherance of a business. However, if a business is transferred as a going concern, the supply is **outside the scope of VAT**. In other words it is not treated as a supply of goods or services and therefore no output tax is due to be accounted for on the supply of that business.

[VATA 1994,s.
49](#)

[SI 1995/1268](#)

VAT Notice
700/9

No VAT is charged on the sale of a business provided certain **conditions are met**.

If VAT is charged when it should **not** have been:

- The seller must cancel any VAT invoice issued and provide the new owner with a refund of the VAT charged (normally by issue of a credit note or document giving similar effect).
- If any VAT is incorrectly shown on a VAT invoice which is not cancelled, it is recoverable by HMRC from the seller.
- The new owner will not be able to reclaim this amount as input tax (even if he has paid it to the vendor in good faith) because there was no taxable supply. But where HMRC are wholly satisfied that the amount of "VAT" has been both declared and paid to them by the seller, they may allow the new owner to recover it as if it were input tax.

The TOGC rules are compulsory, so it is very important to establish from the outset whether the business is being sold as a going concern.

When a TOGC occurs, s.49(1)a VATA 1994 states that the transferee must take account of the transferor's turnover when considering the VAT registration threshold. Consequently where the seller is compulsorily registered, the buyer is compulsorily registered from the date of transfer.

27.2 TOGC conditions

Subject to certain exceptions, the supply by a person of the assets of his business to a person to whom he transfers that business (or part thereof) as a going concern is neither a supply of goods nor a supply of services provided **all** the following conditions are satisfied.

- (a) The assets are to be used by the transferee in carrying on the **same kind of business** as that carried on by the transferor.

[SI 1995/1268
Art 5\(1\)](#)

It is not essential that the buyer pursues the same type of business as that carried on by the seller prior to the transfer.

- (b) In a case in which the transferor is a taxable person (i.e. registered or liable to be registered for VAT), **the transferee must already be a taxable person or immediately become, as a result of the transfer, a taxable person.** In determining whether the transferee is a taxable person, the turnover of the seller must also be taken into account. [SI 1995/1268 Art 5\(1\)](#) [VATA 1994, s. 49\(1\)](#)
- (c) In relation to a part transfer, that part is capable of separate operation. It does not matter whether it will, in fact, be operated separately from any other business the new owner carries on. [SI 1995/1268 Art 5\(1\)](#)
- (d) The effect of the transfer must be to put the new owner in possession of a business which can be operated as such. A sale of capital assets is not in itself a TOGC but if the effect is to put the purchaser in possession of a business, then it is such a transfer even if the assets are transferred on different dates. Selling a few assets on their own will not constitute a TOGC. VAT Notice 700/9 Para 2.3
- (e) The business, or part, transferred must be a "going concern" at the time of transfer. This does not necessarily imply that the business is commercially viable. It may have been scaled down due to financial difficulties or in anticipation of sale or be trading under a liquidator or administrative receiver. VAT Notice 700/9 para 2.3
- In order for a business to be regarded as "discontinued", HMRC would normally expect such evidence as all employees having been made redundant, orders no longer being accepted/sought, supplies ceasing, etc. The effect of a break in trading before sale will depend upon the kind of business involved. For example, a seasonal business which has been closed during what is normally the closed season may still be a going concern because it is advertising for customers, accepting bookings, etc. VAT Notice 700/9 para 2.3
- (f) There should be no significant break in the normal trading pattern before or immediately after the transfer. A short period of closure which does not significantly disrupt the existing trading pattern, e.g. for redecoration, will be ignored. VAT Notice 700/9 para 2.3

In deciding whether a transaction amounts to a TOGC, regard must be had to its substance rather than its form, and consideration must be given to the whole of the circumstances, weighing the factors which point in one direction against those which point in another.

In the end, the vital consideration is whether the effect of the transaction was to put the transferee in possession of a going concern, the activities of which he could carry on without interruption.

27.3 Deduction of related input tax

Although a transfer of a going concern is not a supply for VAT purposes, this does not prevent the deduction of input tax on related expenses. There is, however, a distinction between the extent to which the transferor and the transferee can deduct that input tax.

- For the position of the transferee, if the business acquired is to be used to make taxable supplies, any related input tax on acquisition is recoverable. If the business acquired is to be used to make exempt supplies, any related input tax on acquisition is not recoverable. If the business acquired is to be used to make taxable and exempt supplies, any related input tax on acquisition is residual.
- In the case of the transferor, since the sale of the business as a going concern is not a supply, the input tax incurred on the costs of selling the business cannot be attributed to a supply by the transferor.

In *Abbey National plc v C & E Commrs*, [2001] the ECJ confirmed that, in such circumstances, the transferor's costs form part of his overheads and thus, in principle, have a direct and immediate link with the whole of his economic activity so that he can deduct a proportion of the input tax attributable to taxable supplies under his partial exemption method.

However, the ECJ also indicated that if the transferor's costs have a direct and immediate link with a **clearly defined part** of his economic activities, so that the costs form part of the overheads of that part of the business, and all the transactions relating to that part of the business are subject to VAT, he may deduct all the VAT charged on his costs of acquiring those services.

Following the *Abbey National* decision, HMRC take the view that,

- (a) VAT incurred on services that have a direct and immediate link with the transferred part of a business should be treated as an overhead of that part of the business;
- (b) where that part of the business makes only taxable supplies, then the VAT incurred is deductible;
- (c) where that part of the business makes only exempt supplies, then the VAT incurred is not deductible; and
- (d) in instances where both taxable and exempt supplies are made by that part of the business, the VAT incurred is partly deductible by reference to the partial exemption method in place.

C&E Business
Brief 8/2001

Example 1

Tony is a VAT registered retailer. He wants to sell his shop to James. The sale agreement lists the following assets at their agreed sale prices:

	£
Leasehold Shop (50 year lease)	100,000
Goodwill	23,000
Stock	52,000
Equipment	25,000
Sale Price	<u>200,000</u>

James is buying the business and plans to run it in the same way as Tony.

Calculate the VAT due on the transfer.

27.4 Transferring the VAT registration number

If a transfer of a going concern is from a VAT registered trader to a new owner who is not VAT registered, it is possible to apply to transfer the registration number of the previous owner to the new owner.

This would also transfer to the new owner the responsibility for the past VAT history of the old business. Thus, if the previous owner had committed any VAT misdemeanours, the liability for those would transfer to the new owner of the business.

[SI 1995/2518](#)
[Reg 6\(1\)](#)

As a result it is not wise to apply to transfer the VAT registration number between old and new owners, unless there is a very close connection between the two (for example, on the incorporation of a sole trade to a limited company).

If the VAT registration number is not transferred, the new owners do not have any responsibility for the VAT affairs of the previous owner of the business. In general terms this is probably the best way to structure the transfer of a business, i.e. by not also transferring the VAT registration.

27.5 Transfer of Records

Where a business is transferred as a going concern, the seller will keep his business records; unless the buyer elects to retain the seller's VAT registration number (for example, on an incorporation) in which case the business records will be transferred to the new owner.

The seller must make necessary information available to the buyer to enable the buyer to comply with his VAT obligations.

The above came into effect from 1 September 2007. Previously the law required the transfer of the business records from the transferor to the transferee of a TOGC. However, in practice, the transferor was often unwilling to do this, because of Companies Act Accounting Rules which require the retention of the records.

27.6 Special rules for Land and Buildings

Where a TOGC includes land and buildings which would ordinarily be standard-rated, the property will fall outside of the TOGC provisions and **remain a standard-rated supply on which VAT should be charged.**

[SI 1995/1268](#)
[Art 5\(2\)](#)

There are two primary supplies of land and buildings which are standard-rated supplies. These are;

- 1) supplies of new commercial freehold buildings; and
- 2) supplies of land and buildings on which an option to tax has been made.

The transfer of a going concern rule does not cover these assets.

Therefore where "new" freehold buildings or opted land and buildings are transferred as part of a business, all the other assets are transferred VAT free, but the land or the buildings are standard-rated.

However, where the **buyer opts to tax** the land or building, the whole transfer is regarded as within the TOGC and no VAT is charged on the property.

The option must be in effect, and the transferee must have notified HMRC of the option, **no later than the date on which the supply of the land** is treated as having been made.

[VATA 1994, s.](#)
[5\(3\)](#)

Therefore, for the TOGC provisions to apply, the option must be notified to HMRC in writing no later than the time of the supply.

The time of supply is normally the date of the transfer, but a "tax point" could be created by, for example, the payment of a deposit. In this case, the option to tax must be notified to HMRC before a deposit is paid.

[SI 1995/1268](#)
[Art 5\(2\)\(3\)](#)

The transferee should therefore be advised to check the status of the land and buildings before paying a deposit. If a tax point is generated before an option to tax is made, the supply of land would **not** fall within the TOGC provisions and the purchaser will be liable to pay VAT on the supply of land and buildings. While this may be later recovered as input tax, this can give a cash-flow problem for the purchaser.

Finally it should also be noted that **tenanted properties** will be regarded as a business for TOGC purposes. The land and building provision will apply to these transfers as well.

27.7 Capital Goods Scheme

Where a business is transferred as a going concern, any capital items included as part of the transfer are not "sold" for the purposes of the capital goods scheme and therefore the normal CGS sale adjustment does not apply.

The responsibility for applying the capital goods scheme to any capital item transferred passes to the new owner for any remaining intervals.

27.8 Other Points on TOGC

If there is any doubt about whether a sale is a TOGC or not, the seller could be exposed to a liability for VAT if it is not charged when it should have been, and the purchaser is exposed to not being able to recover VAT if the VAT had been wrongly charged in the first place.

This is a situation that a trader does not want to get into. In such a case it is normal to include clauses in the contract for the sale which state that the purchaser agrees to pay VAT on the transfer if HMRC rule that it is not a TOGC and the vendor agrees to supply a VAT invoice in such a case.

Sometimes an amount equal to the VAT is lodged with a Solicitor until HMRC have given a ruling. HMRC are unlikely to rule in advance to say whether a transfer is a going concern or not, because they are unlikely to have enough information to give a ruling until the transaction has taken place. It is advisable to word the contract in such a way that purchaser and seller do not suffer.

Example 2

Which statement(s) are correct

Tick if
Correct

- | | |
|--|--------------------------|
| 1. No VAT is charged on a TOGC since it is a zero-rated supply | <input type="checkbox"/> |
| 2. The VAT registration number of the business can be transferred to the new owner if wished. | <input type="checkbox"/> |
| 3. The VAT records of the business are never transferred to the new owner | <input type="checkbox"/> |
| 4. A brand new factory cannot be transferred VAT free under the TOGC rules unless the buyer opts to tax that building. | <input type="checkbox"/> |

Answer 1

This is the transfer of the business as a transfer of a going concern.

The seller is VAT registered and as long as James registers for VAT as well, which he presumably will have to, we have a TOGC. The business is being run before the sale in the same way as it is going to be run after the sale, so the supply is outside the scope of VAT. Thus no VAT will be charged at all.

Answer 2

- | | Tick if Correct |
|--|-------------------------------------|
| 1. No VAT is charged on a TOGC since it is a zero-rated supply. | <input type="checkbox"/> |
| 2. The VAT registration number of the business can be transferred to the new owner if wished. | <input checked="" type="checkbox"/> |
| 3. The VAT records of the business are never transferred to the new owner. | <input type="checkbox"/> |
| 4. A brand new factory cannot be transferred VAT free under the TOGC rules unless the buyer opts to tax that building. | <input checked="" type="checkbox"/> |