Executive summary

On 20 August 2019, the United Arab Emirates (UAE) Federal Tax Authority (FTA) issued value added tax (VAT) public clarification VATP015 on the transfer of a business as a going concern (TOGC). The public clarification sets out the conditions that must be met for a transfer to qualify as a TOGC under Article 7(2) of Federal Decree-Law No. (8) of 2017 on VAT (UAE VAT Law).

Detailed discussion

Background

Under Article 7(2) of the UAE VAT Law, the transfer of the 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 shall not be considered a supply for VAT purposes. The TOGC rules are compulsory, therefore it is important to establish whether the business is being sold as a going concern.

The public clarification provides information on the following:

- Share sale versus (vs) assets sale
- Sale of assets vs sale of business
- Requirements for a TOGC
- Proof of intention
Share sale vs assets sale
A company can be bought and sold by the transfer of shares. The company itself is not involved in the transaction and therefore the transfer of shares does not affect the business's operations, as all assets, liabilities, licenses and relationships are retained. The purchaser takes over the business with all of its assets and liabilities, including its existing tax obligations.

A transfer of assets involves a transfer of title in the assets from one person to another. In this type of sale, the ownership of the company remains the same and the purchaser does not take on liabilities (including tax liabilities) that have not been part of the transaction or attached to the assets that have been purchased.

The public clarification states that a TOGC is a type of asset sale and not a sale of shares.

Sale of assets vs sale of business
A sale of assets by a taxable person is normally treated as a taxable supply and therefore subject to VAT at the appropriate rate. There are, however, instances where the supply of specific assets is exempt from VAT, for example, in the sale of bare land or residential property.

Where assets are sold as part of a TOGC, the transfer is not considered a supply, and therefore no VAT is charged. This treatment applies irrespective of the VAT treatment that would apply if the assets were sold individually.

Requirements of a TOGC
The following three conditions must be met for a transfer to be treated as a TOGC, and, therefore, out of scope for UAE VAT purposes:

1. There must be a transfer of the whole or an independent part of a business
There must be a transfer of a business for a transfer to qualify under Article 7(2) of the UAE VAT Law. The transfer must give the purchaser possession of the whole business or part of a business which enables separate operation. All the goods and services necessary for the continued operation of the business (or independent part thereof) must be supplies to the purchaser, including goodwill, licenses, employees and ongoing contracts. To qualify as a TOGC, the transferred business must be operational before and at the time of transfer.

2. The transfer must be made to a taxable person
To qualify as a TOGC, the recipient must be a taxable person at the time of transfer. This condition will be met if any of the following is in effect on the date of transfer:
   - The recipient is registered for VAT.
   - The recipient is required to be registered under the mandatory registration rules and has applied to the FTA for registration.
   - The recipient has applied for voluntary VAT registration and the FTA has accepted the application.

The seller is not relieved from its tax obligations incurred during its ownership of the assets and will remain liable to the FTA for any tax violations.

3. The recipient intends to continue the business which was transferred
The purchaser must have a genuine intention to carry on the same kind of business which it acquires to qualify as a TOGC. It is permitted to have a short temporary closure of the business immediately after the transfer to prepare the business for operation under the new ownership.

Implications
It is crucial for a business to assess whether a transfer of a business qualifies as a TOGC, subject to the conditions stated above. If a business incorrectly treats the transfer as a TOGC, VAT may be due on the supply. If the sale of a business qualifies as a TOGC, it is treated as neither a supply of goods nor a supply of services, and therefore it is outside the scope of UAE VAT.

If the seller and purchaser incorrectly treat a transfer as a TOGC, the sale of assets will have taken place at the original time of supply and VAT will be due to the FTA. The seller will be required to issue a tax invoice to the purchaser and the seller may be liable to fixed and percentage-based penalties due to late payment of VAT to the FTA, as stated in Cabinet Resolution No. (40) of 2017 on Administrative Penalties for Violations of Tax Laws in the UAE. The onus is on the seller to confirm that all the TOGC requirements are met, including the purchaser's intention to continue the business as a going concern.
For additional information with respect to this Alert, please contact the following:

**Ernst & Young Middle East (Dubai Branch)**
- David Stevens  
  david.stevens@ae.ey.com
- Engela Wiid  
  engela.wiid@ae.ey.com
- Marc Collenette  
  marc.collenette@ae.ey.com

**Ernst & Young Middle East (Abu Dhabi Branch)**
- James W Bryson  
  james.bryson@ae.ey.com
- Sana Azam  
  sana.azam@ae.ey.com

**Ernst & Young LLP (United States), Middle East Tax Desk, New York**
- Asmaa Ali  
  asmaa.ali1@ey.com
About EY
EY is a global leader in assurance, tax, transaction and advisory services. The insights and quality services we deliver help build trust and confidence in the capital markets and in economies the world over. We develop outstanding leaders who team to deliver on our promises to all of our stakeholders. In so doing, we play a critical role in building a better working world for our people, for our clients and for our communities.

EY refers to the global organization, and may refer to one or more, of the member firms of Ernst & Young Global Limited, each of which is a separate legal entity. Ernst & Young Global Limited, a UK company limited by guarantee, does not provide services to clients. For more information about our organization, please visit ey.com.

Indirect Tax

© 2019 EYGM Limited.
All Rights Reserved.
EYG no. 003876-19Gbl
1508-1600216 NY
ED None

This material has been prepared for general informational purposes only and is not intended to be relied upon as accounting, tax, or other professional advice. Please refer to your advisors for specific advice.

ey.com