

## Chapter 17

# Liability to Pay in Certain Cases

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### Statutory Provisions

<p><b>85. Liability in case of Transfer of Business</b></p> <p>(1) <i>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.</i></p> <p>(2) <i>Where the transferee of a business referred to in subsection (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.</i></p>
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## Extract of the CGST Rules, 2017

**19. Amendment of registration**

(1) *Where there is any change in any of the particulars furnished in the application for registration in FORM GST REG-01 or FORM GST REG-07 or FORM GST REG-09 or FORM GST REG-10 or for Unique Identity Number in FORM GST-REG-13, either at the time of obtaining registration or Unique Identity Number or as amended from time to time, the registered person shall, within a period of fifteen days of such change, submit an application, duly signed or verified through electronic verification code, electronically in FORM GST REG-14, along with the documents relating to such change at the common portal, either directly or through a Facilitation Centre notified by the Commissioner:*

*Provided that –*

(a) *where the change relates to,-*

(i) *legal name of business;*

(ii) *address of the principal place of business or any additional place(s) of business; or*

(iii) *addition, deletion or retirement of partners or directors, Karta, Managing Committee, Board of Trustees, Chief Executive Officer or equivalent, responsible for the day to day affairs of the business,-*

*which does not warrant cancellation of registration under section 29, the proper officer shall, after due verification, approve the amendment within a period of fifteen working days from the date of the receipt of the application in FORM GST REG-14 and issue an order in FORM GST REG-15 electronically and such amendment shall take effect from the date of the occurrence of the event warranting such amendment;*

(b) *the change relating to sub-clause (i) and sub-clause (iii) of clause (a) in any State or Union territory shall be applicable for all registrations of the registered person obtained under the provisions of this Chapter on the same Permanent Account Number;*

(c) *where the change relates to any particulars other than those specified in clause (a), the certificate of registration shall stand amended upon submission of the application in FORM GST REG- 14 on the common portal;*

(d) *where a change in the constitution of any business results in the change of the Permanent Account Number of a registered person, the said person shall apply for fresh registration in FORM GST REG-01:*

*Provided further that any change in the mobile number or e-mail address of the authorised signatory submitted under this rule, as amended from time to time, shall*

be carried out only after online verification through the common portal in the manner provided under <sup>1</sup> [sub-rule (2) of rule 8]

- (1A) <sup>2</sup> [Notwithstanding anything contained in sub-rule (1), any particular of the application for registration shall not stand amended with effect from a date earlier than the date of submission of the application in FORM GST REG-14 on the common portal except with the order of the Commissioner for reasons to be recorded in writing and subject to such conditions as the Commissioner may, in the said order, specify].
- (2) Where the proper officer is of the opinion that the amendment sought under sub-rule (1) is either not warranted or the documents furnished therewith are incomplete or incorrect, he may, within a period of fifteen working days from the date of the receipt of the application in FORM GST REG-14, serve a notice in FORM GST REG-03, requiring the registered person to show cause, within a period of seven working days of the service of the said notice, as to why the application submitted under sub-rule (1) shall not be rejected.
- (3) The registered person shall furnish a reply to the notice to show cause, issued under sub-rule (2), in FORM GST REG-04, within a period of seven working days from the date of the service of the said notice.
- (4) Where the reply furnished under sub-rule (3) is found to be not satisfactory or where no reply is furnished in response to the notice issued under sub-rule (2) within the period prescribed in sub-rule (3), the proper officer shall reject the application submitted under sub-rule (1) and pass an order in FORM GST REG -05.
- (5) If the proper officer fails to take any action, -
- (a) within a period of fifteen working days from the date of submission of the application, or
- (b) within a period of seven working days from the date of the receipt of the reply to the notice to show cause under sub-rule (3),
- the certificate of registration shall stand amended to the extent applied for and the amended certificate shall be made available to the registered person on the common portal.

**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

<sup>1</sup> Substituted vide Noff no. 7/2017-CT dt. 27.06.2017 for – "the said rule"

<sup>2</sup> Inserted vide Noff no. 75/2017-CT dt. 29.12.2017

*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.*

<sup>3</sup>*[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.]*

- (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.*

#### Related provisions of the Statute

Section or Rule	Description
Section 2(17)	Definition of Business
Section 2(107)	Definition of Taxable Person
Section 7	Meaning and scope of supply
Section 9	Levy and collection
Schedule II	Clause 4(c) of Schedule II (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
Section 18	Availability of credit in certain circumstances
Section 28	Amendment of registration

<sup>3</sup> Inserted vide Notf No. 16/2019-CT dt. 29.03.2019

### 85.1 Introduction

This section deals with tax liability that may arise in case of transfer of business under certain circumstances. It deals with the following situations:

- Liability arising before the transfer of business as a whole or in part; and
- Liability arising post transfer of business as a whole or in part.
- Such liability may arise on account of sale, gift, lease, leave and license, hire or in any other manner.

### 85.2 Analysis

#### (i) Liability arising prior to transfer:

- The provision applies when a taxable person who is liable to pay tax transfers his business either wholly or in part, which could be by way of:
  - Sale
  - Gift
  - Lease
  - Leave and license
  - Hire or
  - In any other manner
- The following cases are dealt with separately in this chapter and not covered under this section:
  - Amalgamation / merger -Section 87
  - Liquidation – Section 88
  - In case of death of proprietor – Section 93

**Tax liability:** Both transferor and transferee will be jointly and severally liable for payment of taxes, interest or penalty due upto the time of transfer of business (wholly or partly).

The joint and several liability will remain fastened even if such amounts were determined and become due after the transfer of business.

Interestingly, even liability to pay penalty, which is quasi-criminal in nature, is sought to be fastened on the transferee, although transferee would not have been responsible for the non-payment of tax, interest or penalty liability by the transferor prior to transfer of such business. Care must be taken to include 'indemnity' from transferor in case of any such liabilities arising in future. It may be noted that only 'payment' of dues (tax, interest and penalty) is joint-and-several with transferee but the process will only be against transferor.

It is interesting to note that the liability would be determined against the transferor only, however, if it is not recovered from the transferor, the same would be recovered from the transferee. There is no escape provided by the act against the transferee even if the transferee has purchased the business in a bona-fide manner with no notice of any liability against the transferor. Also, it is pertinent to note that this provision is for recovery and thus, the transferee has no right to contest the liability which has been fastened against the transferor. However, liability in case of transferor also would be subject to the limitation period as applicable in case of transferee. It is pertinent to note that the provision does not provide for subrogation of rights to contest the demand so determined for recovery from the transferee. The only right which transferee has would be recovery of such paid taxes from the transferor.

**(ii) Liability arising post transfer**

It is the 'recovery' of liability in respect of tax, interest and / or penalty which may be determined subsequent to transfer (by follow of process against transferor) and which relates to the period will be the liability of the transferee of business.

As the liability to pay these dues belongs to the 'business' carried on by Person A (PAN XYZ123XYZ), when the business is carried on albeit by Person B (PAN PQR456PQR), the encumbrance is not 'personal' liability of Person A but 'Taxable Person A'. Hence, it can be recovered from 'Taxable Person B' who is now carrying on the business, even though he has obtained a new GST number in order to continue operation of such transferred business.

In case, the transferee is already an existing taxable person, he needs to apply for amendment of his registration certificate within the prescribed time incorporating the changes as to the acquisition of the business (whole or part).

**(iii) Going concern transfer**

Sale of business as a 'going concern' [commonly called, lock-stock-barrel basis] is not taxable as per paragraph 4(c), schedule II of the CGST Act read with entry no. 2 to exemption *Notification no. 12/2017- Central Tax (Rate) dated 28<sup>th</sup> June, 2017*. One may refer to rule 41 that permits the transferor to upload GST ITC 02 on the common portal for effecting a smooth transfer of all unutilised credits pursuant to a transfer as a 'going concern', without any condition of correlation with underlying inputs and / or capital goods.

This provision is not new and is an added measure of responsibility that transferee of business needs to be mindful of to ensure that unpaid liabilities (determined or not, subject to limitation under section 73, 74 or 76) cannot be forfeited on account of sale of business. However, where 'sale of business' is effected by 'sale of assets', transferee carries no liability under GST law as all dues will remain with the 'Taxable Person A'. All recovery provisions against Taxable Person A will not travel to transferee as the

business is left behind with Taxable Person A and only assets (on payment of applicable GST) has been transferred to Taxable Person B.

**(iv) Types of transfer**

This provision does not limit the type of transfer to merger or amalgamation but 'any' form of transfer where the resultant is 'transfer of business' as a going concern. In fact, the types listed covers permanent or temporary transfer of business but on a going concern basis. It is possible for all arrangements and compromises even for limited duration to come within the operation of this remedial provision for recovery of dues.

**85.3 Issues and Concerns**

- (i) In case of transfer of business by whatever method i.e., sale, lease, gift, license etc., the law does not indicate as to what should be the life of capital goods that is to be reckoned in the hands of transferee, for the purpose of GST laws, would it be five years, as reduced by number of years for which such asset was put to use by the transferor or would it be an additional five years from the date of transfer or would it be as per the actual remaining life of the asset on the basis of actuarial valuation as on the date of such transfer. The GST law is silent on this issue. But the very nature of 'going concern' is the recognition of continuity of use of capital goods. Rules 43 and 44 would need to be complied without restarting the period of use applicable in these cases;
- (ii) The person taking over the business of another person should, in the normal course as a matter of due diligence, make sure that all the tax liabilities due under GST (CGST & SGST / IGST) laws in relation to transactions made before the date of transfer is fully discharged with applicable interest due, if any. Further, such transferee shall also ensure that there is no pending proceeding(s) against him under the said Act, to ensure that the transition process is smooth. It must be noted that the GST law casts the burden of paying tax, interest, penalty or any other amount on the transferee jointly with the transferor of business, though such amounts could relate to a period, prior to the date of transfer.

**85.4 FAQs**

- Q1. In case of transfer of business, who is liable to pay tax in respect of business transactions prior to such transfer?
- Ans. Both the transferor and transferee of business (either wholly or partly) are jointly and severally liable to pay tax.
- Q2. Whether such liability as mentioned above is applicable only for tax?
- Ans. Such liability is applicable to interest and penalty also in addition to tax.
- Q3. What are the types of business transfers covered in section 85?
- Ans. Following types of business transfers are covered in the subject provision:

- (a) Sale;
- (b) Gift;
- (c) Lease;
- (d) Leave and license;
- (e) Hire; or
- (f) In any other manner

Q4. To what extent the transferor of business is liable to pay tax / interest / penalties?

Ans. The transferor of business is jointly and severally liable to pay tax / interest / penalties arisen along with the transferee (whether determined prior to transfer or post transfer) upto the date of transfer of business.

Q5. Who is liable to pay tax in respect of supplies made after the date of transfer of business?

Ans. The transferee of business is liable to pay tax after the date of transfer of business.

Q6. If the transferee carries on an existing business, what are the actions to be taken on transfer?

Ans. The transferee is required to make amendments in his registration certificate to give effect to the business transfer.

**85.5 MCQs**

Q1. Transfer of business includes .....

- (a) Sale
- (b) Lease
- (c) Leave & License
- (d) All of the above

Ans. (d) All of the above

Q2. Who is liable to pay the tax in case of transactions prior to the date of transfer of business?

- (a) Transferor
- (b) Transferee
- (c) Both jointly and severally
- (d) jointly

Ans. (c) Both jointly and severally



**Statutory Provision****86. Liability of Agent and Principal**

*Where an agent supplies or receives any taxable goods on behalf of his principal, such agent and his principal shall, jointly and severally, be liable to pay the tax payable on such goods under this Act.*

**Related provisions of the Statute**

Section or Rule	Description
Section 2(5)	Definition of Agent
Section 7	Meaning and scope of supply
Section 9	Levy and collection
Schedule I	Activities to be treated as supply even if made without consideration – Entry no. 3 of the said schedule

**86.1 Introduction**

This section directly casts the liability on a principal, in addition to the liability of the agent who effects the supply of taxable goods on behalf of principal or procures taxable goods on behalf of his principal.

**86.2 Analysis**

Under the GST law, in cases where –

- Taxable Goods are supplied by agent on behalf of principal; or
- Taxable Goods are procured by agent on behalf of principal.

the agent is primarily liable for tax. However, by virtue of this provision, both agent and principal, will be jointly and severally made liable to pay for tax payable on such supplies.

It is important to note that transactions between a Principal and Agent involving 'handling' of goods is regarded as a supply *inter se* vide paragraph 3 of schedule I of CGST Act, 2017. But, in terms of this section, 'joint and several' liability is being fastened on the person, who is not covered by the said fiction (as regards supply). This section is meant to provide recourse to the Government against either of them or not necessarily only upon default by the principal obligor. The Government is free to recover dues from either of them or both (up to the total dues only) without having to exhaust its remedies against the one who was principally liable (principal obligor) and then only proceed against the other. Please note that there is no compulsion that the Government should have exhausted its remedies against the principal to proceed against the Agent, that is the effect of joint-and-several. Once Agent pays, remedy of subrogation (refer section 92 of Transfer of Property Act and section 69 of Indian Contract

Act) will be available to the Agent to stand in the shoes of a creditor and recover under a civil suit, dues that were owed by the principal.

It is important to note that the section is applicable to supply of goods only and not on agents who provides or received services on behalf of Principal. Secondly, it is limited to those cases where such agent undertakes supply or receipt of taxable goods on behalf of the principal. The section is so carefully worded so as to extend the liability on the agent even in respect of all goods which are 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. 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. No other liability of the principal other than in respect of goods received by the agent on behalf of Principal can be fastened on Agent and vice versa. In case of default by the Agent, the law extends such liability on the principal. In case of Principal not registered in the state in which agent is located, the liability still remains as the law does not provide for liability depending upon the registration of the principal but extends an unconditional liability in such cases.

### **86.3 Issues and Concerns**

Liability of the principal who effects supplies through an agent or a principal who receives supplies through an agent, does not end as soon as he (principal) pays tax on the supply made by him to agent for further supply; instead the liability in the hands of the principal continues till the time a further supply is made by agent - say to the final customer (B2B or B2C) and tax is duly discharged by agent on the said supply. This in effect means, that the principal needs to keep a track of compliance by an agent apart from the compliance requirements to be followed by him under the said law, which is an added burden in the hands of principal.

### **86.4 FAQ**

Q1. Whether the principal is also liable for tax payable on the goods supplied by the Agent?

Ans. Yes, the principal will also be jointly and severally liable to pay tax on such supplies, along with the agent.

### **86.5 MCQs**

Q1. Agent and Principal, both are liable to pay tax on supply or receipt of .....

- (a) Taxable Goods only
- (b) Services only
- (c) Goods along with service

(d) None of the above

Ans. (a) Taxable Goods only

Q2. Agent and Principal are liable to pay tax .....

(a) Jointly

(b) Separately

(c) Both jointly and severally

(d) Jointly or Separately

Ans. (c) Both jointly and severally

### Statutory Provisions

#### **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 tax accordingly.*
- (2) *Notwithstanding anything contained in the said order, for all 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.*

### Extract of the CGST Rules, 2017

#### **19. Amendment of registration**

- (1) *Where there is any change in any of the particulars furnished in the application for registration in FORM GST REG-01 or FORM GST REG-07 or FORM GST REG-09 or FORM GST REG-10 or for Unique Identity Number in FORM GST-REG-13, either at the time of obtaining registration or Unique Identity Number or as amended from time to time, the registered person shall, within a period of fifteen days of such change, submit an application, duly signed or verified through electronic verification code, electronically in FORM GST REG-14, along with the documents relating to such change at the common portal, either directly or through a Facilitation Centre notified by the Commissioner:*

*Provided that –*

- (a) *where the change relates to,-*
- (i) *legal name of business;*
  - (ii) *address of the principal place of business or any additional place(s) of business; or*
  - (iii) *addition, deletion or retirement of partners or directors, Karta, Managing Committee, Board of Trustees, Chief Executive Officer or equivalent, responsible for the day to day affairs of the business,-*

*which does not warrant cancellation of registration under section 29, the proper officer shall, after due verification, approve the amendment within a period of fifteen working days from the date of the receipt of the application in FORM GST REG-14 and issue an order in FORM GST REG-15 electronically and such amendment shall take effect from the date of the occurrence of the event warranting such amendment;*

- (b) *the change relating to sub-clause (i) and sub-clause (iii) of clause (a) in any State or Union territory shall be applicable for all registrations of the registered person obtained under the provisions of this Chapter on the same Permanent Account Number;*
- (c) *where the change relates to any particulars other than those specified in clause (a), the certificate of registration shall stand amended upon submission of the application in FORM GST REG- 14 on the common portal;*
- (d) *where a change in the constitution of any business results in the change of the Permanent Account Number of a registered person, the said person shall apply for fresh registration in FORM GST REG-01:*

*Provided further that any change in the mobile number or e-mail address of the authorised signatory submitted under this rule, as amended from time to time, shall be carried out only after online verification through the common portal in the manner provided under <sup>4</sup> [sub-rule (2) of rule 8]*

<sup>5</sup>*[(1A) Notwithstanding anything contained in sub-rule (1), any particular of the application for registration shall not stand amended with effect from a date earlier than the date of submission of the application in FORM GST REG-14 on the common portal except with the order of the Commissioner for reasons to be recorded in writing and subject to such conditions as the Commissioner may, in the said order, specify.]*

(2) *Where the proper officer is of the opinion that the amendment sought under sub-rule*

<sup>4</sup> Substituted vide Noff no. 7/2017-CT dt. 27.06.2017 for – “the said rule”

<sup>5</sup> Inserted vide Noff no. 75/2017-CT dt. 29.12.2017

(1) is either not warranted or the documents furnished therewith are incomplete or incorrect, he may, within a period of fifteen working days from the date of the receipt of the application in FORM GST REG-14, serve a notice in FORM GST REG-03, requiring the registered person to show cause, within a period of seven working days of the service of the said notice, as to why the application submitted under sub-rule (1) shall not be rejected.

- (3) The registered person shall furnish a reply to the notice to show cause, issued under sub-rule (2), in FORM GST REG-04, within a period of seven working days from the date of the service of the said notice.
- (4) Where the reply furnished under sub-rule (3) is found to be not satisfactory or where no reply is furnished in response to the notice issued under sub-rule (2) within the period prescribed in sub-rule (3), the proper officer shall reject the application submitted under sub-rule (1) and pass an order in FORM GST REG -05.
- (5) If the proper officer fails to take any action, -
- (a) within a period of fifteen working days from the date of submission of the application, or
- (b) within a period of seven working days from the date of the receipt of the reply to the notice to show cause under sub-rule (3),

the certificate of registration shall stand amended to the extent applied for and the amended certificate shall be made available to the registered person on the common portal.

**20. Application for cancellation of registration.**

A registered person, other than a person to whom a registration has been granted under rule 12 or a person to whom a Unique Identity Number has been granted under rule 17, seeking cancellation of his registration under sub-section (1) of section 29 shall electronically submit an application in FORM GST REG-16, including therein the details of inputs held in stock or inputs contained in semi-finished or finished goods held in stock and of capital goods held in stock on the date from which the cancellation of registration is sought, liability thereon, the details of the payment, if any, made against such liability and may furnish, along with the application, relevant documents in support thereof, at the common portal within a period of thirty days of the occurrence of the event warranting the cancellation, either directly or through a Facilitation Centre notified by the Commissioner:

~~<sup>6</sup> [Provided that no application for the cancellation of registration shall be considered in case of a taxable person, who has registered voluntarily, before the expiry of a period of one year from the effective date of registration.]~~

<sup>6</sup> Omitted vide Notf no. 03/2018-CT dt. 23.01.2018

**22. Cancellation of registration.**

- (1) Where the proper officer has reasons to believe that the registration of a person is liable to be cancelled under section 29, he shall issue a notice to such person in FORM GST REG-17, requiring him to show cause, within a period of seven working days from the date of the service of such notice, as to why his registration shall not be cancelled.
- (2) The reply to the show cause notice issued under sub-rule (1) shall be furnished in FORM REG-18 within the period specified in the said sub-rule.
- (3) Where a person who has submitted an application for cancellation of his registration is no longer liable to be registered or his registration is liable to be cancelled, the proper officer shall issue an order in FORM GST REG-19, within a period of thirty days from the date of application submitted ~~[sub-rule (1) of]~~ under rule 20 or, as the case may be, the date of the reply to the show cause issued under sub-rule (1) or under sub-rule (21A<sup>8</sup>), cancel the registration, with effect from a date to be determined by him and notify the taxable person, directing him to pay arrears of any tax, interest or penalty including the amount liable to be paid under sub-section (5) of section 29.
- (4) Where the reply furnished under sub-rule (2), [or in response to the notice issued under sub-rule (2A) of rule 21A]<sup>9</sup> is found to be satisfactory, the proper officer shall drop the proceedings and pass an order in FORM GST REG -20:  
<sup>10</sup>[Provided that where the person instead of replying to the notice served under sub-rule (1) for contravention of the provisions contained in clause (b) or clause (c) of sub-section (2) of section 29, furnishes all the pending returns and makes full payment of the tax dues along with applicable interest and late fee, the proper officer shall drop the proceedings and pass an order in FORM GST-REG 20.]
- (5) The provisions of sub-rule (3) shall, mutatis mutandis, apply to the legal heirs of a deceased proprietor, as if the application had been submitted by the proprietor himself.

**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,

<sup>7</sup> Omitted vide Notf No. 7/2017-CT dt. 27.06.2017

<sup>8</sup> Inserted by the Central Goods and Services Tax (Fourteenth Amendment) Rules, 2020, w.e.f. 22-12-2020 vide Notf No. 94/2020-CT dt. 22.12.2020

<sup>9</sup> Inserted by the Central Goods and Services Tax (Fourteenth Amendment) Rules, 2020, w.e.f. 22-12-2020 vide Notf No. 94/2020-CT dt. 22.12.2020

<sup>10</sup> Inserted vide Notf no. 39/2018-CT dt. 04.09.2018

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.

<sup>11</sup>[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.]

- (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.

**[41A. Transfer of credit on obtaining separate registration for multiple places of business within a State or Union territory.**

- (1) A registered person who has obtained separate registration for multiple places of business in accordance with the provisions of rule 11 and who intends to transfer, either wholly or partly, the unutilised input tax credit lying in his electronic credit ledger to any or all of the newly registered place of business, shall furnish within a period of thirty days from obtaining such separate registrations, the details in FORM GST ITC-02A electronically on the common portal, either directly or through a Facilitation Centre notified in this behalf by the Commissioner:

Provided that the input tax credit shall be transferred to the newly registered entities in the ratio of the value of assets held by them at the time of registration.

Explanation - For the purposes 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.

- (2) The newly registered person (transferee) shall, on the common portal, accept the details so furnished by the registered person (transferor) and, upon such

<sup>11</sup> Inserted vide Notf. No. 16/2019-CT dt. 29.03.2019

*acceptance, the unutilised input tax credit specified in FORM GST ITC-02A shall be credited to his electronic credit ledger.]<sup>12</sup>*

**Related provisions of the Statute:**

Section or Rule	Description
Section 2(17)	Definition of Business
Section 2(107)	Definition of Taxable Person
Section 7	Meaning and scope of supply
Section 9	Levy and collection
Section 18	Availability of credit in certain circumstances
Section 28	Amendment of registration
Section 29	Cancellation of registration

**87.1 Introduction**

This section deals with the tax liability on certain transactions between the effective date and date of order of Tribunal/Court in case of amalgamation or merger of companies.

**87.2 Analysis**

- (i) In cases of amalgamation or merger of two or more companies by virtue of an order passed by Tribunal/Court/otherwise, the following two crucial dates are relevant, -
  - Date from / on which the amalgamation/merger is effective;
  - Date of the order pursuant to which the amalgamation/merger takes place.
- (ii) Normally, by virtue of the said order, the transactions of supply of goods and/or services inter-se between the companies merged/amalgamated, between two dates, would get nullified as they would become one entity from the effective date (and not from the date of the order).
- (iii) However, for the purposes of GST, by virtue of this provision, such transactions would continue to be treated as supply by one entity and receipt by the other, viz., all the provisions of this law would equally apply as if the amalgamation or merger had not taken place and both the entities continue as two different taxable persons. Till the date of order of amalgamation/ merger, those companies shall be treated as distinct companies and should discharge their respective tax liabilities.
- (iv) Thus, this provision would eclipse the order and legal effect of the Court/ Tribunal for the limited purposes of GST law. As such, it will NOT be unusual to find that

<sup>12</sup> Inserted vide Notf No. 03/2019-CT dt. 29.01.2019 w.e.f. 01.02.2019



transactions will be reported in the financials of transferee entity after giving effect to the Order but the same transactions (during the intervening period) will remain in the books (and GST returns) of the transferor and WITHOUT unwinding the same. This is a departure from the practice in all other tax laws in such instances.

- (v) It provides that wherever necessary, the registration certificates of the said companies would stand cancelled with effect from the date of the said order.

Please refer to the facility provided by rule 41 for transfer of unutilized input tax credit lying in electronic credit ledger of the transferor.

It is interesting that the words 'amalgamation or merger' is used without reference to various innovations in the field of corporate compromises and arrangements. Experts are of the view that all arrangements where order of NCLT is passed may come within the operation of this provision and the absence of specific terms like demerger or reverse-demerger or spin-off which are different forms of such corporate compromises and arrangements and which operate on the same principle of amalgamations or merger must be allowed where there is an interval of time between date of order and date its effective date.

With the multiple registration within the same State being permitted, credit is permitted to be transferred and reallocated between each such registration by filing Form ITC-02A. This credit will be allocated in the ratio of assets of each registration held.

### 87.3 Issues and Concerns

As the treatment under the Companies Act, 2013 read with relevant rules thereto and GST law are different for a period commencing from effective date of order of merger till the date of issue of order, both the merged company and the resultant company will have to keep track of transactions effected between each other during the above said period and maintain relevant reconciliations for the purpose of both the laws, if the same is not done, it would lead to unnecessary complications and avoidable litigations.

### 87.4 MCQ

- Q1. When two or more companies are amalgamated, the liability to pay tax on supplies between them during the period of effective date of amalgamation order and date of issue of amalgamation order would be on -
- (a) Transferee;
  - (b) Respective companies;
  - (c) Any one of the companies;
  - (d) None of the above.

Ans. (b) Respective Companies.

**Statutory Provisions****88. Liability in case of company in liquidation**

- (1) *When any company is being wound up whether under the orders of a court or Tribunal or otherwise, every person appointed as receiver of any assets of a company (hereinafter referred to as the "liquidator"), shall, within thirty days after his appointment, give intimation of his appointment to the Commissioner.*
- (2) *The Commissioner shall, after making such inquiry or calling for such information as he may deem fit, notify the liquidator within three months from the date on which he receives intimation of the appointment of the liquidator, the amount which in the opinion of the Commissioner would be sufficient to provide for any tax, interest or penalty which is then, or is likely thereafter to become, payable by the company.*
- (3) *When any private company is wound up and any tax, interest or penalty determined under this Act on the company for any period, whether before or in the course of or after its liquidation, cannot be recovered, then every person who was a director of such company at any time during the period for which the tax was due shall, jointly and severally, be 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.*

**Extract of the CGST Rules, 2017****160. Recovery from Company in liquidation. –**

*Where the company is under liquidation as specified in section 88, the Commissioner shall notify the liquidator for the recovery of any amount representing tax, interest, penalty or any other amount due under the Act in FORM GST DRC -24.*

**Related provisions of the Statute:**

<b>Section or Rule</b>	<b>Description</b>
Section 2(17)	Definition of Business
Section 2(107)	Definition of Taxable Person
Section 2(84)	Definition of Person
Section 7	Meaning and scope of supply
Section 9	Levy and collection
Section 82	Tax to be first charge on property
Section 137	Offences by Companies

**88.1 Introduction**

This section deals with the tax and other dues of a company in case it is wound up or liquidated. This section has to be read with rule 160 of CGST Rules, 2017.

**88.2 Analysis**

- (i) Every person appointed as receiver/ liquidator needs to give intimation of his appointment to the Commissioner within 30 days of his appointment.
- (ii) Within 3 months from the date of such intimation, the Commissioner, after making necessary enquiry or calling of information, will notify the liquidator to set apart a sum of money that would be sufficient to discharge, in his opinion, the amount of tax, interest and penalty payable by the company.
- (iii) When a private company is not able to clear its dues, then every person who was the director at any time during the period, for which tax is due, would be liable jointly and severally to pay the dues.
- (iv) However, if any director proves to the satisfaction of the Commissioner that such non-recovery is not due to his gross neglect, misfeasance or breach of duty, the liability would not arise in the hands of such director.
- (v) Rule 160 of CGST Rules, 2017 states that where a company is under liquidation, as specified u/s 88 of the CGST Act, then the Commissioner shall notify the liquidator for recovery of any amount representing tax, interest, penalty or any amount due under the Act.
- (vi) As per rule 160, the intimation must be sent in Form GST DRC – 24 to the Liquidator. This intimation must contain the following details:
  - (a) Name of the company being liquidated.
  - (b) The GSTIN of the company being liquidated.
  - (c) Date of the letter
  - (d) Period for which demand is being made.
  - (e) Demand Order No.
  - (f) Reference to Liquidator's letter intimating liquidation of the company.
  - (g) The actual amount or likely amount, the company owes to State/ Central Government in terms of tax, interest, penalty, other dues and total arrears thereof.
- (vii) Rule 160 employs the term 'notify' the liquidator, while Form GST DRC – 24 'directs' the liquidator to make sufficient provision for discharge of current and anticipated liabilities before final winding up of the company.

### 88.3 Issues and Concerns

It appears that the GST law is directing the liquidator to set aside / make sufficient provision for the tax which is 'due or is likely to be due' under the Act, recoverable from company under liquidation. However, section 326 of The Companies Act, 2013 provides for preferential payments to be made first towards workmen's dues and debts due to secured creditors and only thereafter, follow the sequence as prescribed in section 327 of The Companies Act, 2013 which covers dues to Government in form of taxes, cesses and rates etc. Therefore, directing a liquidator to make provision for the amount of tax, interest, penalty and any other amount due / is liable to become due, would be ultra vires the Companies Act, 2013 read with Insolvency Bankruptcy Code, 2016. However, had a reference to section 82 of CGST Act, 2017 been made in this section, it would have been clear that dues are recoverable and a first charge on property of the person can be made, to recover the dues under this Act, only after fulfilling the preferential provisions as per the Companies Act, 2013 read with the Insolvency and Bankruptcy Code, 2016. Corporate Insolvency Resolution Professionals need to take note of this responsibility after the introduction of IBC.

The liability of tax in case of a private company for any period before or during the course of winding up, has been extended upon 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. There is no absolute bar against a lawsuit or legal proceedings continuing concurrently with the liquidation proceedings, however, on intimation by Official liquidator, the Commissioner needs to determine such liability within three months. It is however, important to note that such liability should be determined once. No liability which is not determined before liquidation cannot be determined thereafter as the provision does not provide for determination of such liability in hands of any directors and post liquidation, any proceedings undertaken against such liquidated company shall be *non est*. Government has issued *Circular No. 187/19/2022-GST dt. 27.12.2022* providing clarification regarding the treatment of statutory dues under GST law in respect of the taxpayers for whom the proceedings have been finalised under Insolvency and Bankruptcy Code, 2016 (IBC). The circular provides that proceedings conducted under IBC also adjudicate the government dues pending under the CGST Act or under existing laws against the corporate debtor, the same appear to be covered under the term 'other proceedings' in section 84 of the CGST Act.

**88.4 MCQs**

Q1. Intimation regarding appointment of liquidator should be given to the Commissioner within 30 days of

- (a) Liquidation
- (b) Cancellation of registration
- (c) Appointment of Liquidator
- (d) Order of Court

Ans. (c) Appointment of Liquidator

Q2. Commissioner will notify the amount of liability within how many days of intimation

- (a) 3 months
- (b) 30 days
- (c) 60 days
- (d) 6 months

Ans. (a) 3 months

Q3. When would a director not be liable to pay the tax dues,

- (a) Liquidator refuses to pay.
- (b) Auditor refuses to pay.
- (c) If the non-recovery is not due to gross neglect of the director
- (d) None of the above

Ans. (c) If the non-recovery is not due to gross neglect of the director

**Statutory Provisions****89. Liability of directors of private company**

- (1) *Notwithstanding anything contained in the Companies Act, 2013 (18 of 2013), where any tax, interest or penalty due from a private company in respect of any supply of goods or services or both for any period cannot be recovered, then, every person who was a director of the private company during such period shall, jointly and severally, be liable for the payment of such tax, interest or penalty 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.*
- (2) *Where a private company is converted into a public company and the tax, interest or penalty in respect of any supply of goods or services or both for any period during*

*which such company was a private company cannot be recovered before such conversion, then, nothing contained in sub-section (1) shall apply to any person who was a director of such private company in relation to any tax, interest or penalty in respect of such supply of goods or services or both of such private company.*

*Provided that nothing contained in this sub-section shall apply to any personal penalty imposed on such director.*

#### Related provisions of the Statute

Section or Rule	Description
Section 2(107)	Definition of Taxable Person
Section 2(84)	Definition of Person
Section 7	Meaning and scope of supply
Section 9	Levy and collection
Section 82	Tax to be first charge on property
Section 137	Offences by Companies

#### 89.1 Introduction

This section deals with recovery of tax dues, interest or penalty from the directors of a private company, where the private company has not discharged any of its tax, penalty or interest liability towards the supply of goods or services or both.

#### 89.2 Analysis

- (i) If the tax, interest or penalty were not paid by a private company in relation to any supply of goods and / or services for any period, then every Director of such private company during such period will be liable to pay such dues. The period of liability and person holding office of director in such private limited company should coincide to fasten such liability on the director. For eg., Mr. X was a director in Company ABEC Private Limited for the period from 1.1.2021 to 31.12.2021. The Company has unpaid liability for the period from 1.7.2017 to 31.12.2017. Mr. X cannot be made liable to pay such dues. Further, even in cases where a person was a director during the period for which demand arises, the liability of the Director will be relaxed when, he proves that such non-recovery of dues is not because of his gross negligence, misfeasance or breach of duty in relation to the affairs of the company.
- (ii) However, when a private company is converted to a public company, then no such recovery of old dues can be made from the person(s) who were directors of the private limited company before such conversion.

- (iii) Moreover, an exception has been carved out for the above provision i.e., (ii) above – viz., this is not applicable to personal penalty which can be imposed on such director.

### 89.3 MCQs

Q1. When a private company is converted into public company, the liability of director of private company before conversion is.....

- (a) Tax only
- (b) Tax and Interest
- (c) Tax, Interest or Penalties
- (d) None of the above

Ans. (d) None of the above

Q2. Who is liable to pay the tax in case tax, interest or penalty can't be recovered from the private company?

- (a) Additional director
- (b) Whole time Director
- (c) Managing Director
- (d) All of the above

Ans. (d) All of the above

### Statutory Provisions

#### **90. Liability of partners of firm to pay tax**

*Notwithstanding any contract to the contrary and any other law for time being in force, where any firm is liable to pay any tax, interest or penalty under this Act, the firm and each of the partners of the firm shall jointly and severally, be liable for such payment:*

*Provided that where any partner retires from the firm, he or the firm, shall intimate the date of retirement of the said partner to the Commissioner by a notice in that behalf in writing and such partner shall be liable to pay tax, interest or penalty due up to the date of his retirement whether determined or not, on that date:*

*Provided further that if no such intimation is given within one month from the date of retirement, the liability of such partner under the first proviso shall continue until the date on which such intimation is received by the Commissioner.*

### Related provisions of the Statute

Section or Rule	Description
Section 94	Liability in other cases

### 90.1 Introduction

This section deals with the liability of a partner of a firm to pay any tax, interest or penalty that was otherwise payable by the firm.

### 90.2 Analysis

- (i) Where a partnership firm is liable to pay any tax, interest or penalty, all the partners of such firm will be jointly and severally liable to pay all such amounts.
- (ii) If any of the partners retire, then such partner or the firm shall intimate the Commissioner by a notice in writing within one month from the date of retirement. In such cases, the retiring partner shall be liable to pay tax, interest and penalty, if any, upto the date of his retirement (whether determined or not prior to retirement). Thus, if the retiring partner intimates to the Commissioner within one month of his retirement, he shall be liable for any GST liability only upto his date of retirement. For e.g., Mr. X retires from Partnership M/s Together Trades on 31.12.2022. If he intimates to commissioner on or before 31.1.2023, his liability towards the GST liability of firm can only be extended upto 31.12.2022.
- (iii) However, where no such intimation is given by the partner to the Commissioner within 1 month from retirement date, the liability of such retired partner will continue till the date on which the intimation is received by the Commissioner.
- (iv) The provision will be equally applicable for LLPs.

Every partner who retires from a partnership firm should file an intimation to the jurisdictional Commissioner giving the details of his retirement – viz., the name of the firm, registration number of the firm and the date of his / her retirement. If the firm is operating in more than one States, such intimation should be filed in all such States.

### 90.3 FAQs

- Q1. Whether the retiring partner is liable to pay tax?
- Ans. Retiring partner shall be liable to pay tax, interest and penalty, if any upto the date of his retirement (whether determined or not prior to retirement).
- Q2. What are the precautions to be taken by the retiring partner?
- Ans. Retiring partner shall intimate the Commissioner by a notice in writing of his retirement within one month from the date of his retirement.
- Q3. Whether partner or firm is liable to intimate to the Commissioner regarding his retirement?
- Ans. Either the retiring partner or the firm shall intimate the Commissioner by a notice in writing of retirement of a partner.



Q4. What is the time limit for the firm or partner to give intimation of retirement of partner?

Ans. The time limit to intimate retirement is within one month from the date of retirement to ensure that the liability is not fastened post-retirement date.

Q5. What are the consequences of non-intimation?

Ans. The liability of the retiring partner continues till the date of receipt of intimation by the Commissioner.

#### 90.4 MCQs

Q1. Retiring partner should intimate the retirement to

- (a) Department
- (b) Government
- (c) Commissioner
- (d) All of the above

Ans. (c) Commissioner

Q2. Intimation of retirement as partner, has to be given to the Commissioner within.....

- (a) 1 month from the date of retirement
- (b) 60 days from the date of retirement
- (c) 90 days from the date of retirement
- (d) 45 days from the date of retirement

Ans. (a) 1 month from the date of retirement

Q3. If the intimation is delayed to the Commissioner, then the retiring partner is liable to pay tax dues till:

- (a) the date of intimation received by the Commissioner
- (b) the date of acceptance of intimation by the Department
- (c) the date of retirement
- (d) the date of show cause notice

Ans. (a) the date of intimation received by the Commissioner

#### Statutory Provisions

**91. Liability of guardians, trustees etc.**

*Where the business in respect of which any tax, interest or penalty is payable under this Act is carried on by any guardian, trustee or agent of a minor or other incapacitated person on*

*behalf of and for the benefit of such minor or other incapacitated person, the tax, interest or penalty shall be levied upon and recoverable from such guardian, trustee or agent in like manner and to the same extent as it would be determined and recoverable from any such minor or other incapacitated person, as if he were a major or capacitated person and as if he were conducting the business himself, and all the provisions of this Act or the rules made thereunder shall apply accordingly.*

### 91.1 Introduction

This section enables collection of tax, interest or penalty from the guardians, trustees or agents of a minor or any other incapacitated person in respect of the business carried on for them.

### 91.2 Analysis

- (a) In respect of business carried on, on behalf of, or for the benefit of a minor or incapacitated person (by the following persons who carry on such business), then such person will be liable to pay tax, interest or penalty:
- Guardian; or
  - Trustee; or
  - Agent;
- (b) The tax, interest, penalty or any other dues which such minor or incompetent person will be liable to, are the amounts which are recoverable from the minor or any such incapacitated person and which are levied, assessed in the hands of guardian, trustee or agent. It is important to note that such person should be in the position of guardian, trustee or agent when such business is undertaken.
- (c) The dues are recoverable from the guardian, trustee or agent in respect of business of the minor or other incapacitated person by treating them as major or capacitated person, who is conducting the business for himself.
- (d) The deeming fiction is required to overcome the general principle of law, which operates in favour of a minor or incapacitated person to plead minority or incapacity in respect of dues or claims, particularly penal liability.
- (e) Interestingly the expression 'incapacitated person' is not defined in the Act. It should refer only to a person who is a person of unsound mind or one who is terminally ill.

### 91.3 FAQs

- Q1. Who is liable for tax dues etc., in case of a business of minor or incapacitated person?
- Ans. The Guardian, or the Trustee; or the Agent, as the case may be, who is conducting the business on behalf and for the benefit of minor or incapacitated person.

Q2. Whether the minor for whom the business is carried out by Guardian can escape liability on the ground of minority of the beneficiary?

Ans. The minor is deemed to be a major for the purposes of collection of any tax/interest/penalties arising out of the business carried out for him. Hence, the general principle of law has no application, and the Guardian, Trustee or Agent cannot escape such liability.

#### 91.4 MCQs

Q1. In case of business carried on by minor or other incapacitated person through Guardian / Agent who is liable to pay tax?

- (a) Guardian/Agent
- (b) Friend
- (c) Business Partner
- (d) None

Ans. (a) Guardian/Agent

Q2. The dues recoverable under this section includes

- (a) Only Interest
- (b) Any dues which are recoverable under this Act
- (c) Only tax
- (d) Only Penalty

Ans. (b) Any dues which are recoverable under this Act

#### Statutory Provisions

##### **92. Liability of Courts of Wards, etc.**

*Where the estate or any portion of the estate of a taxable person owning a business in respect of which any tax, interest or penalty is payable under this Act is under the control of the 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, the tax, interest or penalty shall be levied upon and be recoverable from such Court of Wards, Administrator General, Official Trustee, receiver or manager, in like manner and to the same extent as it would be determined and be recoverable from the taxable person as if he were conducting the business himself, and all the provisions of this Act or the rules made thereunder shall apply accordingly.*

### 92.1 Introduction

This section empowers collection of tax, interest or penalty from Administrator General, Official Trustee or any receiver or manager, who controls the estate or any portion thereof in respect of the taxable person who owns a business and whose estate is being controlled.

### 92.2 Analysis

In respect of any tax, interest or penalty relating to a business of the taxable person whose estate or part thereof is under the control of the following persons, the said persons will be liable to pay dues under this Act, as if they were themselves conducting the business as taxable person/s:

- (i) Administrator general or
- (ii) Official trustee or
- (iii) Any receiver or manager or
- (iv) Including any person, whatever be his designation, who in fact actually manages the business.

**Illustration.** Mr. ABC is appointed as manager of Mr. X, to manage the estate of Mr. X, who owns a garment business. Mr. X is liable to pay Rs. 20, 00,000/- of CGST, interest and penalty to the Government. The department can recover such dues from Mr. ABC who is managing the estates of Mr. X., by invoking this provision.

### 92.3 Issues and Concerns

The provisions relating to registration or any other provisions of this Act, does not provide for reference of court of wards by whatever name called such as, Administrative General, the Official Trustee, or any receiver or manager who is controlling the estate or part of the estate of a registered person. It is not clear, whether the assessee himself has to intimate in writing to the jurisdictional officer about court of wards who is conducting business in his behalf and get such court of ward registered in the records of jurisdictional officer.

### 92.4 FAQ

Q1. Who is liable to pay tax dues if the estate of a taxable person is controlled by Court of Wards?

Ans. The dues are recoverable from the Court of Wards, as if he is conducting the business for himself.

### 92.5 MCQs

Q1. If the estate or any portion of the estate of a taxable person is under the control of the Court of Wards, Administrative General etc., the tax due from such taxable person is liable to be paid by -

- (a) Court of Wards.
- (b) Taxable Person
- (c) Legal representative of taxable person
- (d) None of the above

Ans. (a) Court of Wards

Q2. The Court of Wards, Administrative General, etc must be appointed by-

- (a) Supreme Court
- (b) High Court
- (c) Any court
- (d) None of the above

Ans. (c) Any Court

Q3. The dues recoverable under this section includes

- (a) Only Interest
- (b) Any dues which are recoverable under this Act
- (c) Only tax
- (d) Only Penalty

Ans. (b) Any dues which are recoverable under this Act

### Statutory Provisions

**93. Special Provisions regarding liability to pay tax, interest or penalty in certain cases.**

- (1) *Save as otherwise provided in the Insolvency and Bankruptcy Code, 2016, where a person, liable to pay tax, interest or penalty under this Act, dies, then-*
- (a) *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, shall be liable to pay tax, interest or penalty due from such person under this Act, and*
  - (b) *if the business carried on by the person is discontinued, whether before or after his death, his legal representative shall be liable to pay, out of the estate of the deceased, to the extent to which the estate is capable of meeting the charge, the tax, interest or penalty due from such person under this Act, whether such tax, interest or penalty has been determined before his death but has remained unpaid or is determined after his death.*

- (2) *Save as otherwise provided in the Insolvency and Bankruptcy Code, 2016, where a taxable person, liable to pay tax, interest or penalty under this Act, is a Hindu Undivided Family or an association of persons and the property of the Hindu Undivided Family or the association of persons is partitioned amongst the various members or groups of members, then, each member or group of members shall, jointly and severally, be liable to pay the tax, interest or penalty due from the taxable person under this Act upto the time of the partition whether such tax, penalty or interest has been determined before partition but has remained unpaid or is determined after the partition.*
- (3) *Save as otherwise provided in the Insolvency and Bankruptcy Code, 2016, where a taxable person, liable to pay tax, interest or penalty under this Act, is a firm, and the firm is dissolved, then every person who was a partner shall, jointly and severally, be liable to pay the tax, interest or penalty due from the firm under this Act up to the time of dissolution whether such tax, interest or penalty has been determined before the dissolution, but has remained unpaid or is determined after dissolution.*
- (4) *Save as otherwise provided in the Insolvency and Bankruptcy Code, 2016, where a taxable person liable to pay tax, interest or penalty under this Act, -*
- (a) *is the guardian of a ward on whose behalf the business is carried on by the guardian, or*
- (b) *is a trustee who carries on the business under a trust for a beneficiary.*
- then if the guardianship or trust is terminated, 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, whether such tax, interest or penalty has been determined before the termination of guardianship or trust but has remained unpaid or is determined thereafter.*

### 93.1 Introduction

Section 93 of GST Act is subject to Insolvency and Bankruptcy Code, 2016. The objects clause of Insolvency and Bankruptcy Code inter-alia is to provide that it has been enacted amongst other things to 'alter the order of priority of payment of Government dues'.

Section 53 of Insolvency and Bankruptcy Code, 2016 which provides for distribution of assets of a company starts with a non-obstante clause against 'any law' enacted by Central or State Government. As per section 53 of IBC, the Government dues stand fifth in the order of priority as follows:

- (a) Insolvency Resolution process costs and liquidation costs paid in full
- (b) Workmen's dues for 24 months preceding liquidation commencement date and debts owed to a secured creditor
- (c) Wages and unpaid dues owed to employees for 12 months preceding liquidation

commencement date

- (d) Financial debts owed to unsecured creditors
- (e) Amounts due to Central Government and the State Government, including amount to be received on account of Consolidated Fund of India and Consolidated Fund of State, in respect of whole or part of two years preceding liquidation commencement date<sup>1</sup>
- (f) any remaining debts and dues
- (g) preference shareholders, if any
- (h) equity shareholders or partners, as the case may be

GST is received by Central and State Governments in the Consolidated Fund of India and Consolidated Fund of State respectively.

As per section 74 of the CGST Act, 2017, tax, interest, penalty can be demanded for a period of five years from the relevant date. However, section 82 of the CGST Act, 2017 states that any amount payable by a taxable person or any other person on account of tax, interest or penalty shall be a first charge on the property of such taxable person or other person, subject to Insolvency and Bankruptcy Code, 2016. Hon'ble Supreme Court in the matter of *State Tax Officer (1) vs Rainbow Papers Limited*, 2022 SCC Online SC 1162 has held that State is a secured creditor under state VAT Act (Gujarat in present case). The State tax Act provided that any amount payable by a dealer or any other person on account of tax, interest or penalty for which he is liable to pay to the Government shall be a first charge on the property of such dealer, or as the case maybe, such person.

### 93.2 Analysis

#### Death of a person (Individual)

- (i) If a person (an individual) who is liable to pay tax dies: -
  - (a) In case of continuation of business: the legal representative or the any other person who carries on the business after his death is liable to pay tax, interest, penalty or any other due which is due from the deceased person; or
  - (b) In case of discontinuation of business before or after his death: the legal representative is liable to pay the tax, interest, penalty or any other dues to the government, from and to the extent of the estate of the deceased.
- (ii) The legal representative or any other person as the case may be is liable to pay the tax, interest or penalty whether-
  - (a) It has been determined before his death but has remained unpaid or
  - (b) It has been determined after his death<sup>13</sup>

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<sup>13</sup> This is to overcome the Supreme Court decision in *Shabina Abraham Vs CCE*, 2015 (322) ELT 372 (SC).

**Partition of HUF or AOP**

In case of a HUF or AOP property is partitioned between the member or group of members then the liability to pay tax, interest or penalty

- Is on each member or group of members (jointly and severally) who got a portion in that property.
- The member or the group of members is/are liable only upto the time of partition whether such
  - Tax, interest and penalty has been determined before partition but has remained unpaid or
  - is determined after such partition

**Dissolution of firm**

In case the firm is dissolved-

- Every person who was a partner upto the time of dissolution is jointly and severally liable to pay the tax, interest or penalty.
- The person who was a partner is liable to pay tax even if it is
  - determined before dissolution but not paid or
  - determined after dissolution.
- The provision applicable for partnership firm would equally apply for LLP as well.

**Termination of Guardianship or Trusteeship**

In case the guardian is carrying on the business on behalf of a ward or the trustee who carries the business under the trust on behalf of beneficiary, then on the termination of guardianship or trusteeship,

- The ward or the beneficiary is liable to pay tax, interest or penalty upto the time of such termination.
- The ward or the beneficiary is liable to pay tax, interest or penalty
  - determined before the termination of guardianship or trusteeship but not paid or
  - determined after such termination

The above provisions are applicable to extent that there is no contrary provision in Insolvency and Bankruptcy Code, 2016. Reference to discussion under para 4 of schedule II would also be relevant in the context of continuity of business and liability to discharge arrears.

**93.3 FAQs**

- Q1. Can a legal representative be made liable for tax dues payable by a deceased person?
- Ans. Yes. Legal representative is made liable for the tax dues of the deceased person even if it is determined after death.



Q2. To what extent tax dues of the deceased person could be recoverable from the legal representative?

Ans. (a) In case of continuation of business, the legal representative or any other person who carries on the business after his death is liable to pay tax, interest, penalty or any other due which is due from the deceased person; or

(b) In case of discontinuation of business before or after his death, the legal representative is liable to pay the tax, interest, penalty or any other dues to the government. The liability of the legal representative in case of discontinued business is only to the extent of property or estate received from such deceased person.

Q3. In case of partition of HUF or AOP, what would be the extent of liability of members of the HUF/AOP?

Ans. The member or the group of members is/are liable only upto the time of partition.

Q4. In case of dissolution of a firm, upto which date, the partners would be responsible to pay the tax dues?

Ans. Every person who was a partner upto the time of dissolution is jointly and severally liable to pay the tax, interest or penalty.

#### 93.4 MCQs

Q1. Who is liable to pay tax if the business of an individual is discontinued before his death-

- (a) Board of Directors or Manager
- (b) Any member of his person who is willing to pay
- (c) Legal representative of taxable person
- (d) Employee

Ans. (c) Legal representative of taxable person

Q2. The legal representative or any other person of an individual who is dead is liable to pay tax, only if -

- (a) The business has been carried on by the legal representative
- (b) The business has been carried by the legal representative or any other person
- (c) The business has been carried by any other person
- (d) None of the above.

Ans. (b) The business has been carried on by the legal representative or any other person

Q3. The dues recoverable under this section includes-

- (a) Only Interest
- (b) Any dues which are recoverable under this Act
- (c) Only tax
- (d) Only Penalty

Ans. (b) Any dues which are recoverable under this Act

Q4. As per this section, the member or group of members of HUF or AOP is/are liable to pay tax on taxable supplies -

- (a) Even after its partition
- (b) Upto the time of partition
- (c) Both (a) and (b)
- (d) None of the above

Ans. (b) Upto the time of partition

#### Statutory Provisions

##### **94. Liability in other cases**

- (1) *Where a taxable person is a firm or an association of persons or a Hindu Undivided Family and such firm, association or family has discontinued business-*
- (a) *the tax, interest or penalty payable under this Act by such firm, association or family up to the date of such discontinuance may be determined as if no such discontinuance had taken place; and*
  - (b) *every person who, at the time of such discontinuance, was a partner of such firm, or a member of such association or family, shall, notwithstanding such discontinuance, jointly and severally, be liable for the payment of tax and interest determined and penalty imposed and payable by such firm, association or family, whether such tax and interest has been determined or penalty imposed prior to or after such discontinuance and subject as aforesaid, the provisions of this Act shall, so far as may be, apply as if every such person or partner or member were himself a taxable person.*
- (2) *Where a change has occurred in the constitution of a firm or an association of persons, the partners of the firm or members of association, as it existed before and as it exists after the reconstitution, shall, without prejudice to the provisions of section 90, jointly and severally, be liable to pay tax, interest and penalty due from such firm or association for any period before its reconstitution.*
- (3) *The provisions of sub-section (1) shall, so far as may be, apply where the taxable person, being a firm or association of persons is dissolved or where the taxable*

*person, being a Hindu Undivided Family, has effected partition with respect to the business carried on by it and accordingly references in that sub-section to discontinuance shall be construed as reference to dissolution or, to partition.*

*Explanation - For the purpose of this chapter,*

- (a) *a "limited liability partnership" formed and registered under the provisions of the Limited Liability Partnership Act, 2008) shall also be considered as a firm.*
- (b) *"court" means the District Court, High Court or Supreme Court.*

#### Related provisions of the Statute

Section or Rule	Description
Section 90	Liability of partners of firm to pay tax

#### 94.1 Introduction

This section discusses the liability of partners of firm or members of AOP or HUF on discontinuation of business.

#### 94.2 Analysis

- (i) In case of discontinuance of business, the firm or AOP or HUF, the liability of the firm/AOP/HUF shall be determined (upto the date of discontinuance) as if no such discontinuance had taken place.
- (ii) Every partner of such firm or member of such AOP or HUF at the time of discontinuance shall be jointly and severally liable for payment of tax, interest and penalty imposed.
- (iii) In case of change in the constitution of the firm or association, the partners and members who existed before reconstitution shall be liable jointly and severally to pay tax, interest or penalty for any period upto the date of reconstitution. This will operate even if the retirement was intimated to the commissioner in terms of section 90.
- (iv) Discontinuance includes dissolution of firm or association and partition in case of HUF.
- (v) This provision, the way it applies to a partnership firm will apply to an LLP as well.

#### 94.3 FAQs

- Q1. In case of discontinuance of business of a firm or AOP or HUF, who would be liable to pay the tax and other dues?
- Ans. Every partner of the firm or member of the AOP or HUF at the time of discontinuance shall be jointly and severally liable.
- Q2. In case of discontinuance of partnership business to what extent a partner would be liable?
- Ans. Every person who was a partner at the time of discontinuance is jointly and severally liable for liability of the discontinued firm towards tax, interest or penalty.

Q3. In case of reconstitution of partnership firm how and to what extent the partner liability is determined?

Ans. Without prejudice to the provisions of section 90, all the partners of the firm prior to the date of reconstitution and after the date of reconstitution shall jointly and severally, be liable to pay tax, interest or penalty due from firm which is reconstituted, for any period before its reconstitution.

**94.4 MCQs**

Q1. In case of discontinuance of HUF business, the liability would arise till the date of

- (a) Discontinuance
- (b) Court verdict
- (c) As mutually agreed upon by the HUF members
- (d) Determination of liability by the Department.

Ans. (a) Discontinuance

Q2. The expression 'firm' would include a \_\_\_\_\_

- (a) Company
- (b) LLP
- (c) HUF
- (d) AOP

Ans. (b) LLP