

Liability to Pay in Certain Cases Under GST

Under GST statutes, the liability to pay the tax has been casted on the supplier of goods or services. There are situations where either the effective control of a taxable person is affected by another person or benefits of its property is received by one or more persons. The statute in order to expand the liability of such persons who are in effective control of affairs of business or are in possession of the property of such person has provided their liability under the GST statutes for recovery of any unpaid tax of such taxable person from them. The provisions are absolute in certain cases, but restricted liability is provided in others. This article examines the liability of persons other than the taxable person and limitation of liability in such cases. Read on...



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Understanding the Context

Section 9 is the charging section of the Central Goods and Services Tax Act, 2017 ("CGST Act"). The section provides that every supplier of goods or services is liable to pay GST on every taxable supply effected by him. However, under specific provisions of section 9 of the CGST Act, the liability to pay tax has been shifted from the supplier to the recipient in case of notified goods and services and in certain specified services on the E-commerce operator through whom such services are being supplied. The extension of liability to pay tax by persons other than the supplier finds extension beyond section 9 also. While under section 9, the liability has been shifted absolutely from the supplier to the recipient or the e-commerce company, there are certain occasions where the

liability to pay tax has not been shifted absolutely but is co-extended to specified persons other than the supplier. Thus, it becomes pertinent for persons undertaking such transactions to understand the nature and extent of the tax liability which they have become liable for. Chapter XVI of the CGST Act provides for the specified cases where the liability to pay has been co extended to specified persons other than the supplier. We shall now discuss such cases in detail hereunder.

Liability in case of transfer of business

Section 85 of the CGST Act provides that the transferee in case of transfer of business along with transferor shall be jointly and severally liable to pay the tax, interest or any penalty due from the taxable person (transferor) in respect of such business.



Thus, the transferee along with the acquisition of business from another person, also acquires his liability of GST which remains unpaid for any period prior to date of such transfer. The determination of such liability would ensure the transferee to take adequate precautions in terms of making due diligence of all GST liabilities which remains unpaid on the date of such transfer of business in whole or in part. The transfer of business would include the activity continuing or resuming as it was being undertaken prior to such transfer and such entity or part of entity is capable to function as an unit as a whole. For e.g., M/s ABC enterprises purchasing the entire manufacturing facility of M/s Anything Private Limited shall be liable for any GST liability for any past period which is determined or is determined after such transfer. In case of part of enterprises, for e.g., purchasing the logistics business of M/s Anything Private Limited which can be run as an independent logistics business by the purchaser, the purchaser would be liable for any GST liability of such part of the enterprise only.



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Usually, the purchaser prefers to purchase the business as a going concern since the transfer of such business is exempt from levy of GST under Entry No. 2 of *Notification No. 12/2017 dated 28.06.2017*. Thus, GST is not levied on transfer of such business or any part or fixed assets, or stock as part of such business. In alternate, the purchaser can purchase individual assets of the business, in which case the transfer would be that of assets and not of business and in such cases while GST would be applicable on different assets as per their applicable rates and no benefit of exemption would be available. However, in case of individual asset purchase, the transferee would not be liable for any past liability of the transferor under section 85 of GST.

It is also important to note that in case of transfer of business, the transferee will not continue the business on the GST number of the transferor but shall obtain a new GST registration on his own Permanent Account Number (PAN). However, if the transferee is already registered, he shall make amendment to his existing registration to include the newly acquired business.

Liability of agent and principal

Section 86 of the CGST Act provides that where an agent supplies or receives any taxable goods *on behalf of his principal*, he shall also be jointly and severally liable to pay the tax payable on such goods. The important points worth noting in this case is that it is only applicable to supply of goods and not services. Secondly, it is limited to those cases where such agent undertakes supply or receipt of taxable goods on behalf of the principal. The



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section is so carefully worded so as to extend the liability of the agent even on goods received from the transferor so as to cover situations like goods lost, stolen, destroyed, or for that matter are not available post such receipt in hands of the agent. The agent shall not be liable for any other liability of the principal under the GST statutes including in respect of any goods which are not received from them. In the opinion of the author, the agent shall also not be liable for any Input Tax credit (“ITC”) which was not available in any manner to the Principal even when such ITC can be linked to such goods. The liability of the agent shall only start on the receipt of goods which he receives on behalf of the principal and shall be limited only in respect of such goods.

Liability in case of amalgamation or merger of companies

Section 87 of the CGST Act provides for liability in case of amalgamation and mergers in respect of liability acquired for supply amongst the merging/ amalgamating company(ies). It provides that when two or more companies are amalgamated or merged, from an earlier date (prior to date of order of such merger

or amalgamation) and any 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. The liability has been fastened by bringing a deeming fiction that for such period the companies shall be deemed to be distinct companies. The registration of such amalgamating or merging companies shall be cancelled with effect from the date of the said order and not from the date of merger or amalgamation in such order.

Liability in case of company in liquidation

Section 88 of the CGST Act prescribes for determination of liability in case of company in liquidation. It provides that in the case of a company under liquidation, the Commissioner would notify the liquidator within three months from the date on which he receives intimation of the appointment of the liquidator, the amount which shall be



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sufficient to provide for any tax, interest or penalty which is then, or is likely thereafter to become, payable by the company.

The liability of tax in case of a private company which is wound up before or during the course of winding up, has been casted on the person(s) who was director of such company at any time during the period for which the tax was due. Such directors have been made jointly and severally liable for the payment of such tax, interest or penalty, unless he proves to the satisfaction of the Commissioner that such non-recovery cannot be attributed to any gross neglect, misfeasance or breach of duty on his part in relation to the affairs of the company. It is pertinent to mention that the director is responsible for the period during which he was holding the position as a director. This liability under this provision has not been extended on other officers of the Company including CEO, CFO etc.

Liability of directors of private company

Section 89 of the CGST Act makes the directors of a private limited company liable for payment of tax in case such amount cannot be recovered from such company. It provides that where any tax, interest or penalty due from a private company remains unrecovered for any period then any person who was a director during *such* period shall, jointly and severally, be liable for the payment of such unpaid amount. The provision specifically renders a Director jointly and severally liable for tax dues assessed against private companies unless he proves that the non-recovery cannot be attributed to any gross neglect, misfeasance or breach of duty on his part in relation to the affairs of the company. It is worth noticing



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that such liability has not been affixed on the shareholders of the Company. Thus, relying on *Nihal Chand v. Kharak Singh Sunder Singh*, (1936) 2 Company Cases 418 wherein it has been held that liability of the company simultaneously is also not the liability of shareholders, it can be said that no liability can be extended to shareholders in GST as well. In normal cases, Courts may not lift the corporate veil unless it is found to be a case of fraud against the state or another person. Thus, while shareholders have not been made party for recovery, the directors have been made liable for payment of unpaid taxes in case of private company. However, there lies a good case to argue that such liability of directors is not absolute but limited to their gross neglect, misfeasance or breach of duty. In the case of *Pepsico India Holdings Private Limited v. Food Inspector [(2011) 1 SCC 176]*, the Apex Court has held that mere bald statement that a person was a Director of the Company is alleged to have committed the offence is not sufficient unless a specific allegation regarding his role in the management is made clear.

Further, no liability shall also lie on the directors in case such private limited company is converted into a public limited company. This Section overrides any provisions of Companies Act,



Section 90 of the CGST Act extends the liability in case of partnership firm to its partners as well. The Section provides that in case where any tax, interest or penalty cannot be received from the firm, each of the partners of the firm shall be jointly and severally liable for such payment.

2013 (18 of 2013). The reason for such exclusion is that courts have held liability of the Company independent of the directors. Reference on the issue can be made to the *Sunil Parmeshwar Mittal v. Deputy Commissioner (Recovery Cell), Central Excise, Mumbai & Ors [2005 (188) E.L.T. 268 (Bom.)]*, wherein Hon'ble Bombay High Court held that as soon as a company is incorporated, it constitutes an independent juristic person in the eyes of law as distinct from its members constituting it. Thus, considering effect of incorporation of a company and its independent juristic existence, a former director of the company cannot be held responsible for payment of the liabilities of the company in absence of any specific provision and thus, the Court held that directors were not liable to pay outstanding dues of the Central Excise duty payable by the Company. The present provision has been introduced to overcome the above handicap as faced by the revenue in earlier laws.

Liability of partners of firm to pay tax

Section 90 of the CGST Act extends the liability in case of

partnership firm to its partners as well. The Section provides that in case where any tax, interest or penalty cannot be received from the firm, each of the partners of the firm shall be jointly and severally liable for such payment. Unlike in the case of directors, the partner(s) is not saved from such liability unless he can prove that he was not liable for any action which led to such non-payment. The liability has been fastened on the partners in an absolute manner by the statute. However, if a person ceases to be partner and he intimates the date of retirement to the Commissioner in writing, then he shall be liable for such liability only up to the date of his retirement. However, he remains liable for tax and other dues up to his retirement date even if the liability is determined at a date post his retirement. If the partner fails to intimate within one month of his retirement to the Commissioner, he shall remain liable till the date of intimation to Commissioner. Thus, it is important for every partner to intimate immediately to the Commissioner of his retirement from any partnership. In the views of the author, the present clause seems to have over stretched the liability of a retired partner since a procedural lapse cannot fasten a liability on a person for a period when he was not in control of the affairs of the firm.

Liability of guardians, trustees, etc

Section 91 of the CGST Act provides that in case of business being carried on by any guardian, trustee or agent of a minor or other incapacitated person where the tax, interest or penalty remains unrecoverable, then in such cases, the liability shall vest on and shall be recoverable from such guardian, trustee or agent in the same manner as that of the owner of such business. It is interesting to note that this section has not carved out any exception to this case and in cases where the fault of non-payment cannot be fastened on the actions of guardian, trustees etc., the liability is, such cases also can be fastened on such guardian, trustees etc. Thus, when a person is acting in a fiduciary capacity, he should make sure that the GST dues are cleared without delay.

Recovery in case of death or dissolution or termination

Section 93 of the CGST Act provides for liability in case of death of a person or dissolution of an entity and it provides for the person(s) liable to pay tax, interest or penalty under the GST Act(s) in such cases. The provision is subjected to the provisions of Insolvency and Bankruptcy Code, 2016. The different cases are summarised as under:

Situation	Person liable to pay tax and other GST dues
In case of death of a person, if a business carried on by the person is continued after his death by his legal representative or any other person.	Such legal representative or other person
In case of death of a person, if the business carried on by the person is discontinued.	His legal representative shall be liable to pay, out of the estate of the deceased.

In case where property of Hindu Undivided Family (“HUF”) or an association of persons (“AOP”) is partitioned amongst the various members or groups of members.	Each member or group of members shall be jointly and severally liable to pay the tax, interest or penalty due from such HUF or AOP.
In case of dissolution of a partnership firm.	Every person who was a partner shall be jointly and severally liable to pay the tax, interest or penalty due from the firm under this Act.
In case of termination of guardianship or trust.	The ward or the beneficiary shall be liable to pay the tax, interest or penalty due from the taxable person upto the time of the termination of the guardianship or trust.

In *Shabina Abraham v. Collector of Central Excise and Customs - 2015 (322) E.L.T. 372 (S.C.)*, the issue was whether a show cause notice under the Central Excises and Salt Tax Act, 1944 could be issued to the legal heirs of a sole proprietor after his death, against whom a show cause notice had been issued raising a demand of excise duty. Hon’ble Supreme Court held that there was no machinery provision under the Central Excise Act which enabled the continuation of such proceedings against the legal heirs of a deceased assessee. The case is important from the present

perspective as well as while the liability to pay is different from the continuation of proceedings of determining liability in case of a dead person. Despite the above provisions, in the view of the author, this issue would also find its way to the Apex Court under the GST regime as well.

Other cases

Section 92 of the CGST Act provides for similar liability in case of Court of Wards, the Administrator General, the Official Trustee or any receiver or manager (including any person, whatever be his designation, who in fact manages the business) appointed by or under any order of a court.

Section 94 provides that in case of discontinuation of business owned by a firm or an association of persons or a Hindu Undivided Family and such firm, association or family, and there are unpaid dues of tax, interest or penalty, then, every person who, at the time of such discontinuance, was a partner of such firm, or a member of such association or family, shall be jointly and severally liable for the payment of such unpaid dues. Such determination of dues can be prior to or after such discontinuance.

Conclusion

From the above discussion, it can be suggested that the liability to pay tax under the GST statutes is absolute on the taxable person making the taxable supplies. If the tax dues cannot be recovered from such person, then the government has empowered the recovery of such tax dues from the persons who are benefitted from the estate of such person. While in some cases the recovery from estate is limited to the value of estate received by the successor, however, in other cases like dissolution or partition, the liability is joint and several. In view of the author, such liability cannot be more than the estate benefits received by the persons who receive such estate on dissolution or partition. In certain cases, the liability is fastened on the persons who were in control of the affairs of the business of such taxable person. Under certain sections, the liability to pay tax may appear to be unlimited, however, in the views of the author, such liability should be fastened on the person who were responsible for such non-payment and not on every person by virtue of his fiduciary position. It is also to be understood that such liability need to be determined in the hands of the taxable person only. It is not a liability of third party, however, due to specific provisions, recovery can be made from such third parties as discussed above. The very provisions of determination of a tax liability shall need to be followed first and first attempt should be made for recovery from the taxable person and only in case when such recovery cannot be made, then only, the provisions of liability of third persons be effected by the revenue. GST law is still in its infancy and thus, it would take some more time to see how courts decipher all the above provisions. ■■■



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