

Anderson Shaw - Useful Information - Articles

Legal & Technical Aspects of Selling a Business – Shares or Assets?

Warning: Advice on all legal aspects of selling a business or a company should be obtained from a solicitor. This document only serves as a guide and does not replace such legal advice.

An important question is whether the proposed transaction should be by sale of shares or assets. From a vendor's point of view this decision is substantially driven by tax considerations whilst from a purchaser's point of view it is driven by risk.

The risk point is because in a sale of shares, **all** the assets and liabilities of the business are transferred to the buyer. For instance, any legal claim against the business, even if it predates the sale, will be 'inherited' by the new owner. If a buyer suspects that the acquisition has liabilities, which are either hidden or cannot be easily quantified then an asset purchase will be his favoured option.

In practice, most transfers of businesses are done by way of a sale of shares, to avoid the seller, in effect, paying tax twice. In a sale of assets, the company is required to pay Corporation Tax on any capital gain which arises between the book value of assets and the sale consideration. Then the seller has to pay tax again when the cash is taken out of the company. This double tax can make a very substantial difference to the vendor's net gain.

In order to address the risks to the purchaser of a sale of shares, the legal documentation will usually contain warranties which the vendor will be expected to sign which are designed to give the purchaser 'comfort' that there are no 'skeletons' and if there are, he will have a means by which to receive compensation. In addition, there will also be lengthy and complicated tax warranties and indemnities since all contingent tax liabilities will also generally be inherited by the purchaser of shares.

On the other hand, if it is a sale of assets it is usually a less complex transaction with the main task being to ensure that all the assets to be sold are listed. If the assets are not mentioned or referred to in the purchase documentation then the purchaser will not obtain good title to them.

Change of control provisions are something which must be considered as this can be an issue whichever route is chosen albeit it is usually less of an issue with share sales. It is common to find change of control clauses in property leases, hire purchase arrangements and formal business contracts. This means that even if the transaction is a share sale the relevant permission from the landlord, funder or customer will be required. Another area in which this can be problematic is accreditations and approvals.

Employees are protected by TUPE Regulations which means that whether the sale is by shares or assets the new owner automatically picks up responsibility for employees and including their years of service etc.