

Transfer of Business

This document should be read in conjunction with section 20(2)(c) of the Vat Consolidation Act 2010. (VATCA 2010)

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1 Introduction

Section 20(2)(c) of the Value-Added Tax Consolidation Act 2010 (the VAT Act) provides that a transfer of ownership of goods, being the transfer to an accountable person of a totality of the assets or part thereof, of a business, even if that business or part thereof had ceased trading, where those transferred assets constitute an undertaking or part of an undertaking capable of being operated on an independent basis, is deemed not to be a supply for VAT purposes.

Section 26 of the VAT Act provides that the transfer of goodwill or other intangible assets of a business, in connection with the transfer of the business, or part thereof, or in connection with the transfer of ownership of goods that qualify for relief under section 20(2)(c) is deemed not to be a supply for VAT purposes when the transfer is between an accountable person and a taxable person who carries on a business in the State, or between a person who is not an accountable person and another person.

These two provisions, generally referred to as Transfer of Business relief (TOB), are important measures aimed at reducing compliance costs for traders. However, traders are advised that when they are involved in a transfer that could qualify for TOB they should, in cases of doubt, check with their local Revenue District before paying any VAT invoiced by the vendor in such circumstances. Where a transfer that qualifies for TOB takes place it is important to note that any VAT paid by a purchaser to a vendor in error will not be deductible since the transfer is deemed not to be a supply for VAT purposes.

Articles 19 and 29 of Council Directive 2006/112/EC (the VAT Directive) provide the vires for the provisions in section 20 and 26 the VAT Act. The definitions of accountable person and taxable person are set out in Section 2(1) of the VAT Act. For the purposes of TOB the term accountable person does not include a person registered for VAT only for the purposes of accounting for intra-Community acquisitions or received services.

This manual does not deal with the transfer of a business by means of the transfer of the shares in a company. The transfer of shares in a company is exempt from VAT in accordance with paragraph (6)(1) of Schedule 1 of the VAT Act.

2 What are transfers of business assets qualifying for the relief

VAT law refers to the transfer of a totality of the assets, or part thereof, of a business. Where a business is transferred, the assets that may be transferred can normally be sub-divided as follows:

1. premises
2. employees
3. plant and machinery
4. stock
5. goodwill
6. intellectual property
7. debtors.

The classic transfer of a business as a going concern will include the transfer of all seven. However, some businesses may not have all seven. For example, there may be no plant, machinery or stock where the business is a service business. The Courts have ruled that the relief does not cover the transfer of assets alone. The transferred assets must constitute an undertaking, or part thereof, capable of being operated on an independent basis.

3 Circumstances in which the relief applies to tangible assets

The relief applies where the transferred assets, or part thereof, are capable of being operated on an independent basis:

- to carry on the same or a similar taxable business
- for the purposes of the acquirer's own taxable business, following the cessation of the transferor's business or
- to carry on a different taxable business in the premises using the assets acquired.

The relief applies even if the business or part of the business has ceased trading.

The relief does not apply to the sale of stock-in-trade on its own or the once-off sales of business assets. For example, the sale of an oil tanker by a garage owner who also delivers home heating oil would not qualify for TOB. In contrast, the sale of the entire home-heating oil distribution business which also includes that oil tanker would qualify for the relief.

The absence of any one of the component parts of the business from the transfer will not automatically preclude the application of the provision to the transaction.

Where a person acquiring a business, or part of a business, has applied for but has not yet received a VAT registration number, the vendor may apply TOB.

4 Circumstances in which the relief applies to intangible assets

Goodwill and intangible assets that are transferred as part of the transfer of a business may benefit from TOB and be deemed not to be a supply for VAT purposes.

The relief for intangible assets and goodwill applies both to the transfer from an **accountable person to a taxable person** who carries on a business in the State and to the transfer from a person who is not an accountable person to another person.

5 Transfers that may benefit from TOB

A transfer of a milk quota between farmers, whether they are registered for VAT or not, may benefit from TOB even where the farming business has ceased trading. A transfer of a taxi license similarly may benefit from TOB.

The transfer of a publican's business with accompanying assets qualifies for the relief. In addition, the consideration charged to an accountable person for an agreement to extinguish a publican's licence, even without the accompanying assets being sold, comes within TOB.

In general, when a partner disposes of his or her interest in a partnership (as distinct from his or her interest in the assets of the partnership) there is no supply for VAT purposes. A disposal of an interest in assets of the partnership or of an interest in co-owned assets may constitute a supply for VAT purposes and, where applicable, may be subject to TOB provisions.

6 Transfer of a business to a non-established person

TOB does not extend to the transfer of a business to a person who is not registered or entitled to register for VAT in the State. The transfer of the goods out of the State may benefit from the zero-rating for EU intra-Community supply or export. The transfer of rights to intellectual property by a business in the State to a business established outside the State is generally not taxable in the State.

7 Sales by Receivers and Liquidators

A sale of goods forming part of the assets of a business of an accountable person under a power exercised by another person, including a liquidator or receiver, is generally deemed to be supplied by the accountable person under section 22(3) of the VAT Act. The disposal by way of TOB is deemed not to be a supply for VAT purposes. Therefore, where a liquidator or receiver or other person exercising a power disposes of the assets of an accountable person by way of transfer of business section 22(3) does not apply to the liquidator or receiver or other person.

8 Transactions after the transfer of assets

Where a transferor of a business issues an invoice to a customer and, subsequent to the transfer of the business, the goods are faulty and returned or where a discount or rebate is due to the customer against the price originally charged for the goods, then sections 39(4) and 67(1)(b) of the VAT Act (together with Regulation 20 VAT Regulations 2010) impose an obligation on the transferor to issue a credit note in respect of such transactions. Where a business has passed by way of TOB and the transferor had no tax liabilities outstanding in respect of that business Revenue concessionally allow the transferee, rather than the transferor, to issue a credit note in respect of such transactions.

Similarly, where a transferor of a business supplies goods issued under warranty and, subsequent to the transfer of a business, the customer returns the goods to the transferee for repair/replacement, the transferee is not entitled to recover input VAT incurred on expenditure relating to the fulfillment of the warranty since this expenditure does not relate to any taxable supplies made by the transferee. Where a business has passed by way of TOB and the transferor had no tax liabilities outstanding in respect of that business Revenue concessionally allow the transferee, rather than the transferor, input credit in respect of such transactions.

Where, as part of the transfer of a business to which TOB applies, the transferor of the business transfers debts that, subsequent to the transfer, are determined to be bad debts, the transferee has no entitlement to bad debt relief since transferee is not the accountable person who made the supply. However, bad debt relief subject to the normal conditions is available in respect of any debts retained by the transferor that are not included in the transfer.

9 Deductibility of input VAT

Section 59(2A) provides that a deduction of input VAT is allowable in respect of services directly related to the transfer of a business where that transaction would have been taxable but for TOB. Deductibility does not extend to a transfer of business where the parties agree that they would have acted differently, that is, they would have exercised a joint option to tax the transaction were it not covered by TOB.

No deductibility is available for services directly related to the disposal of a reversionary interest in accordance with Section 93(2).

There may be an entitlement to deductibility where the services bought in for the transfer of business represent inputs that are cost components of the general overheads of the business and, therefore, have a direct and immediate link to the taxable supplies of the transferred part of the business.

Some examples of deductibility of VAT charged on services related to the transfer of assets are set out in Annex 1.

10 Transfers of business that include property

The transfer of a freehold or freehold equivalent interest in property to an accountable person when:

- the property forms part of an amalgam of assets capable of being operated on an independent basis, or
- the property itself, such as a property that is currently let or was let in the past, constitutes an undertaking capable of being operated on an independent basis

may qualify for TOB. When property is an asset that passes under TOB the VAT rules for property transactions must be considered. These are set out in detail in the VAT on Property Guide (April, 2008) (as amended). The following paragraphs deal with the interaction between the TOB and the VAT on Property rules, in particular the Capital Goods Scheme (CGS).

The transfer of a property under TOB during the period when **a property is considered new** and taxable under the VAT on Property rules will give rise to the following:

- the transferor is treated as having made a taxable supply of the property; and
- the transferee is deemed to have been charged the VAT that would have been charged but for the fact that TOB applied. The amount of tax that would have been charged is treated as the **total tax incurred**. Where the transferee does not have full deductibility the transferee must pay to Revenue the difference

between the total tax incurred and the amount the transferee would be entitled to deduct if VAT had been charged on the supply of the property.

The transfer of a property under TOB **outside the period where a property is considered new**, that is, if the property were supplied at the time the transfer takes place its supply would be exempt from VAT, results in the transferee **stepping into the shoes** of the transferor for the purposes of the CGS. The transferee takes over from the transferor and inherits the adjustment period of the property. For example, if six of the 20 intervals have elapsed then there will be 14 intervals remaining in the adjustment period for the transferee.

The transferee steps into the shoes of the transferor where, under TOB, an **assignment or surrender of a legacy lease takes place** on which the transferor had an entitlement to deduct tax on the acquisition or development of the property and that transfer or assignment would be taxable in the absence of TOB. There is no new 20 year life and the transferee is liable for CGS obligations for the remainder of the VAT life of the capital good.

The sale of a property that is subject to TOB may trigger the cancellation of a waiver of exemption in accordance with Section 96(12). Where this occurs Revenue will give credit in calculating the cancellation sum as follows:

- Where the sale would have been taxable but for TOB, a credit is given for VAT at reduced rate, currently 13.5%, of the sales consideration.
- Where the sale would have been exempt but for TOB, a credit is given for the VAT taken on by the purchaser under the capital goods scheme, that is, the liability that would arise for the transferee if the transferee immediately diverted the property to an exempt use.

Exporters who qualify under section 56 of the VAT Act are entitled to have supplies to them zero-rated. A qualifying exporter, who avails of the zero rate on the costs of acquiring or developing property, including construction costs and refurbishment costs as a tenant, has the same responsibility within the CGS as if VAT has been charged at the rates appropriate to the goods or services concerned and fully deducted by the exporter.

The concepts of 'undertaking' and 'business' include the exploitation of tangible and intangible property for the purposes of obtaining income therefrom on a continuing basis. It follows that the transfer of a let property is a transfer capable of qualifying for TOB since the transferred asset is capable of being operated on an independent basis. TOB will only apply when the person acquiring the let property is an accountable person but not necessarily accountable in respect of the asset being acquired. TOB does not apply to vacant property that has never been let or partially let.

TOB relief may apply in the following circumstances:

- the transfer of properties that are let, or that have been let, for a period of time on a continuing basis. This can include a transfer of a property, such as a shopping centre or office block, where some units are let or have been let on a continuing basis and some are vacant; and
- the transfer of a portfolio of distinct properties, including some that are or have been let on a continuing basis, where the portfolio of properties is being sold in one lot to one purchaser. Where a portfolio of properties is being divided and sold to more than one purchaser, each individual sale will be treated separately and TOB may apply to none, some or all of the sales.

TOB cannot apply to land or properties held as trading stock. However, where that stock is tangible property that has been exploited for the purposes of obtaining income therefrom on a continuing basis, such as the let properties in the preceding paragraph, TOB may apply.

There is a taxable supply of services where a property on which an input credit would have been allowable but for the operation of TOB is appropriated to private or non-business use before 1 January 2011 but during a period of 20 years following the acquisition or development of the property. Section 27(2) and section 44 of the VAT Consolidation 2010 Act and regulation 7 of the VAT Regulations 2010 set out details of the charge and the method to be used to identify the extent to which the goods are to be used for private or non-business purposes.

Where a property acquired or developed on or after 1st January 2011 forms part of the business assets that pass under TOB and the property, or part of the property, is subsequently used for private or non-business use, a CGS adjustment arises.

Annex 2 contains examples of transfers of property capable qualifying for TOB.

11 Capital Goods Record

Where a business is transferred under TOB provisions the transferor will normally be required to retain in his or her possession all records for at least six years from the date of the last transaction, unless Revenue notify the person that retention is not required.

The change in the property rules in 2008 introduced the Capital Goods record. The vendor must pass a Capital Goods record to a purchaser including when the supply of immovable goods is deemed not to be a supply by virtue of TOB provisions. In such circumstances, the transferee steps into the shoes of the transferor in relation to Capital Goods obligations.

The Capital Goods record should reflect new buildings in the last 20 years and refurbishments in the last 10 years, since each has a distinct capital goods life. The task of creating a Capital Goods Record for periods prior to 1 July 2008 usually involves looking back in time by reference to available documents and corporate memory. Documents, such as planning applications and fixed asset additions in accounts filed with the Companies Office, that are on the public record may be available going back over the potential 20 year life of the capital good.

These should be obtained, where available, as they will give a good indication of when the building was constructed, its intended use and changes in use, some of which may have been refurbishments. Accounts prepared using recognised accounting standards should be available for the last 6 years since this is the required retention period for tax purposes. These should be consulted to identify additions to fixed assets that will generally relate to a new capital good or a refurbishment.

Where it proves impossible to identify all items of capital expenditure a practical approach must be adopted where individual items cannot be specifically identified. For example, the fixed assets schedule of a business shows there were additions totalling €150,000 in 2007. From the accounts it is clear that €120,000 was the cost of a building extension and €20,000 the cost of carpark layout, the balance of €10,000 refers to the cost of other unidentified capital expenditure on buildings. This balance of €10,000 may be treated as a separate single 2007 capital good.

Where capital expenditure is not shown on the Balance Sheet practitioners may assume that capital goods are not reflected in Profit and Loss items unless the practitioner has concerns about the accounting standards used in the preparation of the accounts, or other matters. In such cases, the practitioner should contact the vendor's Revenue District.

Annex 1

Examples of deductibility of VAT charged on services directly related to the transfer of assets subject to TOB.

1. A developer developed a block of apartments with the intention of selling them on completion. The developer was unable to sell the apartments on completion and rented them for a period. The block of apartments is subsequently sold to an accountable person and is subject to TOB. VAT charged on services directly related to the sale is deductible because the sale would, but for TOB, be subject to tax.
2. A manufacturer sells its taxable business which consists of a factory, which is not new, together with plant. The VAT charged on services directly related to the sale is deductible because the services are cost components of the general overheads of a fully taxable business.
3. A VAT-exempt person sells its business which consists of a building that is not new together with equipment. The VAT charged on services directly related to the sale is not deductible because the services are cost components of the general overheads of an exempt business. Neither are they covered by Section 59(2A) as the sale would not be taxable even in the absence of TOB.
4. The owner of commercial property that is not new and has been let or partially let sells the property and the sale is subject to TOB. A number of scenarios arise.
 - a) VAT on services directly related to the sale is deductible if all the property or all its units were subject to taxable lettings.
 - b) VAT on services directly related to the sale is partially deductible if only some of the units were subject to taxable lettings.
 - c) VAT on services directly related to the sale is not deductible if none of the units were subject to taxable lettings.
 - d) In the case of a transfer of a development where some units are let on a taxable basis, some units are subject to exempt lettings while other units are vacant:
 - VAT is deductible in respect of the taxable lettings
 - VAT is not deductible in respect of exempt lettings
 - VAT may be partially deductible in relation to the vacant units depending on factors including the intended use of the units and the use to which they have been put.

Annex 2

Examples of transfers of property capable of TOB treatment.

- TOB applies to properties that are let at the time of transfer. For example, a developer developed a block of apartments with the intention of selling them on completion. The developer was unable to sell the apartments on completion and rented them for a period. The developer subsequently sold the block of apartments to an accountable person. TOB rules apply to this sale. However, if the developer had sold the same apartments to private individuals TOB would not apply.
- TOB applies where a property has been let on a continuing basis and is being sold to a tenant who is an accountable person.
- TOB applies where a portfolio of properties, some or all of which are let or have been let on a continuing basis, is being sold as one lot by one vendor to one purchaser, who is an accountable person. Where a similar portfolio of properties is being divided and sold to more than one purchaser or where a number of vendors are selling a portfolio of properties to a single purchaser, each sale should be treated separately in respect of TOB provisions.
- The sale of a mixed development, which includes some let units, some vacant units, some incomplete units and some development land, by a single vendor in one lot to a single purchaser is capable of TOB treatment. The appropriate CGS treatment should be applied to each portion of the development.

Vacant Properties

- TOB applies in the case of a vacant property that was let or partially let on a continuing basis in the past.
- TOB applies where a vacant property was used for the purposes of a business in the past and has the necessary quality and attributes to be used for a similar business again immediately after transfer. For example, TOB applies to a factory that is vacant at the time of transfer but has all the necessary fixtures and fittings to be operated as a factory again following transfer.