

Transfers Of Going Concerns

On a Transfer of a Going Concern (TOGC), it is accepted that the buyer takes on any responsibility to adjust VAT originally incurred by the seller, and subject to the Capital Goods Scheme (CGS). TOGC clauses normally contain a warranty that, for example, the property is not subject to the CGS.

HMRC are now of the view that the point is not confined to the CGS, and that the buyer might also have to adjust VAT incurred by the seller on other expenditure, where this has not actually been used by the seller. One example would be a refurbishment below the £250k for the CGS, where the space has not yet been reoccupied following the work. Recent HMRC guidance says that the seller should provide the buyer with information about this, which would suggest that a further warranty is needed in TOGC clauses.

There is no apparent basis in law for any of this. We have asked HMRC about this, and they have said that there is no need for one, and that they are relying on general principles. Sometimes the point would benefit the buyer, and other times it would involve a cost. But in any case the point is a potential nuisance in transactions, particularly if, as is likely, the other side are not aware of it. We don't recall ever seeing the point picked up in a sale agreement.

Unless there is a particular reason for thinking that the point would benefit your client, our suggestion would be to ignore it, at least for the time being.

But please let us know if you come across cases where either side tries to insert a clause to cover the point.

If you would like to discuss this or any other VAT matter, please do not hesitate to contact us.

Elysian Associates

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