

M&A: ADVISING ON THE SALE OF A PRODUCTIVE UNIT IN SPAIN

Our clients, owners of a company that carried out several business activities, among them the distribution in Spain and Portugal of high-tech clinical equipment, received a purchase offer from a large group operating in the clinical sector interested in their distribution activity.

Structuring the [transaction](#) as a sale of a Productive Unit, instead of a sale of the company shares, allowed our clients to sell only the distribution unit and continue with the company and the other business activities. From the buyer's perspective it was also the best solution, as it was only interested in the distribution of clinical equipment.

In a transaction of this nature, the first step consists of analyzing the possibility of separating the targeted business activity (in this case, the distribution of clinical equipment) from the other activities carried out by the company, and confirm that this activity can be considered as a Productive Unit for the purposes of article 7.1 of the VAT Law. Otherwise the transaction would be assessed as a regular sale of assets/liabilities and would be subject to VAT.

According to Article 7.1 of the VAT Law, VAT is not levied on *the transfer of a set of tangible and, where appropriate, intangible assets which, forming part of the business or professional assets of the taxable person, constitute or are likely to constitute an autonomous economic unit in the transferor, capable of carrying on a business or professional activity by its own means, regardless of the tax regime applicable to such transfer in the field of other taxes.*

This means that it is necessary that the organizational structure that goes along with the transferred assets and liabilities is sufficient to allow the development of an autonomous economic activity. In the case we are analyzing, it implied the transfer of all the personnel assigned to such activity.

Therefore, the first step was determining all the elements to be transferred as part of the Productive Unit and ensuring that they constituted *an autonomous economic unit*. This requires an in depth process of identification of all the elements that compose the Productive Unit and that are necessary to develop the activity autonomously, such as contracts with suppliers, contracts with manufacturers, contracts with customers, leasing contracts, employment contracts, licenses and permits, stocks, insurance policies, accounts receivable, accounts payable, etc.

BARCELONA

Balmes, 209, planta 2

08006 - Barcelona

+34 93 218 40 00

MADRID

A. Bosch 5, bajo D

28014 - Madrid

+34 91 037 84 81

www.gimenez-salinas.es

info@gimenez-salinas.es



GBL
Alliance
Opening the World
for your business

It is important to have all these items properly listed in order to define the scope of the assets and liabilities that are being transferred to the buyer and to avoid any potential future discussions as to what has been transferred and whether these assets actually constitute a Productive Unit.

Listing the assets and liabilities also helps to limit the scope of the buyer's [due diligence](#), which will focus on all the items actually transferred as part of the Productive Unit, with no need to have access to other business information of the company that is not relevant for the purposes of the transaction.

As is customary in most M&A transactions, in this case the buyer also sought to protect the goodwill of the acquired Productive Unit and the continuity of its customers and suppliers through an [earn-out](#) formula linked to the continuity, as manager, of one of the company's shareholders for a period of three years and the achievement of certain results by the Productive Unit during that time.

The drafting of [earn-out](#) clauses in this kind of transactions is particularly complex since the Productive Unit is normally integrated into the buyer's larger structure, which carries out other similar activities. It is essential to request separate accounting records of the acquired Productive Unit in order to calculate the result of the future [earn-out](#), and ensure that the results of the Productive Unit are not negatively affected by the buyer's internal costs and recharges. Likewise, we had to regulate in detail the mechanisms to protect our clients in the event that the buyer took organizational and commercial decisions during the three year period that could negatively impact the objectives set forth for in the [earn-out](#).

Another element of complexity in this transaction was the fact that the main asset of the Productive Unit consisted of exclusive distribution contracts for Spain and Portugal granted by several international leading manufacturers. The continuity of these exclusive distribution contracts was essential for the completion of the transaction, therefore, the transaction was subject to a suspensive clause until the manufacturers' authorizations were obtained. As some manufacturers took the opportunity to renew the terms of their contracts, a three-party negotiation (manufacturer, seller and buyer) took place in order to close the contracts and remove the suspensive condition. Finally, in a process of this nature, it is essential to properly manage the structure and timings of the transaction to ensure that if, for any reason, the sale of the Productive Unit is not closed, the existing business unit will not be affected.

Thankfully, the transaction was successfully closed and the Productive Unit forms now part of a large group dedicated to the clinical sector with great growth potential.

BARCELONA

Balmes, 209, planta 2

08006 - Barcelona

+34 93 218 40 00

MADRID

A. Bosch 5, bajo D

28014 - Madrid

+34 91 037 84 81

www.gimenez-salinas.es

info@gimenez-salinas.es



GBL
Alliance
Opening the World
for your business