

## BUSINESS RESTRUCTURING & GST



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The Indian economy is burgeoning - exhibiting robust growth and immense potential. It has attained a centre stage in the global economy - wherein global investors and business houses are keeping a keen eye on it.

In light of the same, business restructurings viz. mergers, demergers, acquisitions, and other strategic realignments is witnessing a significant trend in the Indian business landscape. The changing economic landscape, characterized by globalization, technological advancements, evolving consumer preferences and regulatory reforms have been key drivers of this trend.

While the main reasons for business restructuring would always seem to be the pursuit of growth and market expansion - the need to improve operational efficiency and competitiveness, government policies and regulatory developments have been key factors shaping the business restructuring landscape in India.

Understanding the tax implications of business restructuring is crucial as it can significantly impact the financial outcomes and strategic decisions involved. With the advent of GST, issues in the business restructurings have been evolving and seek some pondering. In this article, I have tried to bring out some of these issues having legal as well as procedural implications in various forms of business restructurings.

- **Taxability**

The first and foremost question that comes to the mind would be whether such transactions would be taxable under GST.

Taxability of a transaction under the GST law is to be analysed in terms of the charging Section – Section 7 of the CGST Act which is reproduced as under:

***“Section 7: Scope of supply***

(1) For the purposes of this Act, the expression "supply" includes –

- (a) all forms of supply of goods or services or both such as sale, transfer, barter, exchange, licence, rental, lease or disposal made or agreed to be made for a consideration by a person in the course or furtherance of business;
- (aa) the activities or transactions, by a person, other than an individual, to its members or constituents or vice versa, for cash, deferred payment or other valuable consideration.

*Explanation. – For the purposes of this clause, it is hereby clarified that, notwithstanding anything contained in any other law for the time being in force or any judgment, decree or order of any Court, tribunal or authority, the person and its members or constituents shall be deemed to be two separate persons and the supply of activities or transactions inter se shall be deemed to take place from one such person to another;*

- (b) import of services for a consideration whether or not in the course or furtherance of business; and
- (c) the activities specified in Schedule I, made or agreed to be made without a consideration
- (d) deleted

- (1A) Where certain activities or transactions constitute a supply in accordance with the provisions of sub-section (1), they shall be treated either as supply of goods or supply of services as referred to in Schedule II.
- (2) Notwithstanding anything contained in sub-section (1), –
- (a) activities or transactions specified in Schedule III; or
- (b) such activities or transactions undertaken by the Central Government, a State Government or any local authority in which they are engaged as public authorities, as may be notified by the Government on the recommendations of the Council,  
shall be treated neither as a supply of goods nor a supply of services.
- (3) Subject to the provisions of sub-sections (1), (1A) and (2), the Government may, on the recommendations of the Council, specify, by notification, the transactions that are to be treated as –
- (a) a supply of goods and not as a supply of services; or
- (b) a supply of services and not as a supply of goods.”

As can be seen from the provisions of charging section – for a transaction to be taxed under GST it should be either 'goods' or 'services'.

While sale / transfer of business is not a movable property (thus - not goods) – issue arises about its coverage within the ambit of services.

For this, let us refer to the definition of service as provided u/s 2(102) of the CGST Act, 2017 which is reproduced below for ready reference:

'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;

On going through this definition, it is evident that term service has been very loosely defined under GST. There are 2 schools of thought prevalent in interpreting the said term:

The first school of thought advocates Purposive Interpretation of the term – service. It considers that a literal reading/interpretation of the definition would create an ambiguity. A transaction of sale/transfer of business includes transfer of assets (tangible/ intangible, movable / immovable, cash/bank balances, securities, etc.), liabilities (including contingent liabilities), employees, contracts, etc. Merely because this transfer does not qualify as goods – classifying the said transaction as service would result in absurdity. Thus, the term service has to be interpreted with the intent / purpose of the law. In the absence of any element of service (or deemed services as per Schedule II) - business restructuring activity cannot be classified as service.

The second school of thought advocates literal interpretation of the term – service. As per this interpretation – the scope and coverage of the term service is wider and covers anything other than goods. The only restriction to the above scope and coverage would be those specifically covered in Schedule III (For e.g., Employment services, funeral/ burial services, sale of land / completed building, etc.). In case the same is considered service – a view may be taken that the same is covered u/s. 7. Consequently, Exemption as per Sr. No. 2 of Notification 12/2017 – CT (Rate) may be claimed.

Based on the view taken for taxability of the transaction, ITC reversal u/s. 17 may also be applicable - viz. In case business transfer is assumed to be taxable and exemption is claimed vide Notification 12/2017 - CT (Rate), reversals u/s. 17(2) of the CGST Act, 2017.

- **Registrations**

In case of business restructuring among Companies - there are two different dates i.e., the effective date (i.e. date from which the scheme would be given effect) and the date of order (i.e. date when the scheme is approved by the Court or Tribunal). Generally, the effective date is prior to the date of the order. Post the issuance of the order, the procedural formalities under the applicable laws are to be undertaken.

Section 87 of the Central Goods and Services Tax Act, 2017 ('CGST Act') provides for liability in case of amalgamation or merger of companies. As per Section 87(2) of the CGST Act, the registration certificates of the companies (i.e., the subsumed companies) shall be cancelled with effect from the date of the order.

Section 29 of the CGST Act provides for cancellation of GST registration by the Proper Officer on application by the taxpayer or on his own motion.

Section 29(2) of the CGST Act read with Rule 21 of the CGST Rules provides for specific reasons for which the Proper Officer can cancel the GST registration of the taxpayer on Suo-moto basis with effect from a retrospective date. Discontinuation of business on account of business restructuring is not covered in the same. In such a scenario, GST registration can be cancelled by the officer but not from a retrospective date.

Rule 20 of the CGST Rules allows 30 days' time for a taxpayer to apply for cancellation of GST registration. As per Rule 21A such registration stands suspended from the date of submission of the application or the date from which the cancellation is sought, whichever is later. The said suspension shall proceed towards cancellation if the procedural requirements are fulfilled.

Thus, in all practical respects - the suspension/cancellation date would be after the date of the order. Thus, there is a conflict between the registration provisions and Section 87(2) of the CGST Act.

It is pertinent to note that the effective date of cancellation of registration would have an impact on the other aspects such as claim of ITC, filing of GST returns, job work compliances, etc.

Further, under the Income-tax Act, the receipt of the order requires Companies to re-file their tax returns as the Company which has merged or amalgamated into the other company has ceased to exist. However, under the GST law up to the date of the order all the Companies continue to exist. This may have impact on various system-based parameters run by tax authorities for issuance of notices.

- **Claim of Input Tax Credits**

As mentioned above, effective date of registration cancellation for the subsumed Companies in case of mergers and amalgamations would be date of the order.

Issue arises in relation to the inward supplies prior to the date of the order. When such inward supplies were made, these subsumed companies were registered and entitled to ITC u/s. 16(1) of the CGST Act. However, they may not be entitled to ITC u/s. 16(2) of the CGST Act in case the conditions are not fulfilled which *inter-alia* may include:

- ✓ He may not be in possession of tax invoice; or
- ✓ The tax invoices were not appearing in GSTR 2B; or
- ✓ The goods were in transit and received by the said company after the date of the order.

In such a scenario, the subsumed Company may be able to satisfy the conditions after the date of order and be entitled to the ITC thereafter. However, by virtue of Section 87 the subsumed Company does not remain registered person w.e.f. date of the order. This would make the subsumed Company disentitled to the ITC which was otherwise eligible/entitled to be claimed.

Without prejudice to the above, assuming that the taxpayer is required to apply for cancellation within 30 days from the date of the event requiring cancellation i.e., date of the order –the issue of ITC claim would remain even after such date of cancellation.

Similar issues would also arise in case of reversals made under Rule 37 of the CGST Rules, 2017 by the subsumed Company which are to be reclaimed post the date of the order.

Chapter XVI (Sections 85 to 88) of the CGST Act provide for liabilities but there are no specific provisions related to claim of ITC, etc. However, by virtue of the Court/Tribunal order – the assets and liabilities of the subsumed Companies are taken over by the merged/amalgamated Company. Thus, such ITC may be claimed by the merged/amalgamated Company subject to fulfilment of the conditions.

Reference may be drawn to Rule 9(2) of the CENVAT Credit Rules, 2004 wherein the proviso allowed the Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise to allow the credit even if invoice did not contain adequate particulars, they are satisfied that the goods or services covered by the said document have been received and accounted for in the books of account of the receiver.

In light of the above provisions and merger order of the Hon'ble High Court – Hon'ble CESTAT Hyderabad allowed the claim of CENVAT Credit by the transferee for the Invoices in the name of the transferor Company in the case of FARMAX INDIA LTD. Versus COMM. OF CUS., C. EX. & S.T., HYDERABAD-IV [2020 (43) G.S.T.L. 526 (Tri. - Hyd.)].

While similar provisions are not present under the GST law – the same will have a persuasive value.

Nevertheless, this position will also face challenge in terms non appearance of ITC in GSTR 2B and consequent issuance of DRC 01C to the transferee, etc.

An alternate view would be to continue the GST registration of the subsumed entity and continue to claim the ITC in the said registration. The said accumulated credit may be transferred to the transferee by way of ITC-02. This view may also face the challenge of claim of ITC beyond the registration period prescribed under the law.

These are just a few of the plethora of legal and procedural challenges that are part of the bundle of other issues in the course of business restructuring. These will have to be determined beforehand and the businesses will have to address the same with an adequate transition planning.

At the same time, advocacy and representation for the open issues need to be made by the industry at the appropriate forums.

