

The Chamber of Tax Consultants  
Study Circle Meeting on 22<sup>nd</sup> August 2022

**GST implication on Merger, acquisition, de-merger  
and sale of business**

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# Understanding Mergers, Acquisitions & Transfer of Business

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# Modes of Transfer of Business

- ▶ **Sale of assets** – Itemised sale of assets not amount to a business/ undertaking.
- ▶ **Transfer of Undertaking** – Transfer of assets with liabilities constituting a business activity capable of being run independently.
- ▶ **Merger** – The acquiring company retains its identity whereas the acquired company is dissolved and ceases to exist.
- ▶ **Amalgamation** - Two or more companies consolidate to form a single entity. All the combining companies lose their separate existence and entity.
- ▶ **Demerger** – An identified business undertaking is transferred to the transferee entity. The transferor entity remains in existence post demerger.
- ▶ **Share Acquisition** – The acquirer purchases the equity shares of the target entity from the sellers/owners. It is a mere transaction in security.

# 1. Transfer of Going Concern

- ❑ ABC Limited has two lines of business: manufacture & sale of steel, and trading of plastic products. The company wants to sell its undertaking relating to plastic products. The transfer will include brand name, trademark, inventory, debtors, creditors, loans, outstanding contracts, obligations, etc. It has following questions in this regard:
  - ❑ Whether transfer of an entire line of business will be leviable to GST?
  - ❑ What will be the GST liability in case where some of the creditors/debtors are not transferred as they are common for both the businesses?
  - ❑ What will be the treatment in case the transaction is held not to be a transfer of going concern?

## Notification No. 12/2017-Central Tax (Rate) dated 28.06.2017 -

In exercise of the powers conferred by sub-section (1) of section 11 of the Central Goods and Services Tax Act, 2017 (12 of 2017), the Central Government, on being satisfied that it is necessary in the public interest so to do, on the recommendations of the Council, hereby exempts the intra-State supply of services of description as specified in column (3) of the Table below from so much of the central tax leviable thereon under sub-section (1) of section 9 of the said Act, as is in excess of the said tax calculated at the rate as specified in the corresponding entry in column (4) of the said Table, unless specified otherwise, subject to the relevant conditions as specified in the corresponding entry in column (5) of the said Table, namely:-

SI. No.	Chapter, Section, Heading, Group or Service Code (Tariff)	Description of Services	Rate (per cent.)	Condition
(1)	(2)	(3)	(4)	(5)
	...			
2	Chapter 99	Services by way of transfer of a going concern, as a whole or an independent part thereof.	Nil	Nil

- ▶ 7.11.15. What does the term ‘transfer of a going concern’ mean?
  - ▶ Transfer of a going concern means transfer of a running business which is capable of being carried on by the purchaser as an independent business, but shall not cover mere or predominant transfer of an activity comprising a service.
  - ▶ Such sale of business as a whole will comprise comprehensive sale of Immovable property, goods and transfer of unexecuted orders, employees, goodwill etc. Since the transfer in title is not merely a transfer in title of either the immovable property or goods or even both it may amount to service and has thus been exempted.

# Meaning of Transfer of a Going Concern

- ▶ Deputy Commissioner (CT), Coimbatore Vs K. Behanan Thomas, 1977 39 STC 325 (Mad.) –
  - ▶ Sale of branch at Ooty held to be a sale of business. Business is a unit which produces profit.
- ▶ Monsanto Chemicals of India (P) Limited Vs State of Tamil Nadu [1982] 51 STC 278 (Mad.) -
  - ▶ A person may carry on several lines of business and each line of business would be a unit of business by itself. If there is a sale of that unit of the business as a whole, then the assessee would not be liable to be taxed.
- ▶ Zacharia v. State of Kerala, [1977] 39 STC 221 (Ker.) -
  - ▶ The mere fact that the seller had undertaken to settle liabilities which had accrued prior to the sale of the business would not by itself show that the seller had not transferred the business as a whole so long as the seller did not retain any part of the assets.



- ▶ **UK VAT HMRC Internal Manual (VTOGC3250) – Principles summarized by the Upper Tribunal in the case of Intelligent Managed Services Ltd (FTC/27/2014)**
  - ▶ In order to be a transfer of a totality of assets, or part thereof, the assets transferred must together constitute an undertaking capable of carrying on an independent economic activity.
  - ▶ This is to be distinguished from a mere transfer of assets.
  - ▶ The nature of the transaction must be ascertained from an overall assessment of the factual circumstances, which includes the intentions of the transferee, as determined by objective evidence, and the nature of the economic activity sought to be continued.
  - ▶ The transferee must intend to operate the business, or the part of the undertaking, transferred and not to simply liquidate the activity concerned immediately and sell the stock, if any.
  - ▶ Although succession to the business is not a condition, but a consequence of the application of the no-supply rule, the nature of the transaction must be such as to allow the transferee to continue the independent economic activity previously carried on by the seller.

## ▶ GSTR 2002/5 – When a ‘supply of a going concern’ GST-free?

### 38-325 Supply of a going concern

(2) A supply of a going concern is a supply under an arrangement under which:

- (a) the supplier supplies to the recipient all of the things that are necessary for the continued operation of an enterprise; and
- (b) the supplier carries on, or will carry on, the enterprise until the day of the supply (whether or not as a part of a larger enterprise carried on by the supplier).

- ▶ **All of the things that are necessary for the continued operation of an enterprise**
  - ▶ A 'thing' is necessary for the continued operation of an 'identified enterprise' if the enterprise could not be operated by the recipient in the absence of the thing.
  - ▶ However, it does not refer to every conceivable thing which might be used in the 'identified enterprise'.
  - ▶ Two elements are essential for the continued operation of an enterprise:
    - ▶ The assets necessary for the continued operation of the enterprise including, where appropriate, premises, plant and equipment, stock-in-trade and intangible assets such as goodwill, contracts, licenses and quotas; and
    - ▶ The operating structure and process of the enterprise consisting of the commercial or economic activity relevant to the type of enterprise being conducted, for example, ongoing advertising and promotion

- ▶ If ABC Ltd. assigns value to individual assets and liabilities, whether it will lead to denial of exemption from GST?
  - ▶ Slump sale under Income Tax
    - ▶ '(42C) "slump sale" means the transfer of one or more undertakings as a result of the sale for a lump sum consideration without values being assigned to the individual assets and liabilities in such sales.
    - ▶ *Explanation 1.*—For the purposes of this clause, "undertaking" shall have the meaning assigned to it in *Explanation 1* to clause (19AA).
    - ▶ *Explanation 2.*—For the removal of doubts, it is hereby declared that the determination of the value of an asset or liability for the sole purpose of payment of stamp duty, registration fees or other similar taxes or fees shall not be regarded as assignment of values to individual assets or liabilities.'
- ▶ No such condition under the GST law for qualifying for exemption.

# Transaction not amount to Going Concern

- ▶ If a transfer of some assets with liabilities is held not amounting transfer of a going concern, the tax treatment will be as follows –
  - ▶ Gross value of transfer of assets will be taken as value of supply (ignoring the value of liabilities).
  - ▶ If no separate values are assigned, the transaction will be treated as a mixed supply taxable at the highest rate.
  - ▶ In case the transfer of assets comprise some assets which are under Schedule III (such as land and building), the value of such assets will be excluded on some reasonable means.
  
- ▶ Section 2(74): Mixed Supply –
  - ▶ “mixed supply” means two or more individual supplies of goods or services, or any combination thereof, made in conjunction with each other by a taxable person for a single price where such supply does not constitute a composite supply.

## 2. Transfer of Input Tax Credit in case of Transfer of Business



- ❑ XYZ Ltd. has two undertakings: one dealing in FMCG Products and another dealing in Foods & Beverages. It has registrations in various states. XYZ Ltd. wants to demerge the undertaking dealing in Foods & Beverages. It has huge balance of accumulated input tax credit which cannot be utilised by the FMCG Business. XYZ Ltd. has following questions:
  - ❑ Whether it can transfer the accumulated ITC to the new demerged entity?
  - ❑ If yes, what is the quantum of credit it can transfer to the new entity?
  - ❑ Whether the credit has to be transferred state wise or entity wise?
  - ❑ What will be the position if instead of demerger, XYZ Ltd. sells the undertaking dealing in Foods & Beverages?

- ▶ **Section 18 (3) of the CGST Act –**
  - ▶ Where there is a change in the constitution of a registered person on account of sale, merger, demerger, amalgamation, lease or transfer of the business with the specific provisions for transfer of liabilities, the said registered person shall be allowed to transfer the input tax credit which remains unutilised in his electronic credit ledger to such sold, merged, demerged, amalgamated, leased or transferred business in such manner as may be prescribed.



▶ **Rule 41 - Transfer of credit on sale, merger, amalgamation, lease or transfer of a business.-**

(1) A registered person shall, in the event of sale, merger, de-merger, amalgamation, lease or transfer or change in the ownership of business for any reason, furnish the details of sale, merger, de-merger, amalgamation, lease or transfer of business, in FORM GST ITC-02, electronically on the common portal along with a request for transfer of unutilized input tax credit lying in his electronic credit ledger to the transferee:

Provided that in the case of demerger, the input tax credit shall be apportioned in the ratio of the value of assets of the new units as specified in the demerger scheme.

**Explanation:** - For the purpose of this sub-rule, it is hereby clarified that the “value of assets” means the value of the entire assets of the business, whether or not input tax credit has been availed thereon.

▶ **Rule 41 - Transfer of credit on sale, merger, amalgamation, lease or transfer of a business.-**

(2) The transferor shall also submit a copy of a certificate issued by a practicing chartered accountant or cost accountant certifying that the sale, merger, de-merger, amalgamation, lease or transfer of business has been done with a specific provision for the transfer of liabilities.

(3) The transferee shall, on the common portal, accept the details so furnished by the transferor and, upon such acceptance, the un-utilized credit specified in FORM GST ITC-02 shall be credited to his electronic credit ledger.

(4) The inputs and capital goods so transferred shall be duly accounted for by the transferee in his books of account.”

- ▶ **State Level/ India Level** - Under the provisions of the CGST Act, each registration is considered a distinct person for the purpose of the Act. Accordingly, for the purpose of apportionment of ITC, the value of assets of the new units is to be taken at the State level (at the level of distinct person) and not at the all-India level.
- ▶ **ITC Balance** - The ITC balance has to be seen at the date of filling of Form ITC-02 as Section 18(3) provides for transfer of input tax credit which remains unutilized in the electronic credit ledger of transferor.
- ▶ **Value of Assets** - The ratio of the value of assets should be taken as on the “appointed date of demerger” as it is the date from which the scheme for demerger comes into force as per section 232(6) of the Companies Act, 2013.
- ▶ **ITC not availed** - The value of assets shall include all the assets whether or not ITC has been availed on such assets.

- ▶ **Both should be registered** - The transferor is required to file FORM GST ITC-02 only in those States where both transferor and transferee are registered. Thus, ITC can be transferred only if both the transferor and transferee are registered in a state.
- ▶ **Total Amount (not head wise)** - The ratio of value of assets shall be applied to the total amount of unutilized input tax credit (ITC) of the transferor. The transferor will be at liberty to determine the amount to be transferred under each tax head of ITC (CGST/SGST/IGST, subject to the amount determined under Rule 41 and the balance of ITC available with the transferor.
- ▶ **Transfer of Cess** - Further, the said formula shall also be applicable for apportionment of Cess between the transferor and transferee.
- ▶ **Other forms of Transfer** - The formula for apportionment of ITC, as prescribed de-merger, shall be applicable for all forms of business re-organization that results in partial transfer of business assets along with liabilities.

- ▶ What will be the position if –
  - ▶ the asset to which the ITC pertains is not transferred or the asset is transferred; or
  - ▶ the asset is transferred and the ITC pertaining to such asset has already been utilised?
- ▶ Consider a case –
  - ▶ Transferor has purchased capital goods and has availed full ITC on it. The transferor has done reversal for ten months as per Rule 43 of the CGST Rules;
  - ▶ Thereafter, an undertaking with the capital goods is demerged. The ITC has also been transferred as per Rule 41 of the CGST Rules.
  - ▶ Whether the transferee is required to reverse the credit for balance period of 50 months.
  - ▶ ***Saraswati Industrial Syndicate v. CIT, Haryana - (1990) Supp (1) SCR 332***

### 3. Whether Transfer of Going Concern is an exempt supply requiring reversal of ITC



- ❑ DEF Ltd. transferred one of its undertakings as a going concern to transferee. It is aware that such transfer is exempted under Notification 12/2017-C.T.(R) and accordingly no tax is payable. However, it has following questions relating to Input Tax Credit:
  - ❑ Whether it is required to reverse credit on goods forming part of undertaking which is transferred to the transferee?
  - ❑ Whether it is required to reverse common credit by treating the value of such transfer as an exempt supply?
  - ❑ Whether it can take credit of input services (such as consultant's services) which is directly related to such transfer?

## ▶ UK Value Added Tax Act –

- ▶ Transfer of business as a going concern is treated neither a supply of goods nor a supply of services.

## ▶ Australia GST Act –

- ▶ Sale of a going concern is treated as GST-free (similar to zero-rated).
- ▶ Thus, the supplier will not be liable to pay GST. Further, purchaser and seller will be able to claim full ITC.



- ▶ Section 2(47) of the CGST Act –
  - ▶ “exempt supply” means supply of any goods or services or both which attracts nil rate of tax or which may be wholly exempt from tax under section 11, or under section 6 of the Integrated Goods and Services Tax Act, and includes non-taxable supply;”
- ▶ Section 17(2) of the CGST Act –
  - ▶ Where the goods or services or both are used by the registered person partly for effecting taxable supplies including zero-rated supplies under this Act or under the Integrated Goods and Services Tax Act and partly for effecting exempt supplies under the said Acts, the amount of credit shall be restricted to so much of the input tax as is attributable to the said taxable supplies including zero-rated supplies.

- ▶ Section 2(17) of the CGST Act –  
“business” includes–
  - (a) any trade, commerce, manufacture, profession, vocation, adventure, wager or any other similar activity, whether or not it is for a pecuniary benefit;
  - (b) any activity or transaction in connection with or incidental or ancillary to sub-clause (a);
  - (c) any activity or transaction in the nature of sub-clause (a), whether or not there is volume, frequency, continuity or regularity of such transaction;
  - (d) supply or acquisition of goods including capital goods and services in connection with commencement or closure of business;  
...”
- ▶ Clause (d) is to cover cases of supply of goods and services during or after the closure of business. But the supply of business as a whole will not be covered.
  - ▶ Commissioner Of Sales Tax vs Steel Suppliers Pvt. Ltd. [1985] 98 STC 448 (Bom)

- ▶ SCHEDULE II - ACTIVITIES TO BE TREATED AS SUPPLY OF GOODS OR SUPPLY OF SERVICES
  
- ▶ 4. (c) where any person ceases to be a taxable person, any goods forming part of the assets of any business carried on by him shall be deemed to be supplied by him in the course or furtherance of his business immediately before he ceases to be a taxable person, unless—
  - (i) the business is transferred as a going concern to another person; or
  - (ii) the business is carried on by a personal representative who is deemed to be a taxable person.

- ▶ **Deputy Commissioner (CT), Coimbatore Vs K. Behanan Thomas, [1977] 39 STC 325 (Mad.)**
  - ▶ The closure of a branch by sale thereof as a running concern to another person, apart from not constituting a sale of goods, cannot also be said to be a transaction in connection with or incidental or ancillary to such trade, commerce, adventure or concern mentioned in Section 2(d)(i) of the Act.
- ▶ **Coromandal Fertilizers Limited v. State of A.P., 1999 112 STC 1 (AP)**
  - ▶ The transfer of property in goods as an integral part of the Agreement is not “in the course of business” for the obvious reason that the Assessee ... wants to put an end to its entire business and cease to do the trade or manufacture.

- ▶ **Sterlite Industries (I) Ltd. v. CCE, Pune, 2005 (183) E.L.T. 353 (Tri. – LB)**
  - ▶ Modvat credit was sought to be denied to the job worker on the ground that the inputs were used in the manufacture of the goods which were cleared without payment of duty to the principal manufacturer.
  - ▶ Held that the exemption has been granted only to avoid additional paper work, otherwise every person will pay tax and the another person will take credit. It is only to avoid such scriptory work that the exemption has been granted. But it cannot be interpreted otherwise to deny the very benefit for which it has been intended.
  - ▶ Maintained in **Commissioner v. Sterlite Industries (I) Ltd. - 2009 (244) E.L.T. A89 (Bom.)**

- ▶ Section 16(1) of the CGST Act –
  - ▶ Every registered person shall, subject to such conditions and restrictions as may be prescribed and in the manner specified in section 49, be entitled to take credit of input tax charged on any supply of goods or services or both to him which are used or intended to be used in the course or furtherance of his business and the said amount shall be credited to the electronic credit ledger of such person.
- ▶ ITC on services which are exclusively used for such transfer may not be availed.
- ▶ Further, 5% of common credit may be liable for reversal as per Section 17(1) of the CGST Act read with Rule 42(1)(j) of the CGST Rules.

## 4. Payment of tax during the Appointed Date and Effective Date



- ❑ A Ltd. amalgamated and merged with B Ltd. The appointed date was fixed in the scheme of merger as 1.4.2021. The order of amalgamation has been passed on 30.6.2022. The certified copy of the order is filed with the registrar on 20.7.2022. A Ltd. supplied goods to B Ltd. during the appointed date and the effective date. A Ltd. and B Ltd. wants clarity on the tax liability on supplies made during the interim dates:
  - ❑ Whether tax is payable on supplies made by A Ltd. to B Ltd. from 1.4.2021 to 30.6.2022?
  - ❑ Whether tax is payable on supplies made by A Ltd. to B Ltd. from 1.7.2022 to 20.7.2022?



- ▶ **Marshall Sons & Co. v. ITO - 1997 (2) SCC 302:**
  - ▶ Every scheme of amalgamation has to necessarily provide a date with effect from which the amalgamation/transfer shall take place.... It is true that while sanctioning the scheme, it is open to the court to modify the said date and prescribe such date of amalgamation/transfer as it thinks appropriate in the facts and circumstances of the case. If the court so specifies a date, there is little doubt that such date would be the date of amalgamation/date of transfer. But where the court does not prescribe any specific date but merely sanctions the scheme presented to it, it should follow that the date of amalgamation/date of transfer is the date specified in the scheme as 'the transfer date'.

- ▶ Sales tax/service tax not payable on supplies made between amalgamated company and amalgamating company during the interim period:
  - ▶ State Of A.P. v. Jindal Strips Limited, (2007) 10 VST 777 AP;
  - ▶ Skol Breweries v. Commissioner of C.Ex & Cus., 2014 (35) S.T.R. 804 (Tri. - Mumbai);
  - ▶ Commissioner of Service Tax v. ITC Hotels, 2012 (27) STR 145 (Tri. – Del.);
  - ▶ Usha International v. Commissioner of Service Tax, 2016 (43) S.T.R. 552 (Tri. - Del.).

- ▶ No concept of appointed date and effective date in the erstwhile Companies Act, 1956.
  
- ▶ Section 391 of the Companies Act, 1956 –
  - ▶ (3) An order made by the Court under sub-section (2) shall have no effect until a certified copy of the order has been filed with the Registrar.
  
- ▶ Section 232 of the Companies Act, 2013 provides as under –
  - ▶ (5) Every company in relation to which the order is made shall cause a certified copy of the order to be filed with the Registrar for registration within thirty days of the receipt of certified copy of the order.
  - ▶ (6) The scheme under this section shall clearly indicate an appointed date from which it shall be effective and the scheme shall be deemed to be effective from such date and not at a date subsequent to the appointed date.

- ▶ SECTION 87. Liability in case of amalgamation or merger of companies -
  - ▶ (1) When two or more companies are amalgamated or merged in pursuance of an order of court or of Tribunal or otherwise and the order is to take effect from a date earlier to the date of the order and any two or more of such companies have supplied or received any goods or services or both to or from each other during the period commencing on the date from which the order takes effect till the date of the order, then such transactions of supply and receipt shall be included in the turnover of supply or receipt of the respective companies and they shall be liable to pay tax accordingly.
  - ▶ (2) Notwithstanding anything contained in the said order, for the purposes of this Act, the said two or more companies shall be treated as distinct companies for the period up to the date of the said order and the registration certificates of the said companies shall be cancelled with effect from the date of the said order.

- ▶ Similar provision existed in VAT laws of various states -
  - ▶ Section 52 of Gujarat Value Added Tax Act, 2003;
  - ▶ Section 46 of Rajasthan Value Added Tax Act, 2003;
  - ▶ Section 29 of Madhya Pradesh Value Added Tax Act, 2002.
  
- ▶ What will happen in case of demerger?
  - ▶ Suppose a company has two undertakings, A and B.
  - ▶ Goods manufactured by A are captively consumed by B.
  - ▶ Whether tax will be payable on the “supply” made by undertaking A to undertaking B (now B Ltd.) from the appointed date to the effective date?

## 5. Notices/Assessment in the name of amalgamating/transferor entity

- ❑ ABC Ltd. has been merged with XYZ Ltd. w.e.f. 1.4.2021 and the name of ABC Ltd. is struck off from the register of companies. The proper officer issued a show cause notice in the name of ABC Ltd. on 30.6.2021. Subsequently, the assessment order was also passed on 31.12.2021. The company has following questions:
  - ❑ Whether the show cause notice/assessment order in the name of old entity which is not in existence is valid?
  - ❑ Whether the intimation of fact of amalgamation will make any difference in the validity of the show cause notice/assessment order?
  - ❑ Whether participation in the proceedings and representing as ABC Ltd. will be treated as estoppel against the company?

- ▶ **PCIT Vs. Maruti Suzuki India Ltd. (2019) 416 ITR 613 (SC)**
  - ▶ The fact of amalgamation was intimated to AO before any proceedings were initiated.
  - ▶ Even after informing, the AO initiated the proceedings and passed the order in the name of amalgamating entity (which is non-existent).
  - ▶ The amalgamated company participated in the proceedings for assessment and appeal.
  - ▶ **Held:** On amalgamation, the amalgamating entity becomes non-existent and initiation of proceedings against it is void ab initio. Further, the fact of amalgamation was already intimated to AO and even then the orders were passed in the name of old non-existent entity. Mere participation will not be fatal to the case as there is no estoppel in law.
  - ▶ Relied on Spice Infotainment v. Commissioner of Service Tax [(2012) 247 CTR (Del) 500] and its SLP dismissal by Supreme Court.



- ▶ PCIT v. Mahagun Realtors (P.) Ltd. - [2022] 137 taxmann.com 91
  - ▶ Distinguished Maruti Suzuki and Spice Infotainment.
  - ▶ The following facts were held to be distinguishing factor:
    - ▶ In the search, no indication was given about amalgamation;
    - ▶ Assessee filed returns in old name;
    - ▶ In the return the fact of amalgamation was suppressed;
    - ▶ Subsequently letters were written intimating amalgamation but that was for later AY;
    - ▶ Appeals and Cross Objections were filed in the name of old entity;
    - ▶ The assessment order stated the name of old company represented by new entity.

- ▶ Further, the following observations were made by the Court:
  - ▶ Spice Infotainment and Maruti Suzuki relied on Saraswati Industrial Syndicate - 1990 SCR Supl. (1) 332. Amalgamation was not separately defined at that time and now for the first time defined in the form of Section 2(1A);
  - ▶ Various provisions of the Act deal with amalgamation/merger such as carry forward, set-off, depreciation, incentives, etc. and thus it is deemed that the business of the amalgamating company is being carried on by amalgamated company and thus different from corporate death as in case of winding up;
  - ▶ Scheme provides that the all liabilities of the transferor company will become the liabilities of the transferee company.

## 6. Other ancillary issues



- ▶ **Section 85. Liability in case of transfer of business. —**
  - ▶ (1) Where a taxable person, liable to pay tax under this Act, transfers his business in whole or in part, by sale, gift, lease, leave and license, hire or in any other manner whatsoever, the taxable person and the person to whom the business is so transferred shall, jointly and severally, be liable wholly or to the extent of such transfer, to pay the tax, interest or any penalty due from the taxable person upto the time of such transfer, whether such tax, interest or penalty has been determined before such transfer, but has remained unpaid or is determined thereafter.
  - ▶ (2) Where the transferee of a business referred to in sub-section (1) carries on such business either in his own name or in some other name, he shall be liable to pay tax on the supply of goods or services or both effected by him with effect from the date of such transfer and shall, if he is a registered person under this Act, apply within the prescribed time for amendment of his certificate of registration.

- ▶ In absence of such section, transferee cannot be made liable to pay tax on sales effected by the transferor
  - ▶ Deputy Commercial Tax Officer v. Sha Sukhraj Peerajee, 1967 SCR (3) 661
- ▶ Similar provisions existed in Sales Tax Acts. However, the provision fastened liability only if the “ownership of the business has been entirely transferred”.
  - ▶ Hajipur Plywood Factory v. State of Bihar [1974] 34 STC 45– It must mean transfer of stock-in-trade, business assets, goodwill (name and place) and other properties of the running concern which were held by the concern for the purpose of carrying on the business.
  - ▶ State of Orissa v. Raja Stores [1987] 65 STC 82 – Mere transfer of stock-in-trade is not a transfer of business.

# Death of Proprietor

- ▶ Section 18(3) of the CGST Act does not specifically mentions death of proprietor as a reason for transfer of ITC on account of transfer of business;
- ▶ Circular No. 96/15/2019-GST, dated 28-3-2019 has clarified that death of proprietor will be treated as a case of transfer of business for the purpose of Section 18(3).
- ▶ The reasoning given is that Section 29 which provides for cancellation of registration states circumstances for cancellation inter alia as transfer of business including death of proprietor.

- ▶ **Section 22. Persons liable for registration. —**
  - ▶ (4) Notwithstanding anything contained in sub-sections (1) and (3), in a case of transfer pursuant to sanction of a scheme or an arrangement for amalgamation or, as the case may be, demerger of two or more companies pursuant to an order of a High Court, Tribunal or otherwise, the transferee shall be liable to be registered, with effect from the date on which the Registrar of Companies issues a certificate of incorporation giving effect to such order of the High Court or Tribunal.
  
- ▶ **Section 87. Liability in case of amalgamation or merger of companies. —**
  - ▶ (2) Notwithstanding anything contained in the said order, for the purposes of this Act, the said two or more companies shall be treated as distinct companies for the period up to the date of the said order and the registration certificates of the said companies shall be cancelled with effect from the date of the said order.

- ▶ Section 2(101) of the CGST Act –
  - ▶ “securities” shall have the same meaning as assigned to it in clause (h) of section 2 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956);
  
- ▶ Section 2(h) of Securities Contract (Regulation) Act, 1956 –
  - (h) “securities” include—
    - ▶ (i) shares, scrips, stocks, bonds, debentures, debenture stock or other marketable securities of a like nature in or of any incorporated company or other body corporate;



- ▶ *Dahiben Umedbhai Patel v. Norman James Hamilton*, (1983) 85 BOMLR 275 –
  - ▶ Shares of private company are not marketable securities.
  
- ▶ *Bhagwati Developers Pvt. Ltd. v. Peerless General Finance and Investment Company Ltd.*, (2013) 9 SCC 584 –
  - ▶ Shares of public unlisted company are marketable securities.

# 7. AAR on Transfer of Business



- ▶ IBM India Ltd. – 2022 (058) GSTL 0179 (AAR-GST-KAR)
  - ▶ In case of demerger, value of all assets to be included in value for apportionment, whether ITC has been taken or not or whether the assets are outside the purview of GST.
  - ▶ Even assets which are created only to comply with requirements of accounting standards are includible in “value of assets”.
  - ▶ Value of assets also includes assets which are not being transferred as part of demerger.
  - ▶ For computation of asset ratio, assets which are transferred to new units ought to be considered against total assets which company is maintaining in particular State.

# Merger of Proprietorship into Company

- ▶ **In Re: B.M. Industries - 2019 (22) G.S.T.L. 293 (A.A.R. - GST)**
  - ▶ Merger of proprietorship firm as a going concern with private limited company with all present and future assets, liabilities, rights, claims, businesses, etc.
  - ▶ Post merger, proprietorship firm will cease business.

Held:

- ▶ Exemption for transfer of business as a going concern will apply to this case.
- ▶ Further, the proprietorship firm can transfer ITC to the company by following the procedure of Section 18(3) of the CGST Act read with Rule 41 of the CGST Rules.

- ▶ M/s. SCV Sky Vision (AARNo.04/AP/GST/2021 dated: 12.01.2021)
  - ▶ Whether transfer of a business without liabilities and employees will amount to transfer of a going concern?

Held:

- ▶ Transfer of business requires comprehensive transfer of assets as well as liabilities which as a whole are capable of carrying on the business independently.
- ▶ If liabilities are not transferred, the transaction will not be a transfer of business as a going concern.

# Shifting of business to another State

- ▶ **Shilpa Medicare Ltd. - Order /AAAR/AP/ 07(GST) /2020 dated 10.11.2020**
  - ▶ Transfer of whole business from Andhra Pradesh to Karnataka.
  - ▶ AAR held that the transaction amounts to transfer of going concern and ITC can be transferred.

AAAR held:

- ▶ Transfer of business between distinct persons situated in different states is not covered by exemption.
- ▶ Further, ITC can also not be transferred in such case.

# Concession Agreement for Airport

- ▶ In re Airports Director Airport Authority of India (ADRG- 03/2022 dated 13/05/2022)
  - ▶ Concession Agreement for Lease of Airport under Section 12A of AAI Act.
  - ▶ All liabilities till the date of transfer will remain with AAI.

Held:

- ▶ The Transaction amounts to transfer of business as a going concern.
  - ▶ AAI has novated all existing agreements in favour of the transferee.
  - ▶ AAI shall not commission any airport within 50 KM radius.
  - ▶ Statutory function of AAI to maintain hotels, restrooms, restaurants at airport are transferred.
  - ▶ The scope of the project includes operations, management and development of the Airport.
- ▶ The Concession fees paid upfront and on periodic basis will be exempt.

# Thank You

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