Buying or Selling a Business

Forrester Sylvester Mackett

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Buying or Selling a Business or Company

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Nick acts mostly for small and medium sized businesses, often family owned, operating in a wide variety of industry sectors. With over 30 years' experience, Nick works closely with his clients to build a good understanding of their business and what they want to achieve, and to give them prompt and practical advice.

> As always with Nick Guinness the matter was dealt with very professionally.
>
> *– Radley House Partnership*

We have prepared this short guide to give you some initial advice on the process of buying or selling a business or company.

There are two options for a buyer: either they can purchase the shares of a company that owns a business or they can buy the assets that make up that business from its owner.

- Share Purchase
- Asset (or Business) purchase

Share purchase

Points to consider on the purchase of shares include:

Continuity

The company's contracts, customers, suppliers and employees will normally remain as they were before the purchase and the ownership of its assets is not affected.
The company will continue as a separate entity, so normally there is no need to involve third parties such as landlords or other parties to contracts for their consent to assign leases or those contracts.

Direct receipt of consideration

Payment for the transfer of shares goes directly to the selling shareholders. With a business sale however the payment goes to the company so must then be distributed to the shareholders.

Due diligence

Because the buyer is buying a company with all its assets and liabilities, the level of due diligence is normally much more extensive.

Capital Gains Tax

There are tax reliefs available on the transfer of shares, but this will be dependant on the type of transaction both parties agree to.

Stamp Duty

The rate of duty payable on a transfer of shares is 0.5%. On a business transfer Stamp Duty Land Tax (SDLT) may be payable on the transfer of any property if included in the sale.

Regulated activities

When transferring shares advisors must consider whether advice given constitutes a regulated activity and whether promotion of a share sale is subject to the legal controls on financial promotions.

Asset (or business) purchase

Points to consider on the transfer of a business include:

New start

The buyer will not be taking over the historic tax and trading liabilities of the business.

Pick and choose

Both parties can choose which assets and liabilities are transferred.

Employees

Because of the Transfer of Undertakings Regulations, the buyer will take over the contracts of employment of any employees of the seller, and there are rules for informing and consulting those employees and providing information about them to the buyer.

Tax

A buyer does not have the benefit of capital allowances on the purchase of shares but for the purchase of certain assets they might be available. A corporate purchaser may be entitled to a tax deduction on the acquisition of goodwill. SDLT will be payable on the transfer of any property if included in the sale.

If you require any further advice, please contact our Corporate team who are happy to see you at any of our five offices.

A guide to documentation

The process may include some or all of the following documents:

Non-disclosure / confidentiality agreement

This should be signed at an early stage as it ensures that any information provided to the buyer will be treated confidentially.

Lock-out / exclusivity agreement

This gives the buyer a period of exclusivity where the seller is prevented from entering into negotiations with other prospective buyers for an agreed period. This is often included in the heads of terms.

Heads of terms

Also known as heads of agreement, memorandum of understanding, letter of intent or term sheet. These set out the key terms of the deal and which, although not legally binding (except for provisions dealing with exclusivity), both parties may wish to sign to confirm their agreement on these issues.

Share purchase / asset purchase agreement

This document will set out the agreement between the parties as to the terms on which the shares or assets will be transferred and will usually include:

- Warranties - these are contractual promises given by the seller about the company / business and its assets and liabilities, for example that all the assets are owned and there are no disputes with third parties.
- Tax Covenant (Share purchases only) - this requires the seller to compensate the buyer for any tax liabilities which have not been paid relating to the period before completion.
- Restrictive covenants - these prevent the seller from competing with the target business or poaching key customers or employees for a specific period following completion (only enforceable if reasonable in scope, duration and geography).

Disclosure letter and disclosure bundle

This is an important document that must be read in conjunction with the warranties in the acquisition agreement. By disclosing exceptions to the warranties at the time of sale, and if these are accepted by the buyer, the seller will prevent them from becoming the subject of a warranty claim thereafter.

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