VAT: Mitigating uncertainty for VAT-free transfers of a going concern (TOGC)

Indirect Tax

01 September 2016

The CIOT, ATT and ICAEW join forces to seek improvements for businesses, advisers and HMRC when dealing with sales of businesses.

The sale or transfer of a business (known as TOGCs) can be significant in value so it is essential to accurately identify whether it would qualify for VAT-free treatment. This is a complex area upon which HMRC is consistently asked to provide rulings.

To help taxpayers, advisers and HMRC arrive at the correct position and to afford greater legal certainty, the CIOT, ATT and ICAEW have produced a joint submission to HMRC through the Joint VAT Consultative Committee. Concerns have been raised and ways proposed to mitigate uncertainty for all parties involved in these transactions.

What is the purpose of TOGC rules?

The reason for allowing a VAT-free transaction is to facilitate and simplify high-value transfers that would place on the transferee a disproportionate VAT charge that would typically be recovered (see *Zita Modes* C-497/01 (para 39)). As with any simplification, there is a balance to be struck between the facilitative nature and steps HMRC may take to prevent tax evasion or avoidance.

The provisions also aim to protect HMRC by removing the liability to large sums of VAT and subsequent entitlement to input tax in situations where the output tax may not be paid over.

It is important to note that the TOGC provisions are mandatory and it is not possible to opt out.

Exploring ways forward with HMRC

We would like the UK's TOGC measures to be improved to better support facilitation for taxpayers who might have to fund substantial amounts of VAT if the normal VAT rules were applied.

Our members report in many cases the facilitative nature of the TOGC provisions are frustrated because taxpayers cannot gain the certainty needed for a VAT-free transaction. Perversely, there are reports of taxpayers seeking to arrange transactions to ensure the TOGC provisions do not apply because it is the only way for them to gain commercial certainty on the VAT treatment.

We consider that, absent clearer guidance, HMRC should provide rulings on request in all cases. We find the department's approach of confining rulings to cases where it identifies an 'unusual' aspect to be unhelpful.

Our joint submission urges HMRC to consider other measures to improve certainty for taxpayers, including:

- an agreed statement of practice with time-limited enquiries, or
- a statutory clearance procedure, or
- a certificate or declaration procedure.

Brexit

In principle, Brexit opens up the possibility that the UK could move away from EU rules on TOGCs but we are not yet aware of any particular proposal or strong feeling on this. Unless the TOGC VAT concept is abolished (which is unlikely to find favour with business and be onerous in some cases), many of the same issues will continue and businesses and HMRC will have to cope with the uncertainty of whether TOGC status applies.

Our submission is on the CIOT website.