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ARTICLES 2019



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# TREADING THE GST PATH – SLII

## TRANSFER OF BUSINESS AND GST



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A vibrant economy is replete with Mergers, De-mergers, Acquisitions and Amalgamations and it is important to understand the GST implications for such commercial weddings and divorces.

### **Registration**

#### ***Sub sections (3) and (4) of Section 22 (4) of the CGST Act, 2017.***

22 (3) Where a business carried on by a taxable person registered under this Act is transferred, whether on account of succession or otherwise, to another person as a going concern, the transferee or the successor, as the case may be, shall be liable to be registered with effect from the date of such transfer or succession.

(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.

### **Different Situations:**

- If an existing company A (GST registrant), acquires the business of B, as a result of which B ceases to exist, the GST registration of B shall be surrendered and in the registration of A, B's premises shall be added as an additional place of business of A.
- If existing companies, A and B (GST registrants) are merged so as to form a new entity C, C shall obtain fresh GST registration and A and B can surrender their registrations.
- If an existing company A (GST Registrant), hives of one of its various divisions, to a new entity B, B shall obtain registration and A shall also continue to hold the registration.

## Input Tax Credit.

### Sub section (3) of Section 18 of the CGST Act, 2017

18 (3) 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 of the CGST Rules, 2017

**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, demerger, 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.

(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, demerger, 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.

The above provisions are self explanatory.

Different Situations.

- If an existing company A (GST registrant), acquires the business of B, B shall file GST ITC 02, so as to transfer the balance ITC credit in the books of B, to A.
- If existing companies, A and B (GST registrants) are merged so as to form a new entity C, A and B shall file GST ITC 02, so as to transfer the balance ITC credit in the books of A and B, respectively to C.
- If an existing company A (GST Registrant), hives of one of its various divisions, to a new entity B, A shall file GST ITC 02, so as to transfer proportionate ITC credit from A to B. The proportion is based on the total value of assets of A vis-à-vis the value of assets made over to B.

### **GST Liabilities.**

Schedule II of the CGST Act, 2017

#### SCHEDULE II

### ***ACTIVITIES TO BE TREATED AS SUPPLY OF GOODS OR SUPPLY OF SERVICES***

#### 4. Transfer of business assets

(a) where goods forming part of the assets of a business are transferred or disposed of by or under the directions of the person carrying on the business so as no longer to form part of those assets, whether or not for a consideration, such transfer or disposal is a supply of goods by the person;

(b) where, by or under the direction of a person carrying on a business, goods held or used for the purposes of the business are put to any private use or are used, or made available to any person for use, for any purpose other than a purpose of the business, whether or not for a consideration, the usage or making available of such goods is a supply of services;

(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.

Notification 12/2017 Central Tax Dt.

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:-

<b>Sl. No.</b>	<b>Chapter, Section, Heading, Group or Service Code (Tariff)</b>	<b>Description of Services</b>	<b>Rate (per cent.)</b>	<b>Condition</b>
(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

Understanding the scope of the above requires some efforts.

As already observed transfer of business may be done in different ways. Sometimes, the transferor would cease to exist and the entire business would be transferred to the transferee. Sometimes, the transferor may continue to exist even after transferring the entire business to the transferee. Another possibility is that the transferor may transfer only a part of its business to the transferee and continue to carry on the remaining business activities. Further, whatever be the mode of transfer, the consideration for the same may either be identified by individually valuing the various assets, liabilities and goodwill or there can be a lump sum consideration for the transfer of various assets and liabilities, which is known as “slump sale”.

In which situation, a transfer of business would lead to supply of any service? It may be noted that transfer of business involves transfer of various assets (movable or immovable; tangible or intangible; etc) and liabilities.

Transfer of various immovable properties by the transferor to transferee would be a transaction of sale of immovable property and hence outside the ambit of GST.

Transfer of intangible assets like Goodwill is neither transfer of goods, nor transfer of immovable property as these are intangible. The following definitions may be noted.

Section 2 (52) "goods" means every kind of movable property other than money and securities but includes actionable claim, growing crops, grass and things attached to or forming part of the land which are agreed to be severed before supply or under a contract of supply;

Section 2 (102) "services" means anything other than goods, money and securities but includes activities relating to the use of money or its conversion by cash or by any other mode, from one form, currency or denomination, to another form, currency or denomination for which a separate consideration is charged;

It may be noted that transfer of intangible assets like Goodwill or trademark would amount to supply of services and hence liable to GST. But as per S.No. 2 of Notification 12/2017 Central Tax Dt. 28.06.2017, Services by way of transfer of a going concern, as a whole or an independent part thereof, is thus exempted from payment of GST.

Transfer of various movable and tangible goods may or may not amount to supply of goods, as explained below.

As per para 4 (c) of Schedule II, if the transferor ceases to exist as a taxable person and (i) transfers the entire business as a going concern to the transferee; or (ii) the business is carried on by the personal representative (Example : Death of a proprietor and continuance of business by the son), there shall be no GST liability. It may be noted that para 4 (c) ibid can be applied only if the transferor ceases to exist as a taxable person.

In any other cases of transferor ceasing to exist as a taxable person, for example, a registered person's turnover falls below the threshold limit, it shall be deemed that all the goods forming part of the assets of the business carried on by him shall be deemed to be supplied by him in the course or furtherance of his business and hence attract GST.

Cases, where the transferor does not ceases to be a registered person are covered by para 4 (a) of Schedule II. It may be observed that in so far as the goods, forming part of the business assets are concerned, transfer of such goods shall amount to supply and liable to GST. For example, if one of the many divisions of a company A is transferred to company B, then the various goods of the division being transferred, such as raw materials, work in progress, finished goods, furniture, machineries, etc. are being supplied by A to B and appropriate GST is payable at the rate applicable for such goods. If separate values are identified for different items of goods, then such value shall be adopted for payment of GST.

In case of slump sale, where separate values are not available, the value cannot be determined under Section 15 (1) of the CGST Act, 2017, as per section 15 (4) recourse has to be made to relevant provisions of Chapter IV of the CGST Rules, 2017.

Since Rule 27 to 29 of the said Rules are applicable in certain specific circumstances (Rule 27 where consideration is not in money; Rule 28 supplies between distinct persons and related persons; Rule 29 supplies through agent;) recourse has to be made to Rule 30.

***RULE 30. Value of supply of goods or services or both based on cost.*** – Where the value of a supply of goods or services or both is not determinable by any of the preceding rules of this Chapter, the value shall be one hundred and ten percent of the cost of production or manufacture or the cost of acquisition of such goods or the cost of provision of such services.

To sum up

Sl. No.	Situation	GST liability
1	Transferor ceases to be a taxable person and the business is transferred as a going concern	NIL
2	Transferor ceases to be a taxable person and the business is succeeded by a representative	NIL
3	In any other case, where the transferor ceases to be a taxable person	GST payable on the goods being transferred at the specific values, if separate values are available. If the values are not available, value shall be 110 % of cost. No GST for the services like transfer of goodwill and intangible assets.
4	Transfer of business assets and the transferor does not ceases to be a taxable person.	GST payable on the goods being transferred at the specific values, if separate values are available. If the values are not available, value shall be 110 % of cost. No GST for the services like transfer of goodwill and intangible assets

