



VAT NEWSLETTER

Federal Fiscal Court on the transfer of a going concern: Scope of the transfer and requirements for the continuation of the business

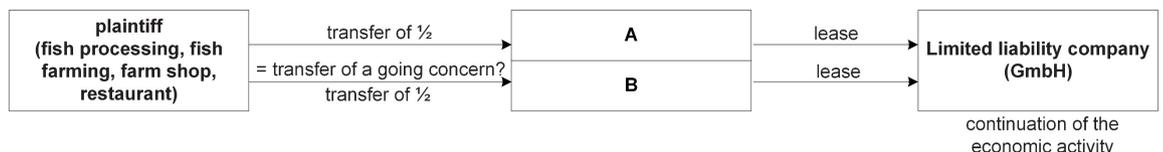
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1 Background

The question of whether the transfer of a business constitutes a non-taxable transfer of a going concern, in accordance with sec. 1 para. 1a of the German VAT Act, is always a case-by-case decision. It is therefore not surprising that the Federal Fiscal Court has had to, once again, comment on the relevant requirements. In its recent decisions, it particularly addressed who must continue the economic activity and what the seller must transfer to the buyer.

2 Federal Fiscal Court, judgement of 13.11.2025 – V R 3/23: Who continues?

The plaintiff operated an extensive business consisting of fish farming, fish processing, a farm shop, and a restaurant. She sold this business asset, in equal parts, to two purchasers (A and B). A few months after the purchase, A and B later leased the entire fish farming facility to a newly established limited liability company, in which they themselves held shares. The limited liability company, as the lessee, continued the operational business. The tax office did not recognize a transfer of a going concern due to the lack of continuation by the purchasers.



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The Federal Fiscal Court decided, as it had previously, that a transfer of a going concern could also occur in the case of consecutive transfers. It is generally sufficient if the final acquirer intends to continue the business. However, this is to be distinguished from a situation where the acquirer does not transfer the business further but merely continues to lease it. A lessee is not an acquirer. With regard to the transfer of a going concern, a lessee is merely a third party. The intention to continue, which must exist at the time of the business transfer, should be based on the acquirer's intention. The lessee's intention is irrelevant. This is also supported by the purpose of the provision (sec. 1 para. 1a of the German VAT Act; Art. 19 VAT Directive). Business transfers should be simplified, and the acquirer should be prevented from being excessively burdened by the transaction. Such an excessive burden does not occur in terms of a lessee. The Federal Fiscal Court has referred the case back to the Fiscal Court. The Fiscal Court is to examine whether, until the conclusion of the lease agreement, A or B (individually or jointly), or possibly a pre-formation company preceding the limited liability company, continued the business or had a corresponding intention. If so, the assumption of at least a – partial – transfer of a going concern may be considered.

3 Federal Fiscal Court, judgement of 13.11.2025 – V R 32/24 and V R 33/24: Who continues what?

The plaintiff in the two parallel cases operated a solar park in each instance. She sold partial installations to various sub-limited partnerships (Sub-KGs). The Sub-KGs received the individual infrastructure (modules, cables, inverters). The central infrastructure (transformer stations, transfer station, grid access point, measurement and regulation technology) remained with the plaintiff. Likewise, the grid connection and feed-in contract under the Renewable Energy Sources Act (EEG) remained with the plaintiff. These feed-in rights were value-determining for the plaintiff's economic activity. The plaintiff purchased the electricity from the Sub-KGs, which sold the generated electricity exclusively to the plaintiff. The plaintiff then continued to feed in all the generated electricity herself, as before the transfer, and collected the EEG remuneration as the "plant operator". For the plaintiff as the seller, there were no changes on the output side due to the sale. Only on the input side did she no longer produce the electricity to be fed in herself, but purchased it from the acquirers.

The Federal Fiscal Court rejected the argument that there had been a transfer of a going concern. The seller continued to carry out the value-determining economic activity – here, the electricity feed-in – herself and thus did not transfer the business to the acquirer. The remuneration claim under the EEG is exclusively due to the plaintiff as the plant operator. This central economic factor did not transfer to the Sub-KGs. Thus, the required transfer of a functional part of the business for a transfer of a going concern was missing, as the acquirers only took over the technical electricity production, not the economically significant part of the business.

4 Conclusion

It is essential for both the seller and the acquirer to thoroughly examine in each individual case whether the conditions for a transfer of a going concern are met. The seller does not have to cease their business activity, but they must not continue it unchanged. The seller must transfer sufficient components to enable the acquirer to conduct an independent economic activity. A mere lease does not constitute a transfer of a going concern due to the lack of transfer to an acquirer. Thus, a lease cannot be part of consecutive transfers. In this case, the intention to continue the business must lie with the initial acquirer. The lessee's intention to continue the business is irrelevant. Business sales should always be secured civilly with a VAT clause. The seller should, among other things, secure the acquirer's intention to continue. The fact that questions regarding the existence of a GiG are contentious, not least due to the high tax volumes involved, is demonstrated by the current preliminary ruling procedures pending before the General Court (T-366/25, T-397/25, T-413/25, T-859/25, T-851/25).