



ROYAL MALAYSIAN CUSTOMS

GOODS AND SERVICES TAX

GUIDE ON TRANSFER OF BUSINESS AS A GOING CONCERN

CONTENTS

INTRODUCTION.....	1
Overview of Goods and Services Tax (GST).....	1
SCOPE OF THIS GUIDE	1
GENERAL OPERATIONS OF THE INDUSTRY.....	2
Concept of TOGC.....	2
GST TREATMENT FOR THE INDUSTRY.....	2
Purpose of the TOGC provision.....	2
DEFINITION OF BUSINESS AND BUSINESS ASSETS	3
CONDITIONS FOR TOGC.....	3
GST IMPLICATION UNDER THE TOGC	4
TRANSFER OF BUSINESS THAT DOES NOT COME WITHIN THE SCOPE OF TOGC.....	5
TOGC INVOLVING GST GROUP MEMBERS	6
CAPITAL GOODS ADJUSTMENT UNDER TOGC.....	6
INPUT TAX ON INCIDENTAL EXPENSES	9
KEEPING OF BUSINESS RECORDS	9
RELATED INFORMATION FOR PARTIES INVOLVED IN TOGC.....	10
FREQUENTLY ASKED QUESTION.....	10
FEEDBACK AND COMMENTS.....	11
FURTHER ASSISTANCE AND INFORMATION	11

INTRODUCTION

1. This industry guide is prepared to assist businesses in understanding matters with regards to Goods and Services Tax (GST) treatment on Transfer of Business as a Going Concern.

Overview of Goods and Services Tax (GST)

2. Goods and Services Tax (GST) is a multi-stage tax on domestic consumption. GST is charged on all taxable supplies of goods and services in Malaysia except those specifically exempted. GST is also charged on importation of goods and services into Malaysia.

3. Payment of tax is made in stages by the intermediaries in the production and distribution process. Although the tax would be paid throughout the production and distribution chain, only the value added at each stage is taxed thus avoiding double taxation.

4. In Malaysia, a person who is registered under the Goods and Services Tax Act 20XX is known as a “registered person”. A registered person is required to charge GST (output tax) on his taxable supply of goods and services made to his customers. He is allowed to claim back any GST incurred on his purchases (input tax) which are inputs to his business. Therefore, the tax itself is not a cost to the intermediaries and does not appear as an expense item in their financial statements.

SCOPE OF THIS GUIDE

5. This guide includes the following:-
- (a) Conditions that are imposed on the transfer of business assets qualifying as a TOGC;
 - (b) GST obligations imposed on the transfer or of business assets under the TOGC;
 - (c) The GST obligations of the transferee of business assets after the TOGC is effected; and

- (d) Input tax incurred on expenses incidental to the TOGC that are claimable by both the transferor and transferee.

GENERAL OPERATIONS OF THE INDUSTRY

Concept of TOGC

6. Under the GST provisions, when a supply of business assets is made as TOGC, such supply of assets by a taxable person (transferor) to another taxable person (transferee) is treated as neither a supply of goods nor a supply of services. Consequently, the transferee who receives such transfer of assets shall be deemed to have incurred input tax on the value of the assets supplied to him and to have deducted such deemed input tax from any output tax due from him on the day of the supply made.

7. TOGC may involve the transfer of a whole or part of a business as a going concern from a taxable person to another taxable person and in the case where only part of the business is transferred, that part of the business must be able to operate on its own. TOGC may include the following:-

- (a) The business assets of a taxable person are taken over by another taxable person due to death or retirement;
- (b) A taxable person sells his business assets or part of his business to another taxable person who carries on the business as a going concern; or
- (c) The entity of a business has changed, for example, partnership becoming a private limited company.

GST TREATMENT FOR THE INDUSTRY

Purpose of the TOGC provision

8. TOGC is a facility provided to both the transferor and transferee involved in the transfer or sale of business as TOGC. The TOGC provision under the GST Act 20XX was introduced for the following purposes:-

- (a) the transferee need not have to pay output tax on the transferred assets and thus alleviate his cash flow burden;
- (b) the transferor did not have to account for output tax on the transferred assets; and
- (c) it could safeguard Government revenue on the output tax which the transferor may default in paying when he ceased business.

DEFINITION OF BUSINESS AND BUSINESS ASSETS

9. The definitions of business and business assets for TOGC purposes are as follows:

- (a) “**business**” is defined under section 3 of the GST Act 20XX, as including any trade, commerce, profession, vocation or any other similar activity, whether or not it is for a pecuniary profit.
- (b) “**business assets**” are any assets of a business whether movable or immovable and include trading stock, machinery, furniture, fixture and fittings and premises.

CONDITIONS FOR TOGC

10. A transfer of business assets can only be regarded as a TOGC when certain conditions are met. Such conditions include:-

- (a) both the transferor and transferee must be GST registered person before the transfer of a business or part of a business is carried out.
Note: A transferee who is not a registered person but would become one upon taking over the transferor’s business must register himself as a registered person before the transfer of the business takes place.
- (b) the transferee shall be treated as having carried on such business before as well as after the transfer and any taxable supplies made by the transferor shall be treated as supplied by the transferee.
- (c) in the case where only part of the business is transferred to a

transferee who is not a GST registered person, then only that part of the business that is transferred shall be taken as having carried on by the transferee before as well as after the transfer for the purpose of computing the prescribed threshold.

- (d) the business transferred must be a going concern before and immediately after the transfer. Any business which has actually ceased operation before the transfer does not qualify for TOGC consideration. However, a short period of break or temporary closure immediately after the transfer to facilitate the smooth transfer might be permissible;
- (e) the transferee must use the transferred assets to continue with the same kind of business of the transferor;
- (f) if only part of the business is sold or transferred, that part of business must be capable of separate operation. However, for the new owner it does not matter whether the transferred business will be operated separately from any other businesses that he is already operating.

GST IMPLICATION UNDER THE TOGC

11. The transfer of a business or part of a business which comes within the scope of TOGC is treated as neither a supply of goods nor a supply of services. Thus, there would be no output tax charged or received by the transferor on such transfer of business. On the other hand, the transferee is deemed to have incurred input tax on the supply and at the same time claimed the deemed input tax. So, in reality there is no payment of GST by the transferee to the transferor for the transfer of business or part of a business under the TOGC.

12. Under TOGC, the principle of continuity upholds. This means that if there is any input tax incurred which has not been claimed by the transferor on the date of transfer, it is claimable by the transferee. However, if there is any output tax which has not been accounted for and paid by the transferor on the date of transfer, it becomes the liability of the transferee to account and pay for the tax.

TRANSFER OF BUSINESS THAT DOES NOT COME WITHIN THE SCOPE OF TOGC

13. There are instances where the transfer of a business does not come within the scope of TOGC, such as follows:-

- (a) A mere sale or transfer of capital assets

A sale or transfer of capital assets which does not result in the purchaser taking over the business of the seller is not a TOGC.

- (b) Transfer of shares which do not change the entity of the business.

A mere transfer of shares from one shareholder in a limited company to another shareholder or person does not constitute a TOGC as the ownership of the business assets still remains within same business entity. Likewise, any change in a partnership shall not be taken into account for the purpose of GST. Thus, the TOGC provisions would not be applicable to a change in the partnership of a firm.

- (c) A series of immediate consecutive transfers of the same business.

A purchaser of a business who made an immediate sale of the business to another party is deemed to have not carried out the business of the first vendor. This would make both his purchase and subsequent sale to be outside the scope of TOGC. Consequently, the normal rules of GST would apply to both his purchase and subsequent sale. See example below.

Example 1:

Ahmad acquired a business from Ali and immediately transferred the business to Akmal. Under this instance, Ahmad is considered as not carrying out the business of Ali, and the TOGC provisions would not apply. This would make Ahmad's purchase from Ali subject to output tax. Ahmad's subsequent transfer of the business to Akmal would also attract GST.

14. The assets of the part of the business transferred are not directly used by the transferee to make supplies but rather used as capital asset of his business.

Example 2:

A property owner, who is in the business of leasing commercial properties, sold part of his business to one of his tenant who then converts the commercial buildings he acquired as his business offices.

TOGC INVOLVING GST GROUP MEMBERS

15. The general provisions that govern GST group registration also apply to supply or acquisition of business assets as a TOGC by members of a GST group as follows:

- (a) any transfer of business assets between members of the same GST group is treated as a disregarded supply and there would be no GST implication;
- (b) any transfer of business assets as TOGC by any group member is deemed to be made by the representative member of the group;
- (c) any acquisition of business assets under a TOGC by any group member is deemed to have been acquired by the representative member of the group.

CAPITAL GOODS ADJUSTMENT UNDER TOGC

16. The general provisions under the capital goods adjustment are applicable to a TOGC. Under the capital goods adjustment, annual adjustments to input tax claims has to be made on any capital items that are used to make mixed supplies if the proportional use of the capital items varies from year to year. When any capital item that falls within the capital goods adjustment are transferred as a TOGC, the transferee is obliged to continue with the adjustments on the transferred capital item(s) for the remainder of the adjustment periods.

17. The tax interval applying to a capital item at the time of its transfer would end on the last day of the transferee's tax year that encompasses the date of transfer. Each subsequent interval, if any, shall end on the last day of the transferee's annual tax year. See example below:

Example 3:

ABC transferred some business assets to XYZ as a TOGC on 25th March 2016. ABC's second tax interval for the transferred assets would end on 30th September 2016 while XYZ's current tax year would only end on 31st December 2016. Thus, the second interval for the transferred assets shall end on 31st December 2016. The third, fourth and fifth interval for the transferred assets would end on 31st December 2017, 31st December 2018 and 31st December 2019 respectively.

18. The obligations of both the transferor and transferee in respect of any capital items transferred under a TOGC are as follows:-

- (a) the transferor must notify the transferee of any capital items that are still covered under the capital goods adjustment;
- (b) the transferor must provide all details and the necessary records and accounts to the transferee to continue with the necessary adjustments;
- (c) the transferee, on the other hand, is required to confirm with the transferor whether the business that is being transferred includes any capital items that are still covered by the capital goods adjustment;
- (d) the transferee has to continue making adjustments to any capital items that are still covered by the capital goods adjustment for the remaining adjustment period, unless there is no proportional change in the use of the capital items to make taxable and exempt supplies for the remaining adjustment period;
- (e) the transferee has to pay additional input tax if the proportional use of the capital items to make exempt supplies increases during the remaining adjustment periods. On the reverse situation, the transferee is able to claim or recover more input tax credit on the capital items;
- (f) when the usage of any transferred capital items subsequently change from making wholly taxable supplies to wholly exempt supplies, the transferee has to repay the input tax (deemed deducted at the time of transfer) to the Director-General of Customs.

- (g) when the usage of any transferred capital items subsequently change from making wholly taxable supplies to mixed supplies, the transferee has to carry out annual adjustment to the deemed input tax claim on the transferred capital items for any remainder intervals and repay the input tax based on the adjustments made to the Director-General of Customs. See example below.

Example 4:

Assuming the transfer of items as a TOGC takes place on 1.1.2016. The capital items have been capitalized by the transferor on 1.1.2015. The usage of the capital items change from making wholly taxable supplies to mixed supplies for the year 2017 (80%), 2018 (50%) and 2019 (70%). The total value of the capital items at the time of transfer is RM1,250,000. The deemed input tax claimed is RM75,000 (RM1,250,000 X 6%). Adjustments that the transferee has to make are shown in the table below:

Table 1: Adjustment in TOGC

Interval (year)	Rate of Taxable use (%)	Adjustment (%)	Computation	Adjustment (RM)
1 (2015)	100%	-	-	-
2 (2016)	100%	-	-	-
3 (2017)	80%	80% - 100%	$\frac{50,000}{5} \times (-20\%)$	(2,000)
4 (2018)	50%	50% - 100%	$\frac{50,000}{5} \times (-50\%)$	(5,000)
5 (2019)	70%	70% - 100%	$\frac{50,000}{5} \times (-30\%)$	(3,000)

Note:

- (a) For the second interval (tax year 2016), no adjustment is required to be made by the transferee as the capital items are used to make wholly taxable supplies.

- (b) For the tax year (interval) 2017, 2018 and 2019, the transferee has to make adjustment to the deemed input tax claimed and repay to the Director General of Customs, input tax amounting to RM2,000.00, RM5,000.00 and RM3,000.00 respectively.

INPUT TAX ON INCIDENTAL EXPENSES

19. Both the transferor and transferee may incur incidental expenses on the transferring of business, such as fees paid for due diligence on the transferred business and legal fees for the preparation and to seal the transfer or sale and purchase agreement. Despite supplies made under TOGC being treated as neither a supply of goods nor services, both the transferor and transferee may claim input tax credit incurred on expenses incidental to the transfer of business as follows:-

- (a) the transferee can claim the full amount of input tax incurred if the acquired assets are used to make wholly taxable supplies;
- (b) if the transferee uses the transferred assets to make mixed supplies, then he has to apportion the input tax claim accordingly based on the partial exemption method adopted;
- (c) since the sale or transfer of business asset by the transferor under the TOGC is not regarded as a supply, the transferor could not treat the input tax on incidental expenses incurred as attributable to taxable supplies. However, the GST legislation allows the transferor to claim any input tax incurred which is incidental to the transfer of going concern.

20. When business assets transferred as a TOGC are used to make only exempt supplies, the transferee are not entitled to claim any input tax incurred on expenses incidental to the transfer.

KEEPING OF BUSINESS RECORDS

21. Under TOGC, records must be kept such as follows:

- (a) both the transferor and the transferee must keep complete records on

the transferred assets.

- (b) the transferor shall transfer, unless otherwise permitted by the proper officer of customs, all records relating to the transferred business as required under section _____ of the GST Act 20XX.
- (c) the transferee shall keep and preserve such records for a period of seven (7) years in accordance with section _____ of GST Act 20XX.
- (d) in the case involving only transfer of part of a business and the related record could not be possibly separated, the transferor must seek the advice from the Royal Malaysian Customs (RMC). Under this circumstance, a supply of certified true copy of all records and documents related to the transferred business to the transferee in lieu of the original records and documents may be allowable. If the RMC allows certified copies of records and documents to be provided to the transferee in lieu of the original records and documents, the transferor shall preserve the original records and documents for a period of seven (7) years from the date the transfer of the business is affected.

RELATED INFORMATION FOR PARTIES INVOLVED IN TOGC

22. The following guides may be of interest to you:-

- (a) GST Registration
- (b) Capital Goods Adjustment
- (c) Partial Exemption

FREQUENTLY ASKED QUESTION

Q1: What is the GST implication on those business assets that are not transferred when I am deregistered from GST?

A1: You must immediately account for output tax on those assets that are not transferred by you.

Q2: I am a non-registered person and in the process of taking over a business from a friend. Despite the takeover, my annual turnover is not expected to exceed the prescribed threshold for GST registration. Can I apply for voluntary registration and treat the take over as a TOGC?

A2: You may apply for voluntary registration and if your application is approved under the voluntary registration, you may treat the transfer as a TOGC. However, under voluntary registration, you must remain registered for at least two years.

FEEDBACK AND COMMENTS

23. Any feedback or comments will be greatly appreciated. Please email your feedback or comments to either Mohd Hisham B. Mohd Nor (m_hisham.nor@customs.gov.my) or Aminul Izmeer B. Mohd Sohaimi (izmeer.msohaimi@customs.gov.my).

FURTHER ASSISTANCE AND INFORMATION

24. Further information can be obtained from:

- (a) GST Website: www.gst.customs.gov.my
- (b) GST Hotline: 03-88822111
- (c) Customs Call Centre:
 - Tel : 03-78067200/ 1-300-888-500
 - Fax : 03-78067599
 - E-mail : ccc@customs.gov.my