

GST and Business Sales

The sale of a business as a going concern is GST free.

The business is a going concern if the business is a continuing business or enterprise.

For example, the sale of a tenanted commercial building would be a going concern.

In order for the GST free status to apply, a number of conditions must be satisfied.

1. The sale must be made in return for some kind of payment;
2. The buyer must be registered or required to be registered;
3. The seller and buyer must agree in writing that the sale relates to a going concern. This requirement is designed to prevent buyers from attempting to claim GST credits when the seller considered the sale to be GST free.
4. Under the agreement, the seller must carry on the business or enterprise until the date of settlement. If operation of the business is discontinued prior to settlement, the exemption status is lost.
5. Under the agreement, the seller must provide the buyer with all of the parts of the business necessary for the business to continue its operation.

It should be remembered that all of the above five ingredients must exist. It is certainly not sufficient for buyer and seller to simply agree as to GST impact.

Even if it is the case that the transaction is subject to GST, the buyer may (provided that it is registered) claim a GST credit. The only disadvantage to the buyer if GST is applicable, is cash flow.

It is most important, particularly from the seller's position, to ensure that the correct status of the contract is ascertained prior to sale.

If, for example, if the seller agrees incorrectly that the transaction is GST free, the burden of paying the GST will fall on the seller, even though no allowance was made for the tax on the sale.

This problem might occur, for instance, where the sale of the going concern is to a buyer who is not registered for GST and the buyer has a turnover of less than \$50,000. (A business with a turnover of less than \$50,000 is not required to be registered. In this case, the seller might incorrectly believe that GST is not payable.

If the buyer is registered or required to be registered and the issue of whether GST is payable is incorrectly decided, then the buyer may get an unintended benefit as the buyer can claim credits even though in fact, it paid no GST.

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If the contract provides for a price inclusive of GST and also provides wrongly that the sale is GST free, but for some reason the contract becomes subject to GST, (for example the operators are forced to discontinue operation prior to settlement), then the seller will be liable for GST under the contract, yet the buyer can claim GST credits.

It is most commonly the seller who is at risk. Accordingly, contracts should attempt to protect the seller. A clause should always be inserted into the contract which provides that any GST payable by the seller may be recovered from the buyer.

The consequences of GST has become a consideration for business owners not only in the day to day operation of a business, it must also be considered prior to the point of acquisition or sale.

This article was kindly written and supplied by Joe Riba of JJ Riba & Company, Solicitors of Maroochydore. Tel 07 5479 1488