Transfer of a going concern: certainty by design

Indirect Tax

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TOGC treatment is determined at the time of supply, making advance planning essential to avoid unexpected VAT liabilities for both parties.

Key Points

What is the issue?

Transfer of a going concern (TOGC) treatment is mandatory: a transaction either qualifies or it does not. The conditions are tested at the time of supply, and the position cannot be repaired retrospectively.

What does it mean to me?

VAT incorrectly charged on a TOGC is not input tax and cannot be recovered by the buyer. VAT not charged on a taxable supply can leave the seller facing an assessment, interest and penalties.

What can I take away?
The treatment of a supply is fixed at its time of supply. Ensure that VAT registration, options to tax and the necessary notifications are in place before completion, as later action cannot repair the position.

Most VAT reliefs must be claimed – a transfer of a going concern (TOGC) is not one of them. Where the conditions are met, the transfer is neither a supply of goods nor a supply of services, so it sits outside the scope of VAT. The attraction on a large deal is obvious: no VAT to fund between completion and recovery, no stamp tax on a VAT-inclusive price, and none of the capital goods scheme clawback that an exempt sale would trigger.

Where the TOGC conditions are met, the treatment applies irrespective of whether the parties have thought about it or want it. Where the conditions are not met, the VAT treatment that goes with a TOGC cannot be applied retrospectively, no matter how badly both sides want it. That single feature explains almost everything that goes wrong in this area, and it also explains the one piece of planning I keep coming back to.

The risk also runs both ways, which is what makes the arguments so hard to settle. Charge VAT on a transaction that satisfies the conditions and the buyer is not entitled to recover it, because it was never input tax. Fail to charge VAT on a taxable supply and HMRC can assess the seller for the VAT due. Either way, there is interest and penalties on top, and an argument about who bears them.

The TOGC conditions

The assets must be used by the buyer in carrying on the same kind of business as the seller and, where only part of a business is transferred, that part must be capable of separate operation. Most TOGC litigation turns on those words, which I will leave for another day.

Where the seller is a taxable person, the buyer must already be, or immediately become, a taxable person. Therefore, the buyer must:

- already be registered;
- be required to register at the date of transfer because the compulsory conditions are met; or
- have been accepted for voluntary registration, with that registration in place when the transfer occurs.

Then come the land conditions, which typically bite where the seller has opted to tax. However, these conditions can also apply where the seller is transferring the freehold of a building under three years old, or of an unfinished one. This can catch people out, because the supply is already standard rated in its own right and the buyer is nonetheless required to opt to tax.

Where these land conditions apply, the buyer must opt to tax, or make a real estate election, and notify HMRC by the relevant date. This is the time of supply, so usually completion, although it may be earlier if a deposit paid to the seller creates a tax point. The buyer must also notify the seller that the buyer's option to tax will not be disapplied by the anti-avoidance rules. This is known as the Article 5(2B) notification under the Value Added Tax (Special Provisions) Order 1995.

In my experience, the requirement to notify the seller is the one most often missed. It is unilateral, no form is prescribed, and it is often assumed that somebody else has done it.

The pending registration

Consider a familiar scene. The buyer's application is with HMRC and has been acknowledged but not processed. No VAT registration number has been issued, and completion is fixed. Some advisers take the view that an application is enough. I disagree, and the disagreement is live enough that you will find it argued both ways in online forums. The answer lies in the difference between the two routes open to a buyer who is not already registered.

Compulsory registration happens by operation of law. Where the transferred business generated taxable turnover above the threshold in the year before the sale, the buyer must be registered from the date of transfer, whether or not it has applied and whether or not HMRC has acted. It is a taxable person as a matter of law, with or without a VAT number. In practice, this is useful as it removes time-sensitive actions that the buyer and its advisers cannot control.

By contrast, voluntary registration only takes effect once HMRC has accepted the application, and that acceptance is a discretionary act. A discretion exercised in March was not exercised in February. The distinction is important: on the compulsory route, waiting for a VAT registration number is not critical; on the voluntary route, HMRC must have accepted the application for registration before the transfer takes place.

The counter-argument is that a registration granted with an effective date before completion means the buyer was registered at that point after all. Importantly, however, both HMRC’s VAT Registration Manual and VAT Notice 700/9, ‘Transfer a business as a going concern’, require a voluntary registration to be in place when the transaction occurs. The application is usually made in good time, with a requested effective date before completion, so the proposed effective date is not the point. On the day of the transfer, the registration is still contingent. HMRC could refuse the application, and the buyer could withdraw it.

A seller relying on a submitted application is therefore relying on HMRC exercising its discretion to accept it and on the buyer not changing its mind. If either does not happen, it is the seller that faces an assessment.

So do not take a view. Why debate something that can be resolved by a little forward planning? HMRC accepts applications specifying an effective date up to three months ahead, including advance notification of an intended TOGC. Make use of this and delay completion until the registration is confirmed.

The history you inherit

In ‘The capital goods scheme: long-term VAT recovery’ (*Tax Adviser*, June 2026 edition), I explained how capital goods scheme obligations pass to the buyer when the capital goods scheme item is part of a TOGC. Most of the time, there is no practical impact, particularly where the property has been, and will continue to be, used for taxable purposes.

Practical problems can, however, arise if the buyer makes exempt supplies in the future, or if it subsequently sells the property and is asked to share its capital goods scheme records.

Inheriting the obligation is worthless without the data: the VAT on the item, the date of first use, the baseline recovery percentage, the interval reached and the adjustments already made. HMRC’s capital goods scheme guidance tells the seller to provide those details and the buyer to ask for them. This is one of the most overlooked areas of property VAT.

There is also a timing problem. The adjustment period for property runs for ten years and records are habitually kept for six. Add a second transfer and you have a building part way through its adjustment period with a baseline that nobody can evidence. I see this happen a lot. Advisers who failed to collect the information when acting for the buyer find themselves being asked to provide it when acting for the seller a couple of years later.

The exposure runs both ways, and this is where the profession could be missing out. HMRC’s manual states that the buyer may need to repay input tax claimed by the original owner and may equally be able to recover more than that owner claimed. Capital allowances specialists price unrealised allowances as a matter of routine. The capital goods scheme position has the same potential for liabilities or additional recovery and is almost never priced, although the contract can share it and HMRC accepts those payments as further consideration within the TOGC.

The July 2026 changes bring a trap. The increase in the capital goods scheme threshold for land and property from £250,000 to £600,000 applies to expenditure incurred from 29 July 2026. Anything already within the scheme stays there under the old £250,000 threshold. For the next decade, the question is when the expenditure was incurred, not whether it reached £600,000.

When you cannot agree, remove the question

Notice 700/9 confirms that HMRC does not give advance clearance for TOGC treatment. The parties must therefore form their own view, with no referee, a completion date in the diary, and assessments that have run to eight figures when a tribunal disagrees years later. Neither side can afford to be relaxed about it, and their exposures point in opposite directions, which is why the argument rarely resolves itself.

I have previously taken the view that, where both sides cannot reach agreement, it may be better to deliberately fail the conditions and achieve certainty that way. This might sound bizarre, but as the conditions are mechanical and cannot be repaired afterwards, they can be failed in real time, and the failure is final.

These uncertainties usually involve commercial property, and there are two ways to ensure that the land conditions are not met. The buyer can opt to tax immediately after completion instead of before the relevant date. This leaves the buyer fully taxable but puts the transaction outside the TOGC provisions, though it may have to explain its input tax claim to HMRC. Alternatively, and perhaps more cleanly, the Article 5(2B) notification can simply be withheld. In fact, I have advised on one agreement where we stated outright in the papers that it was not being given.

HMRC's guidance is explicit that where the buyer has neither opted nor made the required notifications by the relevant date, the property falls outside the TOGC provisions and VAT is due on it, regardless of any later attempt to remedy this.

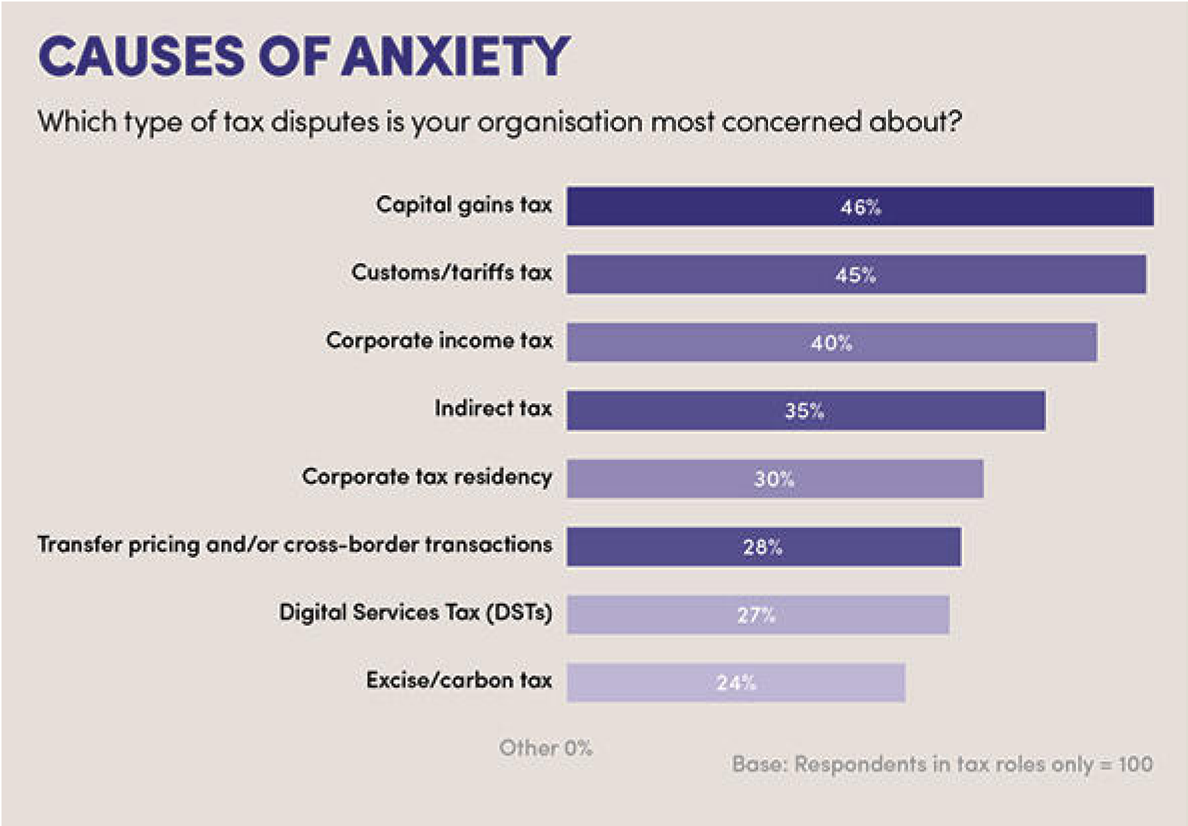
The rules do not force an all-or-nothing outcome. The provision operates to the extent that the transfer consists of the relevant grant, so failing the land conditions makes the property taxable while goodwill, stock and equipment can still pass outside the scope of VAT as a TOGC.

On a property investment sale, the property is the whole transaction, so this provides certainty over the VAT treatment of the entire sale. On a trading business sale, it is arguably better, because the land is usually the only asset in dispute. This approach isolates the land while leaving the VAT treatment of the other assets unaffected.

There is also a cost to this approach which should not be ignored. VAT charged on the sale forms part of the chargeable consideration for stamp tax. The buyer pays stamp tax on the VAT-inclusive value and cannot recover that additional cost. Somebody must agree who bears it, and it usually becomes a commercial issue affecting the price.

Finally, this only works if it is designed in from the outset. Most solicitors work from standard TOGC clauses, and a contract stating that the parties intend TOGC treatment could turn a deliberately late option into a breach of warranty. Those clauses are not fixed. They can be redrafted to record what the parties have actually decided, which is what we did in the agreement above. The VAT treatment therefore needs to be considered at the heads of terms stage.

Image


CAUSES OF ANXIETY
Which type of tax disputes is your organisation most concerned about?
Capital gains tax
46%
Customs/tariffs tax
45%
Corporate income tax
40%
Indirect tax
35%
Corporate tax residency
30%
Transfer pricing and/or cross-border transactions
28%
Digital Services Tax (DSTs)
27%
Excise/carbon tax
24%
Other 0%
Base: Respondents in tax roles only = 100