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SELLING A BUSINESS? WILL YOU GET THE GST EXEMPTION?

Are you currently selling, or thinking about selling your business?

Are you aware of the GST implications of the sale?

With the introduction of the Goods and Services Tax in 2000, without an exemption, a sale of business would usually constitute a taxable supply for the purposes of the GST legislation, thereby giving rise to an obligation on the vendor of the business to remit GST on the sale to the Australian Taxation Office ("ATO").

However, subdivision 38-J of the A New Tax System (Goods and Services Tax) Act 1999 ("GST Act") provides an exemption from the obligation to pay GST on the sale of a business where the sale of the business constitutes a supply of a going concern for the purposes of that subdivision – that is, if certain conditions are satisfied, a supply of a going concern is GST free.

The term "supply of a going concern" is a defined statutory term in the GST Act. In essence, that term is defined such that a supply of a going concern is a supply under an arrangement whereby the supplier supplies to the recipient all of the things that are necessary for the continued operation of an enterprise and, in addition, the supplier carries on, or will carry on, the enterprise until the day of the supply (whether or not as part of a larger enterprise carried on by the supplier).

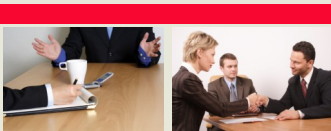
Many people are aware of the existence of this exemption and think that it automatically applies to the sale of any business. This is based on a belief that the ordinary meaning of the term "going concern" corresponds to the required statutory definition contained



in the GST Act. However, this is not always the case.

Subsection 38 – 325 (1) of the GST Act provides that the supply of a going concern is GST free if:-

- The supply is for consideration; and
- The recipient of the supply is registered or required to be registered for GST purposes; and
- The supplier and the recipient have agreed in writing that the supply is of a going concern.

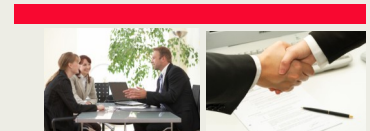


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The conditions above are usually satisfied in the sale of business context because the purchaser will be paying money or other consideration for the purchase of the business, the recipient/buyer is generally registered or required to be registered and the parties usually have lawyers acting for them who advise them to agree in writing that the exemption is to apply.

Accordingly, the issue of whether the sale is GST free as the supply of a going concern will depend on whether the circumstances of the sale conform to the definition of supply of a going concern. That is, whether on the facts of the particular business transaction, it can be said that the supplier/vendor of the business supplies to the purchaser/recipient of the business, all of the things that are necessary for the continued operation of an enterprise.

The things that are necessary will depend on the nature of the enterprise carried on and the core attributes of that enterprise. The ATO has confirmed that the term "all of the things that are necessary" does not refer to every conceivable thing which might be used in the relevant enterprise. For example, access to public roads, public telephone systems and postal services are not ordinarily things that must be supplied by the vendor to the purchaser for the exemption to be available.

The ATO and the Courts have confirmed that the test, of whether all of the things that are necessary have been supplied, is satisfied if the vendor has supplied to the purchaser all of the things that are necessary for the purchaser to be in a position to carry on the identified enterprise from the date of the supply.

The assets necessary for the continued operation of the enterprise include, where appropriate, premises, plant and equipment, stock in trade and intangible assets such as goodwill, contracts, licences and quotas.



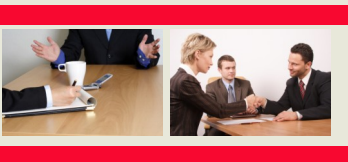
For example, where particular premises are necessary for the continued operation of the business, these premises must be supplied.

Example:-

Patricia conducts a takeaway business from leased premises within a suburban shopping mall. Patricia negotiates the sale of the business to another registered entity which has its own premises from which it intends to operate a takeaway business. The Contract for Sale of the Business provides that the business name, the plant and equipment, the stock and the goodwill are supplied to the purchaser but Patricia retains her premises and intends to commence another business from those premises.

Because the takeaway business is conducted from premises within the mall, some premises are necessary for the conduct of the takeaway business. In this case, the supply is not the supply of going concern as Patricia is not supplying the premises, which are one of the things that are necessary for the continued operation of the takeaway business.

If you are unsure of your GST liability, or would simply like advice in relation to the GST aspects of your business sale or other legal work required in relation to the sale of your business, please contact our business lawyers on 1300 727 813.



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