Buying a Business – Asset or Share Purchase?

When purchasing a business, there are generally two methods available, an asset purchase or a share purchase. In this article, we will look at whether it matters which vehicle a seller or purchaser chooses when buying or selling a business by identifying the advantages and disadvantages of each.

What is An Asset Purchase?
An asset purchase involves the purchase of some or all of the assets owned by an entity and used in carrying on the business of that entity. Assets may include fixed assets, land, buildings, machinery, trading stock and intangible assets such as goodwill and intellectual property. Usually, the assets are specifically identified in the sale and purchase agreement. Sometimes employee liabilities such as accrued annual and long service leave are deducted from the asset price or paid out for tax reasons.

What is a Share Purchase?
A share purchase is slightly more complex than a purchase of business assets, because with the shares comes a range of potential liabilities, many of which may not be identified on the balance sheet of the entity. Share sales may involve the sale of the shares in a trading entity, related entities and occasionally units of a unit trust. In some instances the share value may be determined on the basis of the expected future earnings of the business and may not take into account the underlying market value of the assets or liabilities being acquired. Where a purchaser acquires 100% of the shares in an entity, the purchaser takes control of the entity and all of the assets and liabilities.

What to Consider With An Asset Sale

- **Employees**: an employee’s current employment contract will usually be with the seller or entities controlled by the seller. When buying the assets, the employment relationship cannot be ‘transferred’ from the seller to the purchaser as employment contracts are personal in nature. In this circumstance, it will be necessary for the seller to terminate the employment contract with the employee and for the purchaser to enter into a new employment contract with each employee. The seller will need to consider the treatment of the accrued entitlements, which can vary depending on the terms and conditions of employment of each employee. Similarly, any employee benefit plans may also have to be acquired or assumed and that can be particularly costly in some situations.

- **No Assignment**: key contracts may need third party consent to be assigned, or may not be assignable at all, thereby reducing the value of the business to the purchaser. Specific arrangements may be required to vest title in the purchaser. For example, the consent of landlords or finance companies may be required for transfer of any property or plant & equipment leases where these are subject to mortgages or live purchase agreements.
What to Consider With a Share Sale

- **Continuity of business name:** the business is carried on by the same entity with the purchaser stepping into the shoes of the seller thereby reducing the need for costly and time consuming administration matters. In some instances, customers may not even realise there has been a change of ownership.

- **Employees:** usually remain with the entity and purchaser. Apart from possible provisions in the sale and purchase agreement that may provide for redundancy of specific staff or specific benefits to be paid upon change of control of the business, the legal identity of the employer remains the same.

- **Assignment:** prohibitions against assignment may not arise as the contracting party remains the same. This means that it may be easier to sell the shares than re-assign or novate a large numbers of contracts or licences. It is still important to review the terms of these agreements as often they have “Change of Control” clauses which may have implications for the new purchaser.

- **Tax consequences:** there may be franking credits, tax losses or undisclosed tax liabilities. Potential tax benefits may arise for the seller including small business tax concessions. There may be more flexibility to structure the transaction to optimise the after-tax outcome for the seller. Remember that the purchaser of shares inherits all the “skeletons in the cupboard” of the entity acquired and warranties in the agreement may be of little future value if the seller has dissipated the funds received.

- **Unrecorded liabilities:** including tax liabilities or warranties the purchaser may not know of. It is important to ensure tax, legal and accounting due diligence is undertaken in an effort to identify these liabilities.

- **Ability to cherry pick:** an asset sale provides the purchaser with the ability to choose which assets to acquire and to leave any unwanted assets with the seller.

- **Apportionment:** the purchase price must be apportioned between various classes of assets, including plant and equipment, land and buildings, stock, and goodwill if applicable. This can cause a conflict between a seller’s preference to adopt their book value and a purchaser’s preference to adopt a higher value to maximise tax benefits. The purchase price can, within relevant parameters, be apportioned between assets sold which may result in tax advantages for the seller.

- **Tax consequences:** for a purchaser, the cost of assets can be reset to their market value at the time of purchase which in most instances will reduce the capital gains tax that might otherwise arise at a future date and result in a benefit to the purchaser. A seller might gain a benefit by utilising tax losses to offset other tax liabilities arising from the sale.

- **Goods and Services Tax (GST):** where all of the assets of a business are transferred the sale may be classified as the sale of a ‘going concern’. This may result in no GST being payable on the transaction. Alternatively, where the sale cannot be categorised as a going concern, a GST liability may arise.

- **Duties:** stamp duty or land tax may be payable on the transfer of land and other real property, depending upon the state in which the assets are located. Stamp duty is generally higher on transfer of assets than shares as discussed above.

- **Stamp duty:** may make it more attractive to acquire the shares than the assets. In New South Wales, the current stamp duty rate is:
  - 60 cents for every $100 or part thereof of dutiable value for shares; versus
  - an increasing rate based on the dutiable value of assets starting from $1.25 for every $100 of dutiable value or part thereof. This increases from this rate depending on the dutiable value of the assets.

Care needs to be exercised with “land rich” companies where the entity has land holdings with an unencumbered value of $2 million or more and its land holdings comprise 60% or more of the unencumbered value of all of its property as stamp duty will be levied on the shares at the much higher conveyancing rates.

- **Warranties:** the purchaser will need to ensure they obtain relevant warranties from the purchaser to ensure they are not left with unresolved liabilities such as unpaid fringe benefit tax or payroll tax.

- **Property leases:** review property leases in the entity name including “make good provisions”. Regardless of whether the transaction is structured as an asset purchase or a share purchase it is essential to ensure that both a seller and a purchaser have undertaken sufficient due diligence to ensure there are no unpleasant surprises following the sale/purchase. Furthermore, the purchaser’s preferred vehicle for carrying on the future business will require specific tax and related asset protection/succession advice.
Crowe Horwath in Australia

Crowe Horwath works with companies and individuals to maximise their growth potential and achieve financial goals. The firm’s team of more than 800 Principals and professionals delivers a full range of accounting including, audit and taxation, business advisory, corporate finance and wealth management services nationally from offices in Brisbane, Melbourne, Perth and Sydney. Crowe Horwath is an integral part of the ASX-listed WHK Group – Australia’s fifth largest accounting services group – and a member of the global Crowe Horwath International network. Crowe Horwath International is ranked among the world’s top-ten accounting networks and comprises more than 140 independent accounting and advisory services firms in more than 100 countries. See www.crowehorwath.com.au.

For Further Information

Please contact your local advisor:

**Lauren Cusack**  
Principal, Corporate Finance  
Tel +61 2 9619 1895  
lauren.cusack@crowehorwath.com.au

**Bill Jansen**  
Consultant, Corporate Finance  
Tel +61 2 9619 1867  
bill.jansen@crowehorwath.com.au

**Deanna Chiang**  
Senior Manager, Corporate Finance  
Tel +61 2 9619 1962  
deanna.chiang@crowehorwath.com.au

**Courtney Barros**  
Analyst, Corporate Finance  
Phone: +61 2 9619 1613  
courtney.barros@crowehorwath.com.au

The relationship you can count on

Crowe Horwath Corporate Finance Ltd is a member of Crowe Horwath International, a Swiss verein. Each member firm of Crowe Horwath is a separate and independent legal entity. Crowe Horwath Corporate Finance Ltd and its affiliates are not responsible or liable for acts or omissions of Crowe Horwath or any other member of Crowe Horwath and specifically disclaim any and all responsibility or liability for acts or omissions of Crowe Horwath or any other Crowe Horwath member.

The information contained within this document was compiled by Crowe Horwath Corporate Finance Ltd (CHOF) based on materials from other sources and no warranty regarding the accuracy or completeness of the information is provided. All opinions, conclusions, forecasts or recommendations are reasonably held at the time of compilation but are subject to change without notice by CHOF. CHOF assume no obligation to update this document after it has been issued. Except for any liability which by law cannot be excluded, CHOF/WHK Group Limited, its Directors, employees and agents disclaim all liability (whether in negligence or otherwise) for any error, inaccuracy in, or omission from the information contained in this document or any loss or damage suffered by the recipient or any other person directly or indirectly through relying upon the information.

This publication is intended to provide background information only and does not purport to make any recommendation upon which you may reasonably rely without taking further advice. This publication does not take into account any person’s investment objectives, financial situation and particular needs.

Should you consider the acquisition of a particular financial product as a result of the material contained, you should obtain a copy of and consider the Product Disclosure Statement (where applicable) for that product before making any decision. CHOF may receive a fee for advice and/or the implementation of an investment decision. CHOF and their representatives may have financial interests in some/any of the product(s) included within this report.

Crowe Horwath Corporate Finance Ltd is the holder of an Australian Financial Services Licence – No: 239170, ABN 95 001 508 363 – a WHK Group firm.

www.crowehorwath.com.au