GST free going concerns – some practical issues

22 August 2014
4 min. read
gst clause / duty

A healthy part of HopgoodGanim's Tax and Revenue Law practice involves advising clients and their advisors in relation to the GST free going concern provisions.

The going concern exemption is attractive in that it provides a cash flow advantage to the purchaser in not having to finance a GST component of the purchase price, as well as there being a stamp duty saving.

The following are some of the more common issues that arise from time to time in relation to the GST free going concern exemption:

GST registration of both the vendor and the purchaser

Both parties need to be registered or required to be registered in order for the going concern exemption to apply. From the purchaser's perspective, it is important to have the vendor warrant that they will still be registered for GST as at the date of completion (which is when the supply is made for GST purposes), otherwise the GST-free going concern exemption will not apply.

From the vendor's perspective, the requirement is that the purchaser must be registered or required to be registered for GST purposes as at the date of completion. Although the best position is for the purchaser to be registered as at the date of contract, it is not necessarily problematic if this is not the case provided that there is evidence to show that either the purchaser has made application to the ATO to become registered for GST (on a voluntary basis or otherwise) or there is sufficient evidence to show that the projected turnover of the purchaser would be such that it would be required to be registered for GST in any event.

In terms of the drafting of the GST provisions in the contract, where the going concern exemption is to be relied upon, there should also be an additional GST clause allowing the recovery of GST in instances where, for whatever reason, the GST free going concern exemption does not apply.

Employees

The question often arises as to which employees, if any, are being "transferred" as part of the sale. According to the Commissioner's ruling (GSTR 2002/5), only "key" employees are required to be transferred. Broadly, the Commissioner considers that a key employee is, broadly, one without whom the business could not function. For example, the one and only person who is able to fully comprehend the IT system (integral to the operation of the business) and to make adjustments to it, being the person who created it, would be such an employee. That person would need to be transferred to the purchaser under the sale.

Therefore, generally, a vendor should still be able to satisfy the going concern exemption where relatively few employees are in fact to be transferred to the purchaser (provided that those employees transferred include all the "key" employees).

Partly tenanted buildings

Unfortunately there is no clear indication as to what percentage of a building needs to be tenanted if only one tenant occupies the building. For example if two thirds of a commercial warehouse is leased by one tenant, is that enough to satisfy the going concern exemption? What if it was only one third of the building that was being occupied? In multi-tenanted buildings, the Commissioner's approach is that the going concern exemption will be available if the owner of the building is at the time of sale actively seeking tenants for those areas of the building not currently rented/leased.

Where premises are vacant immediately prior to, or even after the contract has been signed, it is still possible for a tenant to be put into the premises in order to satisfy the going concern exemption. This tenant may also be a related party of the vendor.

It should be noted that stamp duty in the relevant State or Territory is payable on the GST inclusive purchase price. Therefore, if the GST going concern exemption is to apply, this results in a lower GST inclusive purchase price and therefore a lower duty amount. However, if the parties treat the supply as the sale of a going concern and the ATO later contends otherwise, there will be an increase in the duty liability. The GST clause in the agreement should allow for this possibility by stating, for example, that in such circumstances the purchaser will be liable for the increase in duty.

For further advise on taxation matters, please contact HopgoodGanim's Taxation team.

22 August 2014
gst clause / duty
Previous article Next article