GCC VAT rules for transfer of going concern (TOGC)

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GCC VAT Rules for TOGC

A TOGC is the sale of a business including assets, which is treated as outside the scope of VAT under the VAT legislation, subject to meeting certain conditions. This generally results in a cash flow savings for both the seller (transferor) and the buyer (transferee), which is critical in the current environment where companies are focusing on creating efficiencies in their business

Based on guidance issued by the relevant tax authorities in the GCC, we hereby provide an overview of the key considerations and requirements for a transaction to qualify as a TOGC. In this document, we highlight the relevant rules applicable in each of the United Arab Emirates (UAE), the Kingdom of Bahrain (Bahrain), the Kingdom of Saudi Arabia (KSA) and Sultanate of Oman (Oman) and analyse the key differences across the various systems.

Transfer of business

The transfer of a business as a going concern relates to a transfer of the whole or an independent part of a business to a taxable person for the purposes of continuing the business that was transferred.

Generally, all goods and services that are necessary for the continuation of the business or part of it must be transferred to the transferee. Accordingly a TOGC may comprise the transfer of:

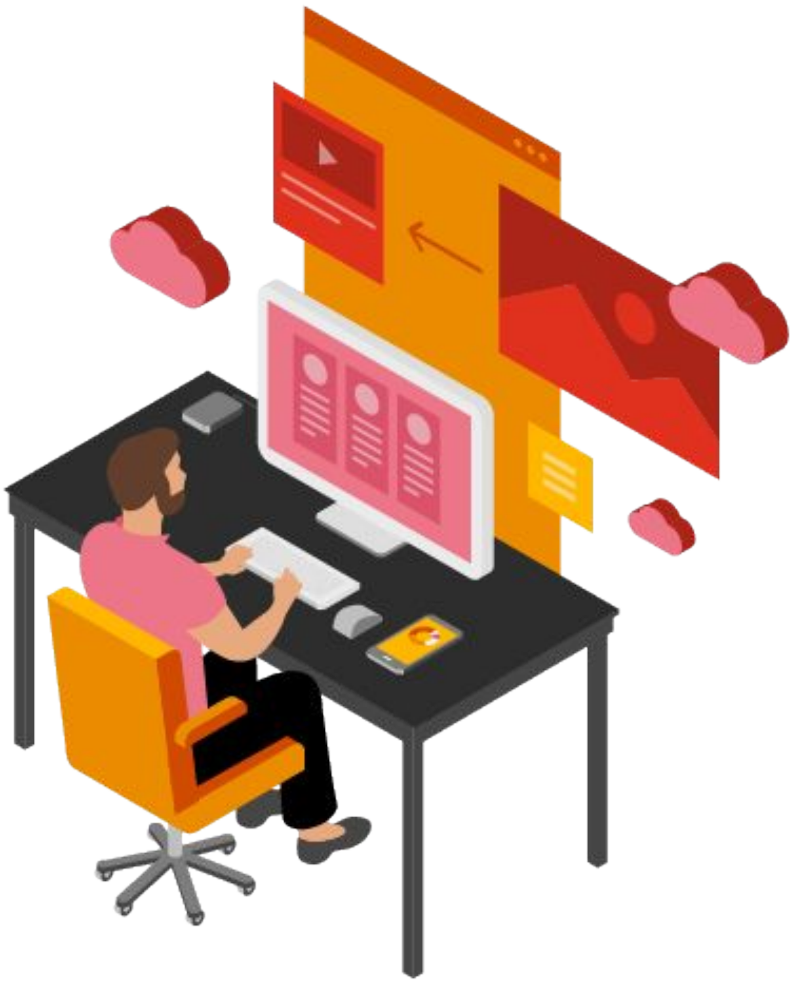
- Tangible assets - such as real estate, vehicles, machinery, inventory and cash;
- Intangible assets - such as goodwill, intellectual property, software and customer lists;
- Liabilities - such as the assumption of an obligation to pay any debts.

VAT treatment

The sale of assets by a VAT registered business is generally treated as a taxable supply subject to VAT at the standard rate, unless explicitly exempt under the legislation. However, when assets are sold as part of a TOGC, the transfer is considered as ‘neither a supply of goods nor a supply of services’. Therefore, a TOGC is considered outside the scope of VAT and no output VAT is chargeable on the business sale thus limiting any impact on cash flow for the recipient.

The purpose of the TOGC is to eliminate what could otherwise constitute a substantial cash flow cost to the transferee of having to pay VAT on the transfer of a business. Further, where there is a qualifying TOGC, the transferor does not need to individually value the assets being transferred for VAT purposes in order to apply the correct VAT treatment.

The newly introduced VAT Legislation in the Gulf Corporation Countries (GCC) did not provide unified guidance or regulations covering the conditions for a transfer of business to be considered as a TOGC. Each of the tax authorities in the GCC VAT Implementing States (currently KSA, UAE, Bahrain and Oman) have issued specific guidance and clarifications on the criteria and requirements for a transfer of business to satisfy the requirements of a TOGC.



We have summarised, in the table below, the GCC Implementing States specific requirements for TOGC.

	KSA	UAE	Bahrain	Oman
VAT implementation date	1 January 2018	1 January 2018	1 January 2019	16 April 2021
VAT standard rate	5% increased to 15% effective 1 July 2020	5%	5%	5%
Definition of business / economic activity	Economic activity is defined as an activity that is conducted in an ongoing and regular manner including commercial, industrial, agricultural or professional activities or services or any use of material or immaterial property and any other similar activity.	Business is defined as any activity conducted regularly, on an ongoing basis and independently by any Person, in any location, such as industrial, commercial, agricultural, professional, service or excavation activities or anything related to the use of tangible or intangible property.	Economic activity is defined as an activity that is conducted in an ongoing and regular manner for the purposes of generating income, and includes commercial, industrial, agricultural or professional activities or services or any use of tangible or intangible assets, and any other similar activity.	Activity is defined as the activity that is conducted in a continuous and regular manner, particularly commercial, industrial, professional, artisanal, or service activity.
Criteria to be satisfied a transfer to be a TOGC	1. The goods and services transferred are capable of being operated as an economic activity in their own right,	1. There must be a transfer of the whole or an independent part of a business.	1. Transfer includes all or part of a business capable of being operated on an independent basis.	1. The part of the activity that has been partially transferred is capable of operating by itself.

We have summarised, in the table below, the GCC Implementing States specific requirements for TOGC.

	KSA	UAE	Bahrain	Oman
Criteria to be satisfied a transfer to be a TOGC (cont'd)	and the recipient immediately following the transfer uses those goods and services to carry on that same economic activity. 2. The recipient (transferee) is a taxable person or becomes a taxable person as a result of the transfer. 3. The supplier (transferor) and the recipient agree in writing that they wish the transfer to be viewed as the transfer of an economic activity.	2. The transfer must be made to a taxable person. 3. The recipient (transferee) intends to continue the business which was transferred.	2. Transferor (supplier) must be VAT registered. 3. Transferee (recipient) must be VAT registered or become liable to register as a result of the TOGC. 4. The transferee must immediately use the assets acquired to conduct the same or a similar economic activity. 5. The transferor and transferee must independently notify the National Bureau of Revenue (NBR) of the transactions within 30 days of the sale/transfer.	2. The supply includes all of the elements of the transferred activity – fully or partially - and the activity's elements consist of all tangible and intangible assets that are used to conduct the activity and may include the activity's debts. 3. The transferee uses the assets to carry out the same type of activity that the transferor is engaged in. This activity does not need to be identical to the Activity of the transferor, but the transferee must be licensed by the respective body to carry out the activity and not only owning a group of assets. 4. The transferor shall be a taxable person, and the transferee becomes taxable as a result of the transaction.

We have summarised, in the table below, the GCC Implementing States specific requirements for TOGC.

	KSA	UAE	Bahrain	Oman
Criteria to be satisfied a transfer to be a TOGC (cont'd)				5. There must NOT be a series of consecutive transfers of the assets.
Supplier / transferor is required to be registered for TOGC purposes	No	No	Yes	Yes
Recipient / transferee must be a taxable person at the time of the transfer or become a taxable person as a result of the transfer	Yes The recipient is a taxable person or becomes a taxable person as a result of the transfer.	Yes The transfer must be made to a taxable person. This condition will be met where: • The recipient is registered; • The recipient is required to be registered under the mandatory registration rules and has applied	Yes The transferee must be VAT registered or become liable to be registered as a result of the TOGC.	Yes The transferee becomes taxable as a result of the supply, if the transferee was not registered prior to the supply.

We have summarised, in the table below, the GCC Implementing States specific requirements for TOGC.

	KSA	UAE	Bahrain	Oman
Recipient / transferee must be a taxable person at the time of the transfer or become a taxable person as a result of the transfer (cont'd)		• for registration to the Federal Tax Authority (FTA); • The recipient has applied for voluntary VAT registration and the FTA has accepted the application.		5. There must NOT be a series of consecutive transfers of the assets.
Requirement for transferee to carry on the transferred business	Yes	Yes	Yes	Yes
Reporting requirements to the Tax Authority	No	No	Yes	Yes
Reporting timeline	30 days from the date of the sale/transfer in the form of a notification.	N/A	30 days from the date of the sale/transfer.	One month from the date of the sale/transfer

We have summarised, in the table below, the GCC Implementing States specific requirements for TOGC.

	KSA	UAE	Bahrain	Oman
Reporting timeline (cont'd)	N/A	N/A	Notification should be on forms which can be obtained from the NBR.	Notification should be on forms which can be obtained from the Sultan of Oman Tax Authority (TA).
Requirement to issue a tax invoice	No	No	No	The transferor must provide the transferee with an invoice in which the transferor indicates in addition to the details included in the tax invoice stipulated in Article (144) of the Executive Regulations, all the supplies resulting from the transfer of the activity, provided that it is indicated in the invoice that the supply is not taxable as a result of the transfer of the activity.

Considering the nature of business operations in the GCC, we have noted below some of the key areas for businesses to consider when undertaking a proposed TOGC transaction:

A. Transfer of business between members of the same VAT group

Members of the same VAT group are treated as being one taxable person for VAT purposes. As such, any inter-group supplies are considered as out of the VAT scope and in any case would not qualify as a TOGC on the basis that there is no transfer for VAT purposes.

B. Transfer of Capital Assets as part of a TOGC

Where capital assets are transferred as part of a TOGC, the capital assets are not considered to be sold for the purposes of the Capital Assets Scheme (CAS). Once the capital assets have been transferred, the obligation for applying the CAS passes to the transferee.

C. Transfer of business to a VAT group

In order for a transfer of business to a VAT group to qualify as a TOGC, the assets must be used to make supplies to persons outside the VAT group and are not consumed within the same VAT group, unless it is used to make supplies to other VAT group members who will then make supplies to persons outside the VAT group.

The transfer of individual assets to separate standalone entities would not qualify as a TOGC on the basis that generally the transfer of individual assets would not be sufficient to conduct a business/economic activity.

However, where individual assets are transferred to different members of a VAT group (which formed together would be the whole business of the transferor), the transfer may qualify as a TOGC on the basis that transferred business would continue to be operated by the members of the VAT group (a single taxable person). The intention of the VAT group members to continue the business transfers would need to be evidenced in order to substantiate the application of the TOGC provisions.

D. Transfer of assets over a period of time

Usually, when a business is transferred, the business assets and any related liabilities would be transferred at the same time. However, there may be instances where assets and liabilities are transferred over a period of time. This does not prevent the transfer from being a qualifying TOGC. Where assets and liabilities are transferred over a period of time, the transferor will need to consider whether each transfer is a separate supply or forms part of the TOGC.

E. TOGC supporting documentation

When a transfer satisfies the conditions of a TOGC, then this transfer will be treated as being outside the scope of VAT and will not be subject to the normal record-keeping requirements under the VAT legislation in each respective jurisdiction.

The Tax Authorities in each jurisdiction may scrutinise whether the conditions of a TOGC are duly satisfied by the transferor. It is important that both the transferor and transferee keep documentation which could be used to substantiate that the conditions of a TOGC have been satisfied (such as any agreements or contracts for the transfer of the business). The supporting documentation should include details such as (but not limited to):

- Detailed description of the transaction;
- Identification of the VAT registration status of the recipient, as the transfer must be made to a taxable person;
- Confirmation from both parties that the transfer is of TOGC and that the recipient intends to continue the business which was transferred;
- Statement listing the party/parties liable for VAT and penalties in case of breaching the terms.

E. Input VAT deduction

Although a TOGC is not a supply for VAT purposes, this does not prevent the deduction of input VAT on related expenses (such as consultancy fees and legal fees which are considered to be a general overhead of the Transferor's business) in accordance with the normal input VAT recovery rules. However, this needs to be assessed based on the recoverability position of the transferor / transferee.

F. Potential customs considerations

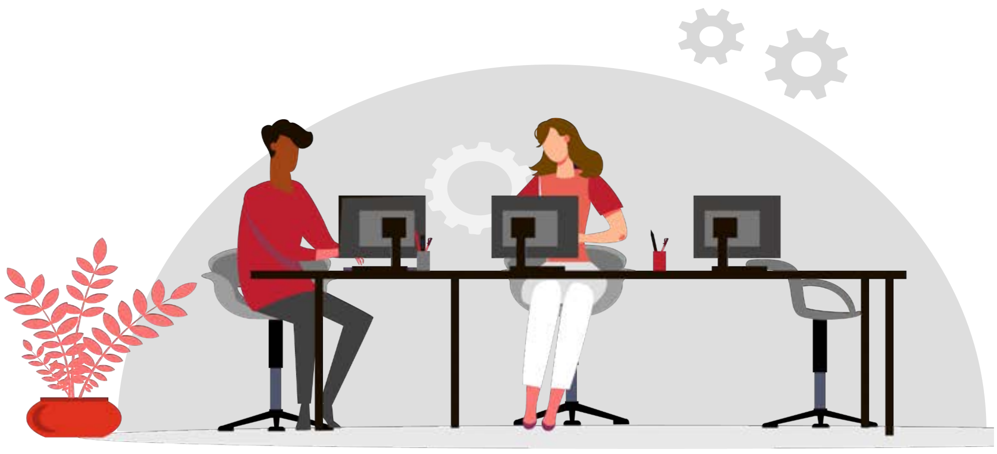
It is important to bear in mind that in cases where the sale of assets implies a cross-border movement, customs duty implications should be assessed. Assets may be exported from one territory to another, and consequently export and import rules must be observed, including the potential customs duty liability and the formalities associated with the shipments.

A case that is of particular interest is when assets sold are placed under a customs suspension arrangement, such as temporary admission. In these situations, depending on the local rules and practice, the sale may not be allowed unless the customs duty payment that was suspended by virtue of the temporary admission relief is settled with the local customs authorities. This may generate a significant cost to the transaction, which needs to be managed and mitigated where possible. If the sale of these goods implies an export from the territory where they were originally temporarily imported, the payment of the customs duty may not be required, but an authorization from the local customs authority to terminate the temporary admission may be necessary.

Key takeaway

Whilst the TOGC principles across the GCC VAT Implementing States are similar, there are some disparities in the rules. In order to ensure that businesses are transacting in a compliant manner, they should understand these disparities in the VAT treatment and the implications on their own business model. Operating a "one-size-fits-all" approach in the GCC increases risks of non-compliance and the imposition of penalties.

If you would like to discuss any of these areas further, please do not hesitate to reach out to our team.



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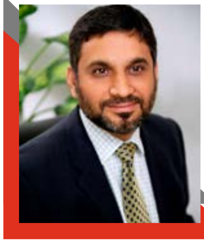

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