



**PRACTICE
STATEMENT No. 38/2016**

SUBJECT	FIJI REVENUE & CUSTOMS AUTHORITY: VAT on Sale of a Going -Concern
DATE OF EFFECT	1 st January 2016
CONFIDENTIALITY STATUS	May be released to the public
LEGISLATIVE REFERENCES	<i>Value Added Tax Act 1991, Section 4, 15, Second Schedule</i>
PRACTICE CO-ORDINATOR	National Manager Revenue Collection

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INTRODUCTION

1. The purpose of this Practice Statement is to provide guidance on the supply of a going-concern for Value Added Tax (VAT) purposes. These guidelines are issued with the authority of the Chief Executive Officer of the Fiji Revenue & Customs Authority (FRCA), who is also the Commissioner of Inland Revenue (CIR).
2. The sale of a taxable activity (business, profession, club etc.) as a going concern by a registered person is deemed to be a supply of goods made in the course or furtherance of a taxable activity. Such supplies are taxable and charged with VAT at the standard rate of nine percent (9%).
3. However, the sale of a taxable activity as a going concern by a registered person to another registered person is VAT free (zero-rated and taxed at zero-percent (0%))
4. The transfer of part of a taxable activity as a going concern can be zero-rated as well if that part is capable of separate operation.
5. A 'going concern' is a taxable activity that operates right up to the date of settlement; there is a walk out- walk in basis and the buyer continues with the business/operations. There is no break in the operations and that sale includes all of the things that are necessary to enable the taxable activity to continue operating before and after the day of sale.
6. For there to be a supply of a going concern, the following conditions must exist -
 - a. the supplier and purchaser must both be VAT registered;
 - b. there must be agreement by the parties that the sale is a going concern and this must be stated in the **sale and purchase agreement**;
 - c. the taxable activity being sold must be a going concern at the time of supply (which is normally the settlement date).
7. Whether or not a taxable activity or part of a taxable activity is sold or transferred as a going concern will depend on the facts of each case. The transfer of an asset which is central to the business (e.g. customer lists, know-how, and employees) are indicators that a business is sold as a going concern.

LEGISLATIVE BASIS

8. The sale of a taxable activity by a registered person as a going concern is, under Section 3 (11) of the *Value Added Tax Act 1991*, deemed to be a supply of goods made in the course or furtherance of a taxable activity. 'Goods' is defined in Section 2 of the *VAT Act* and means all kinds of personal or real property.
9. Such supplies are, under Section 15 of the *VAT Act*, taxable supplies. However, when a taxable activity or part of a taxable activity that can be operated separately is sold as a going concern to another registered person, it is a zero-rated supply as specified under Paragraph 8 of the *Second Schedule - VAT Act*.
10. A taxable activity is defined in Section 4 of the *VAT Act* as any activity carried on continuously or regularly by any person whether or not for profit and involves, or will involve, in whole or in part the supply of goods and services to another person for a consideration. It includes any such activity carried on in the form of a business, services, trade, manufacture, profession, vocation, association, club and the activities of any local authority or public authority.

APPLICATION

11. 'Going concern' is not defined in the *VAT Act* and therefore each case will be considered on the facts as presented. However, the transfers of assets which are central to the taxable activity are indicators that a business etc. is sold as a going concern. Some of these factors are listed below:
 - (a) transfer of legal ownership of the premises or right to use the premises – this would be indicated in the **sale and purchase agreement**;
 - (b) agreement between both parties that the transfer is a going concern - this information should either be stated in the **sale and purchase agreement** or confirmed in writing by the parties;
 - (c) transfer of all assets central to the business etc. such as customer lists, special equipment/tools- a description of the assets being transferred will normally be given in the **sale and purchase agreement**;
 - (d) transfer of employees - this information should be available in the **sale and purchase agreement** and verified by visiting the business premises

(e) transfer of goodwill - even if goodwill is not specifically mentioned, it may be included in the transfer of assets. e.g. there may be an exclusive right to use a vendor's name or a transfer of clientele.

(f) Transfer of business license to enable the smooth continuity of such taxable activity without interruptions.

12. Although the absence of any one or more of these factors does not necessarily mean the sale is not a going concern, the absence of assignments of premises, stock or goodwill is an indication that the transaction does not amount to the transfer of a taxable activity as a going concern.

13. The following examples are based on actual cases and may be used as a guide.

	Asset sold	Decision
1	A vacant building	Taxable Where a supply consists of an asset used in a taxable activity (including land and buildings), the supply of that asset is not a supply of a going concern.
2	A building - buyer confirms that it plans to demolish the buildings and will enter into new agreements with the existing tenants.	Taxable The terms of the agreement does not include the transfer of existing tenants. Another indicator is where the seller gives tenants notice to vacate the premises. In such cases, what is sold is an asset, therefore the supply is taxable.
3	A building with tenants under lease agreements	Where the existing tenants (80% or more) in-house management or maintenance agreements, etc. are part of the sale and the purchaser is a registered person who will continue that activity, the supply may be zero-rated.
4	A shopping complex	Taxable if sold vacant Zero-rated if the buyer is a registered person and will continue the business
5	A homestay business sold to a non-resident – the agreement includes	Zero-rated if what is sold is a taxable activity; provided the buyer is registered at the time of supply and capable of continuing the

	transfer of assets, employees, liquor license and goodwill relating to bookings	business.
6	Taxi or taxi permit/Bus or Route Licence	Taxable The sale of a taxi or a taxi permit/bus or bus route licence only is the sale of an asset. It cannot be operated separately therefore the supply is not a going concern.
7	Taxi with taxi permit / Bus with bus route licence	Zero-rated Where a taxi/bus is sold together with the permit/licence, this will usually constitute the sale of a going concern.
8	Commercial property containing a nursery business which had no sales for a period of time	Zero-rated Even though there were no sales, a taxable activity continued to exist throughout the period.

PROCESS

14. Registered persons are not required to seek the CIR’s approval to zero-rate the sale of a taxable activity. However, as VAT is a self-assessment system, they face the risk of audit and will be required to pay the VAT component, if the information reported is found to be false.

15. If a request for tax advice is received, wherever possible, FRCA will conduct a site visit to verify the information provided. The CIR will provide a formal written notice, advising on the tax rate that may apply (9% or 0%) based on the information provided in the application.

16. Where it is established at a later date that any of the information was false or the arrangement was entered into for the purpose of avoiding tax, the supplier will be required to pay the VAT that should have been paid, even though no VAT was charged. The total value of the supply will be treated as VAT inclusive.

17. Further information can be obtained by contacting any of our Customer Service Centers Fiji wide or emailing info@frca.org.fj or call on telephone number 3243504/ 3243505.

End of PS

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