Title:
Do I Buy The Assets Or The Shares In The Company I Want To Buy (“The Target”)

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824

Summary:
Practical and legal tips about whether to buy a company's shares or its assets when buying a business

Keywords:
Company purchase, company sale, business purchase, asset sale, asset purchase, share sale, share purchase, business sale, transfer as a going concern, TUPE regulations

Article Body:
When you are looking at a company or business purchase, for a buyer the answer will usually be that it will be simpler quicker and more cost effective to buy the assets of a business rather than the shares itself. For the seller it will usually be more tax effective to sell the shares in the business. The reasons for this view are outlined below. In our opinion, selling the business assets rather than the shares (i.e. a business sale) will usually result in quicker more cost-effective deals because the rules on financial assistance do not apply to asset sales (see below) and the buyer can be more selective about which assets (and liabilities) the buyer takes on.

Legal Effect

Where a buyer acquires shares in the Target, the accrued liabilities of the Target remain in those shares, hence extensive warranties and disclosures are sought by the buyer to ensure as far as possible the legal position of the buyer. With asset purchases, the liability of the Target remains in the hands of the seller and the buyer has greater scope to cherry pick which assets she or he wishes to acquire. In practice, a “clean break” from the business is never generally available for the seller, as the buyer will very often want some post completion warranties from the seller, regardless of which structure is used to acquire the business.

Consideration

With company sales (share sales), the purchase monies go into the hands of the individual shareholders. Where an asset sale takes place the sale proceeds go into the hands of the Target. Clearly different tax considerations apply depending on which scenario is adopted.

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Where a share sale takes place then all the assets owned by the company remain with the company, and transfer of ownership in the assets is not an issue. Where the deal is structured as an asset sale, the transfer of assets can be more complicated, particularly where third party consents are required (typically for transfers of leases) and where there are employees (due to the complex rules (Transfer of Undertaking Protection of Employment Regulations – “the TUPE rules”) where there is a sale of a going concern. Where delays arise, solutions can be put in place to ensure the ownership of the asset is ultimately transferred to the buyer. The extent to which this is a workable solution will depend on how fundamental the relevant asset is to the business and the extent to which buyer and seller are willing to work together to develop a workable solution.

Employees

If the buyer wishes to carry on the business in succession to the seller, then as a matter of practicality it makes little difference whether a share sale or asset sale takes place. In both cases, the buyer “inherits” the employees and their accrued rights (under the TUPE rules).

If an asset sale is taking place with no intention to carry on the business then this situation would need to be covered by warranties to protect both buyer and seller from potential employee claims.

Tax

Stamp duty

Duty payable on share transfers is currently 0.5%. Duty payable on the transfer of certain assets including freehold or leasehold property can currently go up to 4%.

Capital Gains Tax – Share Sale By Individual Shareholders

The issue to bear in mind here is that the seller receives the consideration directly for her or his shares.

For sellers the biggest tax benefit they have is likely to be the dramatic effect of taper relief. This can reduce capital gains tax liability to under 25% after two years ownership of a “qualifying asset”, the most important of these being certain shareholdings in unquoted companies, and assets owned by an individual and used in the individuals company (provided the shares in that company meet certain restricted ownership requirements).

Corporation Tax – Asset Sale By Company

There are two tax points where the company sells its assets. Firstly the company may suffer a capital gains tax charge when disposing of the relevant asset to the buyer. Secondly the remaining consideration held the company needs to get to the shareholders. If the net proceeds are distributed by winding up the company the shareholders are treated as disposing of their shares for capital gains tax purposes. If the proceeds are distributed as a dividend involves further tax liability both for the company and the individual receiving the dividend.

Financial Assistance

A company may not give direct or indirect financial assistance to a person acquiring the shares in that company. Typically this arises where a buyer wants to acquire the shares in a company and the buyer finances the acquisition by arranging for the company to charge its assets to a bank fund the share purchase. There is a mechanism for allowing a company to give this assistance but it can be costly and time consuming.

The rules on financial assistance do not apply to asset sales.

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