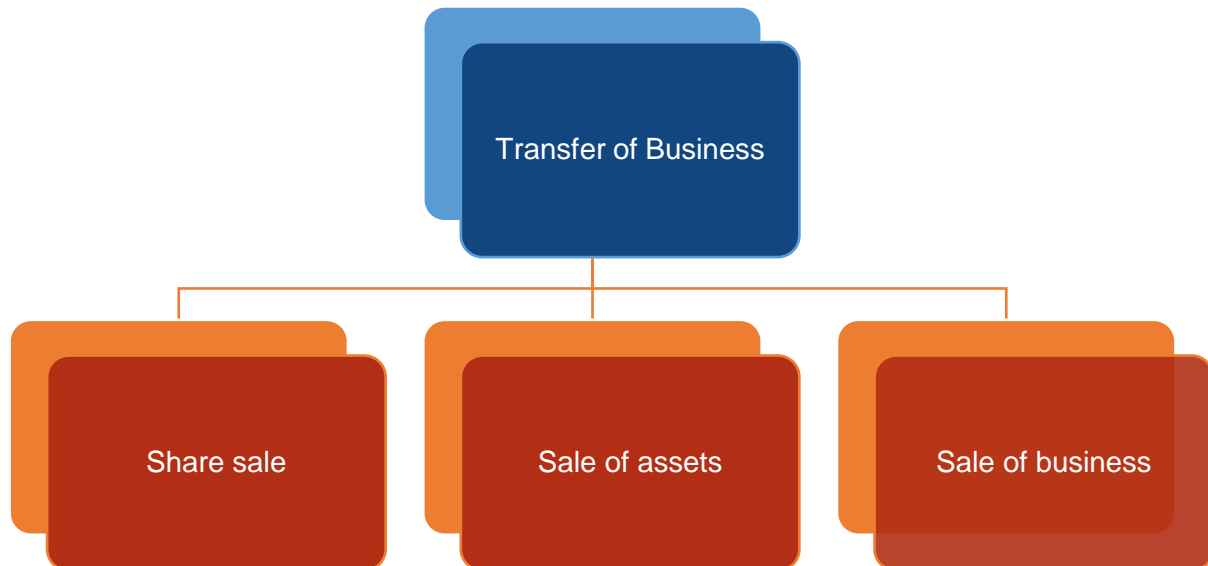


15th Public Clarification – Transfer of Business as a going concern

Introduction

The Federal Tax Authority ('FTA') has recently issued a Public Clarification (VATP015) on Transfer of Business as a going concern ('TOGC').

In the clarification, the three modes of Transfer of Business explained are as follows:





In this clarification, the difference between the following transactions have been analysed. The summary of explanation of such transactions is as follows:

- Share sale – A new owner takes over the company with all of its assets and liabilities – including any existing tax obligations. The Company still retains all its assets, liabilities, licences, employees and relationships.
- Sale of assets - This involves a transfer of title in the assets from one person to another person and there is no change in the ownership of the entities involved in the transaction.
- Sale of business - Assets are sold as part of a transfer of a business as a going concern i.e. transfer of business.

The first two transactions may or may not be subject to VAT depending on the facts, however, transactions involving sale of business (in whole or an independent part) may not be considered a supply under UAE VAT Laws subject to fulfilment of the requirements.

Such requirements have been prescribed in Article 7(2) of the UAE VAT Law of the Federal Decree-Law No. (8) of 2017 on Value Added Tax (the “Decree-Law”) which provides that:

*“the transfer of **whole or an independent part** of a business from a person to a taxable person for the purposes of continuing the business that was transferred is not considered to be a supply for VAT purposes”*

Below is the tabular representation of the requirements outlined in this clarification:

S.No	Requirements	Clarification
1	There must be a transfer of whole or an independent part of a business	<ul style="list-style-type: none">• Transfer must effectively give the recipient the possession of the whole of a business, or part of a business where that part is capable of separate operation.• All of the goods and services that are necessary for continuing operation of that business or a part of a business must be supplied to the recipient.• Such transfer may include, among other things, goodwill, licences, premises, machinery and equipment, employees, ongoing contracts, and liabilities.• The transferred business must be operational before and at the time of transfer i.e. transfer of any business which is yet to commence or has ceased operation before the transfer date, will not tantamount to transfer of a business as a going concern.
2	The transfer must be made to a taxable person	<p>The recipient should be registered or obligated to register for VAT i.e.</p> <ul style="list-style-type: none">• Recipient is registered for VAT (mandatorily or voluntarily).



S.No	Requirements	Clarification
3	The recipient intends to continue the business which was transferred	<ul style="list-style-type: none">The recipient is required to be registered under the mandatory registration rules and has applied for registration to the FTA.An important point is that there is no requirement for the supplier to be registered for VAT for a TOGC to take place.The requirement will be met if the recipient of the business intends to carry on the same kind of business which it acquires.The condition will not be met if the recipient has fundamentally changed, or did not use, the business after acquiring it.An important point to note is prior to treating the transfer as a non-supply under Article 7(2) of the Decree-Law, the supplier should satisfy themselves that the recipient intends to continue the business as a going concern.

Our Comments

There is a lot of activity seen in the Mergers & Acquisition space which generally involves these transactions. Though, the sale of shares or/and assets are an option, there are a large number of transactions of takeovers, mergers etc. which adopt TOGC, a preferred mechanism around the globe despite it being one of the most complex.

This clarification by FTA provides guidance to qualify transactions as TOGC. In case where such requirements are not complied in the past, this may have huge VAT impact on the parties to such a transaction.

Despite the prescribed requirements, there are various other aspects such as what shall constitute a part transfer, transfer of which assets are necessary for continuing the operation, to what extent the liabilities are being taken over, how to justify the intention to continue etc. which should be analysed on a case by case basis.

Additionally, the contract entered between the parties for transfer of business detailing such a transaction will be an important aspect to determine the taxability of these transactions.

Therefore, to fortify the treatment of VAT on such arrangements, due caution should be taken by parties to the contract.



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