Law and Provisions under CGST

Chapter 16 – LIABILITY TO PAY IN CERTAIN CASES

16.0 Liability to pay in certain cases – The provisions related to liability to pay the tax, interest or any penalty due in certain cases which include Liability in case of transfer of business, Liability of agent and principal, Liability in case of amalgamation or merger of companies, Liability in case of company in liquidation, Liability of directors of private company, Liability of partners of firm to pay tax, Liability of guardians, trustees, etc., Liability of Court of Wards, etc., Special provisions regarding liability to pay tax, interest or penalty in certain cases and Liability in other cases are covered under Chapter XVI of the CGST Act 2017 from Section 85 to Section 94.

The Central Government has appointed the 1st day of July, 2017, as the date on which the provisions of these sections came in to force vide Notification No. 9/2017- Central Tax dated 28.06.2017.

Chapter XVI of the CGST Act 2017 - Liability to pay in certain cases	
Section	**Particulars**
Section 85	Liability in case of transfer of business.
Section 86	Liability of agent and principal.
Section 87	Liability in case of amalgamation or merger of companies
Section 88	Liability in case of company in liquidation.
Section 89	Liability of directors of private company
Section 90	Liability of partners of firm to pay tax
Section 91	Liability of guardians, trustees, etc.
Section 92	Liability of Court of Wards, etc.
Section 93	Special provisions regarding liability to pay tax, interest or penalty in certain cases.
Section 94	Liability in other cases

16.1 Liability in case of transfer of business. **[Section 85]**

Section 85(1)	01.07.2017 to till date	**The taxable person who transfers his business in whole or in part, by sale, gift, lease, leave and license, hire or in any other manner what so ever, 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. 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.
Section 85(2)	01.07.2017 to till date	**Transferee of a business shall be liable to pay tax on the supply of goods or services or both effected by him with effect from the date of transfer and shall, if he is a registered person under this Act, apply within the prescribed time for amendment of his certificate of registration.** Where the transferee of a business referred to in sub-section (1) carries on such business either in his own name or in some other name, he shall be liable to pay tax on the supply of goods or services or both effected by him with effect from the date of such transfer and shall, if he is a registered person under this Act, apply within the prescribed time for amendment of his certificate of registration.

16.1.1.1 Transfer of business – Supply of goods or services?

As per Section 7(1)(a) of the CGST Act 2017, the expression “supply” includes all forms of supply of goods or services or both such as sale, transfer, barter, exchange, licence, rental, lease or disposal made or agreed to be made for a consideration by a person in the course or furtherance of business.

Accordingly, the activity of transfer of business can be said to be supply of goods as the definition covers transfer.

Let us refer Section 2(52) of the CGST Act 2017, defining the term **“goods**” which means every kind of movable property other than money and securities but includes actionable claim, growing crops, grass and things attached to or forming part of the land which are agreed to be severed before supply or under a contract of supply.

With reference to the above definition, transfer of a unit of a business cannot be treated as supply of goods since business cannot be said to be a movable property so as to qualify as 'goods' as defined in clause (52) of section 2 of the Act.

We now refer to the definition of Service - Section 2(102) of the CGST Act 2017, defining the term **"services"** which means anything other than goods, money and securities but includes activities relating to the use of money or its conversion by cash or by any other mode, from one form, currency or denomination, to another form, currency or denomination for which a separate consideration is charged.

Prima facie from reading the section 7(1)(a) (supply definition), section 2(52) (goods definition), section 2(102) (services definition), of the CGST Act, it is directly forthcoming that transfer of business is a supply of service.

16.1.1.2 Transfer of business as a going concern being supply of services- Exempt from GST?

Let us refer Notification No. 12/2017 – Central Tax (Rate) dated 28th June, 2017 – Entry No. 2 - Services by way of transfer of a **going concern**, as a whole or an independent part thereof., which is chargeable to Nil Rate of Tax.

The term **'going concern**' is not defined under the GST Act or rules framed there under. The concept of going concern has been defined in Accounting Standards – 1 issued by ICAI which states that a fundamental accounting assumption is that of 'Going Concern' according to which "the enterprise is normally viewed as a going concern, that is, as continuing in operation for the foreseeable future. It is assumed that the enterprise has neither the intention nor the necessity of liquidation or of curtailing materially the scale of the operations".

Let us refer the definition for the expression 'going concern' in 'Taxation of Service: An Education Guide' published by the Central Board of Excise & Customs. Transfer of a going concern means transfer of a running business which is capable of being carried on by the purchaser as an independent business, but shall not cover mere or predominant transfer of an activity comprising a service. Such sale of business as a whole will comprise comprehensive sale of immovable property, goods and transfer of unexecuted orders, employees, goodwill etc. Since the transfer in title is not merely a transfer in title of either the immovable property or goods or even both it may amount to service and has thus been exempted.

Statement on Standard Auditing Practices (SAP) 16, "Going Concern", issued by the Council of the Institute of Chartered Accountants of India, provides that -- "When a question arises regarding the appropriateness of the Going Concern assumption, the auditor should gather sufficient appropriate audit evidence to attempt to resolve, to the auditor's satisfaction, the question regarding the entity's ability to continue in operation for the foreseeable future."

We can rely on the following judgments in this regard-

INDO RAMA TEXTILE LTD., The Delhi High Court held that The definition of Demerger in Act, 1961, would be satisfied if the undertaking that is being demerged is hived off as a going concern, that means, if it constitutes a business activity capable of being run independently for a foreseeable future.

ALLAHABAD BANK VERSUS ARC HOLDING LTD. – The Supreme Court held that if the company is sold off as a 'Going concern', the **purchaser has also to pay the liabilities of other claimants in the proceeding for the liquidation of the company.**

AAAR Andhra Pradesh has held Transfer of business as a going concern between distinct persons does not attract provisions of para 4(c) of Schedule II of CGST Act, 2017 as distinct persons do not qualify to be another person; Transfer is in nature of supply of goods. Re: Shilpa Medicare Ltd - AAAR-GW-972-2020-AP

Transaction of transfer of business by way of merger of two GST registration is not exempted as same is not supply of service since units are merely distinct persons having same PAN and there is no change in constitution of business to consider such transaction as transfer of going concern. Re: M/s.Crystal Crop Protection Ltd - AAR-GW-42-2022-MH

16.1.1.3 Key Judicial Observations – Transfer of business as a going concern being supply of services- Exempt from GST.

The transaction of transfer of business unit shall be treated as a supply of services and exempted if qualify as a going concern.

The transaction of transfer of business unit shall be treated as a supply of services. The transaction would be covered under Entry No. 2 of the Notification No. 12/2017-Central Tax (Rate) dated 28.06.2017 subject to fulfillment of the conditions to qualify as a going concern. **Re:** M/s. Cosmic Ferro Alloys Limited - AAR-GW-33-2022-WB.

The transaction of 'transfer of business' does not fit in the definition of a 'going concern' in the context of exclusion of liabilities.

The transaction of 'transfer of business' does not fit in the definition of a 'going concern' in the context of exclusion of liabilities. Hence, the entry at serial No.2 of the chapter 99 of the Notification No. 12/2017-Central Tax (Rate), dated 28-6-2017 prescribing the rate of tax for 'the services by way of transfer of a going concern as a whole or an independent part there of' as "NIL" rated, is not applicable to the present case. Re: SCV Sky Vision - AAR-GW-268-2021-AP

The transaction of transfer of business as a whole of one of the units in the nature of a going concern amounts to supply of service.

The transaction of transfer of business as a whole of one of the units in the nature of a going concern amounts to supply of service. The transaction of transfer of one of the units of the Applicant as a going concern is covered under Sl.No.2 of the Notification No.12/2017- Central Tax (Rate) dated 28.06.2017 subject to the condition that the unit is a going concern. Re: M/s Rajashri Foods Pvt. Ltd - AAR-GW-492-2018-KT

Supply of 'Transfer of Going Concern service' is exempt from GST.

The subject Supply is 'Transfer of Going Concern Service'. The consideration for the subject Supply is exempt from GST vide Entry No. 2 of Notification 12/2017-CT(R) dated 28-6-2017. Re: M/s. Airport Authority of India - AAR-GW-496-2021-GJ

Not liable to pay tax under CGST/SGST Act on the fixed assets and currents assets on merger of his proprietorship firm as a going concern with a private limited company.

The applicant, on merger of his proprietorship firm as a going concern with a private limited company, is not liable to pay tax under CGST/SGST Act on the fixed assets and currents assets including stocks of raw material, semi-finished and finished goods. Reference made by the applicant Notification No. 12/2017-Central Tax (rate), dated 28-06-2017, which exempts the *intra state* supply of services of transfer of a going concern as a whole or an independent part thereof from the central tax payable under section 9(1) of the CGST Act, is also found to be in favour of the contentions raised by the applicant. Re: B.M. Industries - AAR-GW-175-2018-HR

Transfer of under construction project as ongoing concern exempt from GST.

The applicant has sold the under-construction building, as a whole, with its all assets and transfer the rights of the same to the buyer including the approved map from the competent authority. The buyer has purchased the under-construction building/business to carry on the same kind of business as the purchaser themselves engaged in constructing residential/commercial complexes and selling thereof.

The applicant has transferred the business as a going concern and it may treated as supply of services and as per serial no. 2 of the Notification No. 12/2017-Central Tax (Rate) dated 28-6-2017 (as amended from time to time), the same is exempted from levy of GST as on date. Re: M/s Rajeev Bansal and Sudershan Mittal - AAR-GW-22-2020-UK

16.1.1.4 Transfer of ITC

According to sub-section (3) of section 18 of the CGST Act,

"Where there is a change in the constitution of a registered person on account of sale, merger, demerger, amalgamation, lease or transfer of the business with the specific provisions for transfer of liabilities, the said registered person shall be allowed to transfer the input tax credit which remains unutilized in his electronic credit ledger to such sold, merged, demerged, amalgamated, leased or transferred business in such manner as may be prescribed."

Further, according to sub-rule (1) of rule 41 of the CGST Rules:

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

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

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

Manner of transfer of credit

As per sub-rule (1) of rule 41 of the CGST Rules, a registered person shall file FORM GST ITC-02 electronically on the common portal with a request for transfer of unutilized input tax credit lying in his electronic credit ledger to the transferee, in the event of sale, merger, de-merger, amalgamation, lease or transfer or change in the ownership of business for any reason. In case of transfer of business on account of death of sole proprietor, the transferee / successor shall file FORM GST ITC-02 in respect of the registration which is required to be

cancelled on account of death of the sole proprietor. FORM GST ITC-02 is required to be filed by the transferee/successor before filing the application for cancellation of such registration. Upon acceptance by the transferee / successor, the un-utilized input tax credit specified in FORM GST ITC-02 shall be credited to his electronic credit ledger.

Time limit to file ITC 02

It is important to note that no time limit has been provided under rule 41 of the CGST Rules for filing FORM GST ITC-02. Whereas, Rule 41A prescribes to 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. Similarly, Rule 40 prescribes the registered person shall within a period of thirty days from the date of becoming eligible to avail the input tax credit under sub-section (1) of section 18, or within such further period as may be extended by the Commissioner by a notification in this behalf, shall make a declaration, electronically, on the common portal in **FORM GST ITC-01** to the effect that he is eligible to avail the input tax credit as aforesaid.

16.1.1.5 - Transfer Of Business As A Going Concern - Requirement to reverse ITC ?

Once transfer of business as a going concern is regarded as an exempt supply of service, it is pertinent to analyze whether reversal of ITC under Section 17(2) of the CGST Act read with Rule 42 of the Central Goods and Services Tax Rules, 2017 ("CGST Rules") will be applicable.

Inputs and input services which are solely used for undertaking the proposed transfer of business

On a conjoint reading of Section 17(2) of the CGST Act read with Rule 42 of the CGST Rules, ITC of inputs and input services used exclusively for effecting exempt supplies is ineligible at the outset itself.

Therefore, inputs and input services which are solely used for undertaking the proposed transfer of business, viz. legal services, due diligence services, consultancy services etc. may be said to be ineligible for availing ITC.

Proportionate reversal of credit on account of transfer of business being an exempt supply

ITC of inputs and input services used for effecting taxable supply and exempt supply ("termed as common credit") is eligible to the extent provided under Rule 42 of the CGST Rules. As per the said rule, the proportion arrived by dividing aggregate value of exempt supplies (numerator) and total turnover (denominator) will be applied on the common credit and the said ITC shall be reversed as pertaining to exempt supplies. The reversal is required to be done during every tax period and aggregately at the end of the financial year.

In view of the above provision, the pertinent question is whether common credit attributable to transfer of a going concern will be required to be proportionately reversed. In other words, whether value of transfer of going concern will be includable in the numerator of the above formula for calculating the reversal ratio. On a strict reading of the provisions, it may be said that the value of the transfer of business needs to be included for the purpose of reversal of credit in the month of such transfer and cumulatively at the end of the financial year.

However, in this regard, it is also pertinent to refer to Section 18(3) of the CGST Act which provides that where there is a transfer of business with the specific provisions for transfer of liabilities, the registered person is allowed to transfer the ITC which remains unutilized in his electronic credit ledger to such transferred business in the manner prescribed under Rule 41. Rule 41 of the CGST Rules provides that the registered person shall, in the event transfer of business, furnish the details of transfer of business in FORM GST ITC-02, electronically on the common portal and will be able to transfer it to the transferee. The ITC shall be apportioned in the ratio of the value of assets transferred as explained vide Circular No.133 03/2020-GST dated 23.03.2020.

Once ITC pertaining to the business which is transferred as a going concern is also transferred to the transferee unit as above, it may be said that there will be no ITC pertaining to the transferred unit in the credit ledger of the transferor unit.

It is a cardinal rule of interpretation of statute that if strict interpretation of statute leads to absurd and otiose results, then it must be avoided, and a contextual and purposive interpretation must be given. Therefore, it may be said that upon transfer of credit to the transferee unit under Section 18(3) of the CGST Act, there is no question of further reversing the credit on account of such transfer of business.

Further, it is also an established rule of interpretation that a specific provision prevails over general provision. Therefore, it may be said that there is no requirement to reverse ITC attributable to transfer of going concern under Section 17(2) of the CGST Act read with Rule

42 of the CGST Rules in view of specific provision for transfer of credit under Section 18(3) of the CGST Act.

Conclusion

The possible interpretation that credit reversal is not required however goes against express the language of Section 17(2) of the CGST Act and Rule 42 of the CGST Rules and may lead to interpretational issues and consequent litigations.

Requirement of credit reversal may result in huge financial burden on the taxpayers especially those engaged in making other exempt supplies because including value of business transfer in the aggregate value of exempt supplies in the Rule 42 formula may result in a very high percentage of reversal requirement in the case of common credits for the entire business.

16.1.1.6 Departmental Clarifications - E-way bill in case of storing of goods in godown of transporter- Circular No. 61/35/2018-GST dated 4th September, 2018

Various representations have been received on the matter pertaining to the textile sector and problems being faced by weavers & artisans regarding storage of their goods in the warehouse of the transporter. It has been stated that textile traders use transporters' godown for storage of their goods due to their weak financial conditions. The transporters providing such warehousing facility will have to get themselves registered under GST and maintain detailed records in cases where the transporter takes delivery of the goods and temporarily stores them in his warehouse for further transportation of the goods till the consignee/recipient taxpayer's premises. The transport industry is facing difficulties due to the same and a request has been made to treat these godowns as transit godowns.

2. In view of the difficulties being faced by the transporters and the consignee/recipient taxpayer and to ensure uniformity in the procedure across the sectors and the country, the Board in exercise of its power conferred under section 168(1) of the Central Goods and Services Tax Act, 2017 (hereafter referred to as the CGST Act) hereby clarifies the issues in the succeeding paragraphs.

3. As per rule 138 of the Central Goods and Services Tax Rules, 2017 (hereinafter referred to as the CGST Rules) e-way bill is a document which is required for the movement of goods from the supplier's place of business to the recipient taxpayer's place of business. Therefore, the goods in movement including when they are stored in the transporter's godown (even if the godown is located in the recipient taxpayer's city/town) prior to delivery shall always be accompanied by a valid e-way bill.

4. Further, section 2(85) of the CGST Act defines the "place of business" to include "a place from where the business is ordinarily carried out, and includes a warehouse, a godown or any other place where a taxable person stores his goods, supplies or receives goods or services or both". An additional place of business is the place of business from where taxpayer carries out business related activities within the State, in addition to the principal place of business.

5. Thus, in case the consignee/ recipient taxpayer stores his goods in the godown of the transporter, then the transporter's godown has to be declared as an additional place of business by the recipient taxpayer. In such cases, mere declaration by the recipient taxpayer to this effect with the concurrence of the transporter in the said declaration will suffice. Where the transporter's godown has been declared as the additional place of business by the recipient taxpayer, the transportation under the e-way bill shall be deemed to be concluded once the goods have reached the transporter's godown (recipient taxpayer' additional place of business). Hence, e-way bill validity in such cases will not be required to be extended.

6. Further, whenever the goods are transported from the transporters' godown , which has been declared as the additional place of business of the recipient taxpayer, to any other premises of the recipient taxpayer then, the relevant provisions of the e-way bill rules shall apply. Hence, whenever the goods move from the transporter's godown (i.e, recipient taxpayer's additional place of business) to the recipient taxpayer's any other place of business, a valid e-way bill shall be required, as per the extant State-specific e-way bill rules.

7. Further, the obligation of the transporter to maintain accounts and records as specified in section 35 of the CGST Act read with rule 58 of the CGST Rules shall continue as a warehousekeeper. Furthermore, the recipient taxpayer shall also maintain accounts and records as required under rules 56 and 57 of the CGST Rules. Furthermore, as per rule 56 (7) of the CGST Rules, books of accounts in relation to goods stored at the transporter's godown (i.e., the recipient taxpayer's additional place of business) by the recipient taxpayer may be maintained by him at his principal place of business. It may be noted that the facility of declaring additional place of business by the recipient taxpayer is in no way putting any additional compliance requirement on the transporters.

16.1.1.7 Departmental Clarifications - Clarification in respect of transfer of input tax credit in case of death of sole proprietor- Circular No. 96/15/2019-GST dated 28th March, 2019

Doubts have been raised whether sub-section (3) of section 18 of the Central Goods and Services Tax Act, 2017 (hereinafter referred to as „CGST Act") provides for transfer of input tax credit which remains unutilized to the transferee in case of death of the sole proprietor. As per sub-rule (1) of rule 41 of the Central Goods and Services Rules, 2017 (hereinafter referred to as „CGST Rules"), the registered person (transferor of business) can file 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. Further, clarification has also been sought regarding procedure of filing of FORM GST ITC-02 in case of death of the sole proprietor. In order to clarify these issues and to ensure uniformity in the implementation of the provisions of the law, the Board, in exercise of its powers conferred by section 168 (1) of the CGST Act, hereby clarifies the issues raised as below.

2. Clause (a) of sub-section (1) of section 29 of the CGST Act provides that reason of transfer of business includes "death of the proprietor". Similarly, for uniformity and for the purpose of sub-section (3) of section 18, sub-section (3) of section 22, sub-section (1) of section 85 of the CGST Act and sub-rule (1) of rule 41 of the CGST Rules, it is clarified that transfer or change in the ownership of business will include transfer or change in the ownership of business due to death of the sole proprietor.

3. In case of death of sole proprietor if the business is continued by any person being transferee or successor, the input tax credit which remains un-utilized in the electronic credit ledger is allowed to be transferred to the transferee as per provisions and in the manner stated below –

a. Registration liability of the transferee / successor: As per provisions of sub-section (3) of section 22 of the CGST Act, the transferee or the successor, as the case may be, shall be liable to be registered with effect from the date of such transfer or succession, where a business is transferred to another person for any reasons including death of the proprietor. While filing application in FORM GST REG-01 electronically in the common portal the applicant is required to mention the reason to obtain registration as “death of the proprietor”

b. Cancellation of registration on account of death of the proprietor: Clause (a) of subsection (1) of section 29 of the CGST Act, allows the legal heirs in case of death of sole proprietor of a business, to file application for cancellation of registration in FORM GST REG-16 electronically on common portal on account of transfer of business for any reason including death of the proprietor. In FORM GST REG-16, reason for cancellation is required to be mentioned as “death of sole proprietor”. The GSTIN of transferee to whom the business has been transferred is also required to be mentioned to link the GSTIN of the transferor with the GSTIN of transferee.

c. Transfer of input tax credit and liability: In case of death of sole proprietor, if the business is continued by any person being transferee or successor of business, it shall be construed as transfer of business. Sub-section (3) of section 18 of the CGST Act, allows the registered person to transfer the unutilized input tax credit lying in his electronic credit ledger to the transferee in the manner prescribed in rule 41 of the CGST Rules, where there is specific provision for transfer of liabilities. As per sub-section (1) of section 85 of the CGST Act, the transferor and the transferee / successor shall jointly and severally be liable to pay any tax, interest or any penalty due from the transferor in cases of transfer of business “in whole or in part, by sale, gift, lease, leave and license, hire or in any other manner whatsoever”. Furthermore, sub-section (1) of section 93 of the CGST Act provides that where a person, liable to pay tax, interest or penalty under the CGST Act, dies, then the person who continues business after his death, shall be liable to pay tax, interest or penalty due from such person under this Act. It is therefore clarified that the transferee / successor shall be liable to pay any tax, interest or any penalty due from the transferor in cases of transfer of business due to death of sole proprietor.

d. Manner of transfer of credit: As per sub-rule (1) of rule 41 of the CGST Rules, a registered person shall file FORM GST ITC-02 electronically on the common portal with a request for transfer of unutilized input tax credit lying in his electronic credit ledger to the transferee, in the event of sale, merger, de-merger, amalgamation, lease or transfer or change in the ownership of business for any reason. In case of transfer of business on account of death of sole proprietor, the transferee / successor shall file FORM GST ITC-02 in respect of the registration which is required to be cancelled on account of death of the sole proprietor. FORM GST ITC-02 is required to be filed by the transferee/successor before filing the application for cancellation of such registration. Upon acceptance by the transferee / successor, the un-utilized input tax credit specified in FORM GST ITC-02 shall be credited to his electronic credit ledger.

16.2 Liability of agent and principal. [Section 86]

Section 86	01.07.2017 to till date	**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.** 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.

16.2.1.1 Departmental Clarifications - Scope of Principal-agent relationship in the context of Schedule I of the CGST Act- Circular No. 57/31/2018-GST dated 4th September, 2018 and Corrigendum to Circular No. 57/31/2018-GST dated 5th November, 2018

In terms of Schedule I of the Central Goods and Services Tax Act, 2017 (hereinafter referred to as the "CGST Act"), the supply of goods by an agent on behalf of the principal without consideration has been deemed to be a supply. In this connection, various representations have been received regarding the scope and ambit of the principal-agent relationship under GST. In order to clarify some of the issues and to ensure uniformity in the implementation of the provisions of the law across the field formations, the Board, in exercise of its powers conferred under section 168 (1) of the CGST Act hereby clarifies the issues in the succeeding paras.

2. As per section 182 of the Indian Contract Act, 1872, an "agent" is a person employed to do any act for another, or to represent another in dealings with third person. The person for whom such act is done, or who is so represented, is called the "principal". As delineated in the definition, an agent can be appointed for performing any act on behalf of the principal which may or may not have the potential for representation on behalf of the principal. So, the crucial element here is the representative character of the agent which enables him to carry out activities on behalf of the principal.

3. The term "agent" has been defined under sub-section (5) of section 2 of the CGST Act as follows:

"agent" means a person, including a factor, broker, commission agent, arhatia, del credere agent, an auctioneer or any other mercantile agent, by whatever name called, who carries on the business of supply or receipt of goods or services or both on behalf of another.

4. The following two key elements emerge from the above definition of agent:

a) the term „agent" is defined in terms of the various activities being carried out by the person concerned in the principal-agent relationship; and

b) the supply or receipt of goods or services has to be undertaken by the agent on behalf of the principal.

From this, it can be deduced that the crucial component for covering a person within the ambit of the term “agent” under the CGST Act is corresponding to the representative character identified in the definition of “agent” under the Indian Contract Act, 1872.

5. Further, the two limbs of any supply under GST are “consideration” and “in the course or furtherance of business”. Where the consideration is not extant in a transaction, such a transaction does not fall within the ambit of supply. But, in certain scenarios, as elucidated in Schedule I of the CGST Act, the key element of consideration is not required to be present for treating certain activities as supply. One such activity which has been detailed in para 3 of Schedule I (hereinafter referred to as “the said entry”) is reproduced hereunder:

> 3. Supply of goods—
>
> (a) by a principal to his agent where the agent undertakes to supply such goods on behalf of the principal; or
>
> (b) by an agent to his principal where the agent undertakes to receive such goods on behalf of the principal.

6. Here also, it is worth noticing that all the activities between the principal and the agent and vice versa do not fall within the scope of the said entry. Firstly, the supply of services between the principal and the agent and vice versa is outside the ambit of the said entry, and would therefore require “consideration” to consider it as supply and thus, be liable to GST. Secondly, the element identified in the definition of “agent”, i.e., **“supply or receipt of goods on behalf of the principal”** has been retained in this entry.

7. It may be noted that the crucial factor is how to determine whether the agent is wearing the representative hat and is supplying or receiving goods on behalf of the principal. Since in the commercial world, there are various factors that might influence this relationship, it would be more prudent that an objective criteria is used to determine whether a particular principal-agent relationship falls within the ambit of the said entry or not. Thus, the key ingredient for determining relationship under GST would be whether the invoice for the further supply of goods on behalf of the principal is being issued by the agent or not. Where the invoice for further supply is being issued by the agent in his name then, any provision of goods from the principal to the agent would fall within the fold of the said entry. However, it may be noted that in cases where the invoice is issued by the agent to the customer in the name of the principal, such agent shall not fall within the ambit of Schedule I of the CGST Act. Similarly, where the goods being procured by the agent on behalf of the principal are invoiced in the name of the agent then further provision of the said goods by the agent to the principal would be covered by the said entry. In other words, the crucial point is whether or not the agent has the authority to pass or receive the title of the goods on behalf of the principal.

8. Looking at the convergence point between the character of the agent under both the CGST Act and the Indian Contract Act, 1872, the following scenarios are discussed:

Scenario 1

Mr. A appoints Mr. B to procure certain goods from the market. Mr. B identifies various suppliers who can provide the goods as desired by Mr. A, and asks the supplier (Mr. C) to send the goods and issue the invoice directly to Mr. A. In this scenario, Mr. B is only acting as the procurement agent, and has in no way involved himself in the supply or receipt of the goods. Hence, in accordance with the provisions of this Act, Mr.B is not an agent of Mr. A for supply of goods in terms of Schedule I.

Scenario 2

M/s XYZ, a banking company, appoints Mr. B (auctioneer) to auction certain goods. The auctioneer arranges for the auction and identifies the potential bidders. The highest bid is accepted and the goods are sold to the highest bidder by M/s XYZ. The invoice for the supply of the goods is issued by M/s XYZ to the successful bidder. In this scenario, the auctioneer is merely providing the auctioneering services with no role played in the supply of the goods. Even in this scenario, Mr.B is not an agent of M/s XYZ for the supply of goods in terms of Schedule I.

Scenario 3

Mr. A, an artist, appoints M/s B (auctioneer) to auction his painting. M/s B arranges for the auction and identifies the potential bidders. The highest bid is accepted and the painting is sold to the highest bidder. The invoice for the supply of the painting is issued by M/s B on the behalf of Mr. A but in his own name and the painting is delivered to the successful bidder. In this scenario, M/s B is not merely providing auctioneering services, but is also supplying the painting on behalf of Mr. A to the bidder, and has the authority to transfer the title of the painting on behalf of Mr. A. This scenario is covered under Schedule I. A similar situation can exist in case of supply of goods as well where the C&F agent or commission agent takes possession of the goods from the principal and issues the invoice in his own name. In such cases, the C&F/commission agent is an agent of the principal for the supply of goods in terms of Schedule I. The disclosure or non-disclosure of the name of the principal is immaterial in such situations.

Scenario 4

Mr A sells agricultural produce by utilizing the services of Mr B who is a commission agent as per the Agricultural Produce Marketing Committee Act (APMC Act) of the State. Mr B identifies the buyers and sells the agricultural produce on behalf of Mr. A for which he charges a commission from Mr. A. As per the APMC Act, the commission agent is a person who buys or sells the agricultural produce on behalf of his principal, or facilitates buying and selling of agricultural produce on behalf of his principal and receives, by way of remuneration, a commission or percentage upon the amount involved in such transaction.

In cases where the invoice is issued by Mr. B to the buyer, the former is an agent covered under Schedule I. However, in cases where the invoice is issued directly by Mr. A to the buyer, the commission agent (Mr. B) doesn‟t fall under the category of agent covered under Schedule I.

9. In scenario 1 and scenario 2, Mr. B shall not be liable to obtain registration in terms of clause (vii) of section 24 of the CGST Act. He, however, would be liable for registration if his aggregate turnover of supply of taxable services exceeds the threshold specified in sub-section (1) of section 22 of the CGST Act. In scenario 3, M/s B shall be liable for compulsory registration in terms of the clause (vii) of section 24 of the CGST Act. In respect of commission agents in Scenario 4, notification No. 12/2017 Central Tax (Rate) dated 24.06.2017 has exempted “services by any APMC or board or services provided by the commission agents for sale or purchase of agricultural produce” from GST. Thus, the „services‟ provided by the commission agent for sale or purchase of agricultural produce is exempted. Such commission agents (even when they qualify as agent under Schedule I) are not liable to be registered according to sub-clause (a) of sub-section (1) of section 23 of the CGST Act, if the supply of the agricultural produce, and /or other goods or services supplied by them are not liable to tax or wholly exempt under GST.

Further, according to clause (vii) of section 24 of the CGST Act, a person is liable for mandatory registration if he makes taxable supply of goods or services or both on behalf of other taxable persons. Accordingly, the requirement of compulsory registration for commission agent, under the said clause shall arise when both the following conditions are satisfied, namely: -

(a) the principal should be a taxable person; and

(b) the supplies made by the commission agent should be taxable.

Generally, a commission agent under APMC Act makes supplies on behalf of an agriculturist. Further, as per provisions of clause (b) of sub-section (1) of section 23 of the CGST Act an agriculturist who supplies produce out of cultivation of land is not liable for registration and therefore does not fall within the ambit of the term „taxable person". Thus a commission agent who is making supplies on behalf of such an agriculturist, who is not a taxable person, is not liable for compulsory registration under clause (vii) of section 24 of the CGST Act. However, where a commission agent is liable to pay tax under reverse charge, such an agent will be required to get registered compulsorily under section 24 (iii) of the CGST Act."

16.3. Liability in case of amalgamation or merger of companies. [Section 87]

Section 87(1)	01.07.2017 to till date	**Amalgamation or merger of two or more companies in pursuance of an order of court or of Tribunal or otherwise - The order is to take effect from a date earlier to the date of the order - Taxability on supply of 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 - 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.** When two or more companies are amalgamated or merged in pursuance of an order of court or of Tribunal or otherwise and the order is to take effect from a date earlier to the date of the order and any two or more of such companies have supplied or received any goods or services or both to or from each other during the period commencing on the date from which the order takes effect till the date of the order, then such transactions of supply and receipt shall be included in the turnover of supply or receipt of the respective companies and they shall be liable to pay tax accordingly.
Section 87(2)	01.07.2017 to till date	**Two or more companies being amalgamated or merged shall be treated as distinct companies for the period up to the date**

		of the order and the registration certificates of the said companies shall be cancelled with effect from the date of the order. Notwithstanding anything contained in the said order, for the purposes of this Act, the said two or more companies shall be treated as distinct companies for the period up to the date of the said order and the registration certificates of the said companies shall be cancelled with effect from the date of the said order.

16.3.1.1 Relevance of appointed date and order date

An appointed date is the date agreed between the parties from which such amalgamation or merger is to take effect and such date is specified in the respective scheme of amalgamation. This is the date when the amalgamation of the business is effected and the assets and liabilities are transferred to the amalgamated or merged company.

Section 232(6) of the Income Tax Act states that the scheme shall be deemed to be effective from the 'appointed date' and not a date subsequent to the 'appointed date'. This is an enabling provision to allow the companies to decide and agree upon an 'appointed date' from which the scheme shall come into force.

An effective date is the date on which High Court / National Company Law Tribunal (NCLT) approves such amalgamation or merger. Thus, there is generally a long gap between the two dates.

In Marshall Sons & Co. India Ltd. v. ITO (1997) 223 ITR 809 (SC), it was held by the Supreme Court that every scheme of amalgamation has to necessarily provide a date with effect from which the amalgamation / transfer shall take place, and that such date may precede the date of sanctioning of the scheme by the Court, the date of filing of certified copies of the orders of the Court before the Registrar of Companies, and the date of allotment of shares, etc. It was observed therein that, the scheme, however, would be given effect from the transfer date (appointed date) itself.

16.3.2.1 Departmental Clarifications – Calculation of ITC to be transferred in case of demerger of business - Circular No.133/03/2020-GST dated 23rd March, 2020

CBIC has issued Circular No.133/03/2020-GST dated 23rd March, 2020 for clarification in respect of apportionment and transfer of ITC in the event of merger, demerger, amalgamation or change in the constitution/ownership of business.

In order to ensure uniformity in the implementation of the provisions of the law, the Board, in exercise of its powers conferred by sub-section (1) of section 168 of the CGST Act clarifies the following issues:

Issue / Question - (a) (i) In case of demerger, proviso to rule 41 (1) of the CGST Rules provides that 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. However, it is not clear as to whether the value of assets of the new units is to be considered at State level or at all-India level.

Clarification - Proviso to sub-rule (1) of rule 41 of the CGST Rules provides for apportionment of the input tax credit in the ratio of the value of assets of the new units as specified in the demerger scheme. Further, the explanation to sub-rule (1) of rule 41 of the CGST Rules states that “value of assets” means the value of the entire assets of the business, whether or not input tax credit has been availed thereon. Under the provisions of the CGST Act, a person/ company (having same PAN) is required to obtain separate registration in different States and each such registration is considered a distinct person for the purpose of the Act. Accordingly, for the purpose of apportionment of ITC pursuant to a demerger under subrule (1) of rule 41 of the CGST Rules, the value of assets of the new units is to be taken at the State level (at the level of distinct person) and not at the all-India level.

Illustration A company XYZ is registered in two States of M.P. and U.P. Its total value of assets is worth Rs. 100 crore, while its assets in State of M.P. and U.P are Rs 60 crore and Rs 40 crore respectively. It demerges a part of its business to company ABC. As a part of such demerger, assets of XYZ amounting to Rs 30 Crore are transferred to company ABC in State of M.P, while assets amounting to Rs 10 crore only are transferred to ABC in State of U.P. (Total assets amounting to Rs 40 crore at all-India level are transferred from XYZ to ABC). The unutilized ITC of XYZ in State of M.P. shall be transferred to ABC on the basis of ratio of value of assets in State of M.P., i.e. 30/60 = 0.5 and not on the basis of all-India ratio of value of assets, i.e. 40/100=0.4. Similarly, unutilized ITC of XYZ in State of U.P. will be transferred to ABC in ratio of value of assets in State of U.P.,i.e. 10/40 = 0.25.

Issue / Question - (a) (ii) Is the transferor required to file FORM GST ITC – 02 in all States where it is registered?

Clarification - No. The transferor is required to file FORM GST ITC-02 only in those States where both transferor and transferee are registered.

Issue / Question - (b) The proviso to rule 41 (1) of the CGST Rules explicitly mentions 'demerger'. Other forms of business reorganization where part of business is hived off or business in transferred as a going concern etc. have not been covered in the said rule. Wherever business reorganization results in partial transfer of business assets along with liabilities, whether the proviso to rule 41(1) of the CGST Rules, 2017 shall be applicable to calculate the amount of transferable ITC?

Clarification - Yes, the formula for apportionment of ITC, as prescribed under proviso to sub-rule (1) of rule 41 of the CGST Rules, shall be applicable for all forms of business re-organization that results in partial transfer of business assets along with liabilities.

Issue / Question - (c)(i) Whether the ratio of value of assets, as prescribed under proviso to rule 41 (1) of the CGST Rules, shall be applied in respect of each of the heads of input tax credit viz. CGST/ SGST/ IGST/ Cess?

Clarification - No, the ratio of value of assets, as prescribed under proviso to sub-rule (1) of rule 41 of the CGST Rules, shall be applied to the total amount of unutilized input tax credit (ITC) of the transferor i.e. sum of CGST, SGST/UTGST and IGST credit. The said formula need not be applied separately in respect of each heads of ITC (CGST/SGST/IGST). Further, the said formula shall also be applicable for apportionment of Cess between the transferor and transferee.

Illustration A: The ITC balances of transferor X in the State of Maharashtra under CGST, SGST and IGST heads are 5 lakh, 5 lakh and 10 lakh respectively. Pursuant to a scheme of demerger, X transfers 60% of its assets to transferee B. Accordingly, the amount of ITC to be transferred from A to B shall be 60% of 20 lakh (total sum of CGST, SGST and IGST credit) i.e. 12 lakh.

Issue / Question - (c) (ii) How to determine the amount of ITC that is to be transferred to the transferee under each tax head (IGST/CGST/SGST) while filing of FORM GST ITC–02 by the transferor?

Clarification - The total amount of ITC to be transferred to the transferee (i.e. sum of CGST, SGST/UTGST and IGST credit) should not exceed the amount of ITC to be transferred, as determined under sub-rule (1) of rule 41 of the CGST Rules [refer 3 (c) (i) above]. However, the transferor shall be at liberty to determine the amount to be transferred under each tax head (IGST, CGST, SGST/UTGST) within this total amount, subject to the ITC balance available with the transferor under the concerned tax head. This is shown in the illustration below:

(1)	(2)	(3)	(4)	(5)	(6)
State	**Asset Ratio of Transferee**	**Tax Heads**	**ITC balance of Transferor (pre apportionment) as on the date of filing FORM GST ITC–02)**	**Total amount of ITC transferred to the Transferee under FORM GST ITC02**	**ITC balance of Transferor (post apportionment) after filing of FORM GST ITC–02) [Col (4) – Col (5)]**
Delhi	70%	CGST	10,00,000	10,00,000	0
		SGST	10,00,000	10,00,000	0
		IGST	30,00,000	15,00,000	15,00,000
		Total	50,00,000	35,00,000	15,00,000
Haryana	40%	CGST	25,00,000	3,00,000	22,00,000
		SGST	25,00,000	5,00,000	20,00,000
		IGST	20,00,000	20,00,000	0
		Total	70,00,000	28,00,000	42,00,000

Issue / Question - (d)(i) In order to calculate the amount of transferable ITC, the apportionment formula under proviso to rule 41(1) of the CGST Rules has to be applied to the unutilized ITC balance of the transferor. However, it is not clear as to which date shall be relevant to calculate the amount of unutilized ITC balance of transferor.

Clarification - According to sub-section (3) of section 18 of the CGST Act, “Where there is a change in the constitution of a registered person on account of sale, merger, demerger, amalgamation, lease or transfer of the business with the specific provisions for transfer of liabilities, the said registered person shall be allowed to transfer the input tax credit which remains unutilized in his electronic credit ledger to such sold, merged, demerged, amalgamated, leased or transferred business in such manner as may be prescribed.” Further, sub-rule (1) of rule 41 of the CGST Rules prescribes that the registered person shall file the details in FORM GST ITC-02 for transfer of unutilized input tax credit lying in his electronic credit ledger balance of transferor. to the transferee.

A conjoint reading of sub-section (3) of section 18 of the CGST Act along with sub-rule (1) of rule 41 of the CGST Rules would imply that the apportionment formula shall be applied on the ITC balance of the transferor as available in electronic credit ledger on the date of filing of FORM GST ITC – 02 by the transferor.

Issue / Question - (d) (ii) Which date shall be relevant to calculate the ratio of value of assets, as prescribed in the proviso to rule 41 (1) of the CGST Rules, 2017?

Clarification - According to section 232 (6) of the Companies Act, 2013, "The scheme under this section shall clearly indicate an appointed date from which it shall be effective and the scheme shall be deemed to be effective from such date and not at a date subsequent to the appointed date". The said legal provision appears to indicate that the "appointed date of demerger" is the date from which the scheme for demerger comes into force and it is specified in the respective scheme of demerger. Therefore, for the purpose of apportionment of ITC under rule sub-rule (1) of rule 41 of the CGST Rules, the ratio of the value of assets should be taken as on the "appointed date of demerger".

In other words, for the purpose of apportionment of ITC under sub-rule (1) of rule 41 of the CGST Rules, while the ratio of the value of assets should be taken as on the "appointed date of demerger", the said ratio is to be applied on the ITC balance of the transferor on the date of filing FORM GST ITC - 02 to calculate the amount to transferable ITC.

16.3.3.1 Key Judicial Observations – No refund of unutilized ITC, if assessee don't follow procedure for transfer of ITC to resultant company.

As per provisions of section 87 of the CGST Act 2017 and Rule 41 of CGST Rules 2017 the GSTIN of the appellant was required to be cancelled after issuance of order of Company Law Tribunal for amalgamation and they were required to do their entire activities under the new entity.

As per rule 41 of CGST Rules appellant were also required to transfer their unutilized credit to the new entity. The appellant neither cancelled their GSTIN by filing Form RG-16 with effect from the date of order for amalgamation nor transferred their unutilized credit in Form GST ITC-02 to new GSTIN, thus failed to follow the procedure as prescribed under sec 87 of CGST Act read with rule 41 of CGST Rules. Held that since the appellant has not followed the procedure as prescribed under the Act/Rules/Circular as mentioned supra, they are not entitled for refund and rightly rejected by the adjudicating authority. Commissioner Appeals, Jaipur Re. Sigma Electric Manufacturing Corporation Pvt. Ltd.

16.4. Liability in case of company in liquidation. [Section 88]

Section 88(1)	01.07.2017 to till date	**Winding up of a company, whether under the orders of a court or Tribunal or otherwise - The "liquidator", shall, within thirty days after his appointment, give intimation of his appointment to the Commissioner.** 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 (hereafter in this section referred to as the "liquidator"), shall, within thirty days after his appointment, give intimation of his appointment to the Commissioner.
Section 88(2)	01.07.2017 to till date	**The Commissioner shall notify the liquidator within three months from the date on which he receives intimation of the appointment of the liquidator, the amount to provide for any tax, interest or penalty is likely to become, payable by the company.** 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.
Section 88(3)	01.07.2017 to till date	**Winding up of a company – The 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, not recovered - Director of such company at any time during the period for which the tax was due shall, jointly and severally, shall be liable for the payment of such tax, interest or penalty - Director may not be liable if 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.**

		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.

16.5 Liability of directors of private company. [Section 89]

Section 89(1)	01.07.2017 to till date	**Private company – The tax, interest or penalty due from a private company in respect of any supply of goods or services or both for any period not recovered - 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 - Director may not be liable if 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.** Notwithstanding anything contained in the Companies Act, 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.
Section 89(2)	01.07.2017 to till date	**A private company converted into a public company - 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 not recovered before such conversion- 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. 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:
First Proviso	01.07.2017 to till date	**Personal penalty imposed on director of a private company shall be payable by him as nothing contained in sub-section (2) shall apply in relation to any personal penalty imposed on such director.** Provided that nothing contained in this sub-section shall apply to any personal penalty imposed on such director.

The terms gross neglect, misfeasance and breach of duty are not defined under law, and therefore, we refer to their general meanings.

- Gross negligence is the "lack of slight diligence or care" or "a conscious, voluntary act or omission in reckless disregard of a legal duty and of the consequences to another party."
- Misfeasance is the wilful inappropriate action or intentional incorrect action or advice.
- 'Breach of duty' means a failure to do something that you are legally responsible for.

16.5.1.1 Key Judicial Observations – Liability of directors of a private company for payment of tax, interest or penalty.

Liability of directors of a private company for payment of tax, interest or penalty only if……

In the opinion of this court, reliance placed upon section 89 of the Act is thoroughly misconceived inasmuch the same relates to recovery of any tax, interest or penalty due from a private company in respect of supply of goods or services. Moreover, even if such amount cannot be recovered from the private company, the directors of the company do not ipso facto become liable to pay such amount and it is only if the director fails to prove that nonrecovery cannot be attributed to any gross neglect, misfeasance or breach of duty on his part in relation to the affairs of the company, that the same can be invoked. Re. H.M. Industrial (P.) Ltd. Vs. Commissioner, CGST and Central Excise – HC-GW-637-2019-GJ

Directors cannot be made liable for company dues determined under the Finance Act.

Section 89 of the current CGST Act is confined only to liabilities assessed under the CGST Act and cannot be used to fasten personal liability on Directors for company dues determined under the Finance Act. After all, no new liability can be fastened under the CGST Act for a period prior to its enactment as it does not have retrospective operation. Re. Sanjiv Kumar Mittal *v.* Deputy Commissioner (TRC) – HC-GW-1058-2020-DL

16.6. Liability of partners of firm to pay tax. [Section 90]

Section 90	01.07.2017 to till date	**Firm liable to pay any tax, interest or penalty under CGST Act - The firm and each of the partners of the firm shall, jointly and severally, be liable for such payment.** Notwithstanding any contract to the contrary and any other law for the 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:
First Proviso	01.07.2017 to till date	**Liability of retired partner – Intimation of the date of retirement of the partner to the Commissioner by a notice in writing – Retired partner shall be liable to pay tax, interest or penalty due up to the date of his retirement.** 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:

Second Proviso	01.07.2017 to till date	**Liability of retired partner – No intimation of the date of retirement of the partner to the Commissioner by a notice in writing 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.** 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.

16.6.1.1 Examples

Suppose there is a partnership firm PRASOM & Co. with partners PRA, SO and M and SO retires on 3/7/2020. Tax, interest or penalty due till 3/7/2020 is Rs 20,000 and tax, interest or penalty due from 3/7/2020 to 2/8/2019 is Rs 10,000.

Case I: SO intimated his date of retirement to Commissioner on 20/7/2020 (i.e. within one month). In this case SO will only be liable to pay tax, interest or penalty due till 3/7/2020 (i.e. the date of retirement) which equals Rs 20,000.

Case II: SO intimated his date of retirement to Commissioner on 10/8/2020 (i.e. after one month) and the Commissioner received it on this date only.

In this case SO will be liable to pay tax, interest or penalty due till 10/8/2020 (i.e. on receipt of intimation by the Commissioner) which will be 20,000 + 10,000 = Rs 30,000.

16.6.2.1 Key Judicial Observations – Liability of partners of firm to pay tax.

Property owned by a person of the LLP cannot be attached when The liability of the firm is yet to be determined

The respondent No.3 committed a serious error in invoking Section 90 of the Act for the purpose of provisionally attaching a property owned by a person of the LLP under Section 83 of the Act. There are two reasons why we say so. First, a partner of an LLP is not a taxable person. It is the LLP i.e. the partnership firm who is a "taxable person". The liability of the firm is yet to be determined. There has been no assessment so far as the liability of the firm is

concerned. The day such liability is determined and fixed, it is open for the department to proceed not only against the firm as a taxable person, but also against individual partner of the firm. **Re. UTKARSH ISPAT LLP Versus STATE OF GUJARAT - *HC-GW-90-2022-GJ***

16.7. Liability of guardians, trustees, etc. [Section 91]

Section 91	01.07.2017 to till date	**The business 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 – Liability of any tax, interest or penalty payable under CGST Act - 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.** 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.

16.7.1 The above terms are explained as under:

- A minor is an individual who has not attained the age of 18 years.
- An incapacitated person is an individual for whom a guardianship proceeding is initiated. He has been determined by court as lacking the capacity to manage at least some of the property or to meet at least some of the essential health and safety requirements.

- Guardian is a person who has been appointed by a judge to take care of a minor child or incompetent adult (both called "ward") personally and/or manage that person's affairs.
- As per section 2(5) of the CGST Act, 2017 “agent” means a person, including a factor, broker, commission agent, arhatia, del credere agent, an auctioneer or any other mercantile agent, by whatever name called, who carries on the business of supply or receipt of goods or services or both on behalf of another;
- Trustee is a person, who controls property and/or money for another person or an organisation

16.8. Liability of Court of Wards, etc. [Section 92]

Section 92	01.07.2017 to till date	**Where the estate or any portion of the estate of a taxable person is under the control of the Court of Wards, the Administrator General, the Official Trustee or any receiver or manager appointed by or under any order of a court - The tax, interest or penalty payable under CGST Act 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.** 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.

16.8.1 Key Judicial Observations – Liability of Court of Wards, Administrator General, Official Trustee, receiver or manager.

Section 92 provides for the levy and recovery of GST from a Court of Wards, Administrator General, Official Trustee, receiver or manager.

However, if the Court Receiver is deputed to make an inventory of goods, collect rents with respect to immovable property in dispute or where the property has to be sealed, or the Receiver is appointed to call bids for letting out the premises on leave and license, the fees or charges of the Court Receiver are exempt. In providing these services, the Office of the Court Receiver is acting as a department of the Court and therefore no GST is payable.

There may be instances where payments received by the Court Receiver may attract GST. For instance: (i) Where the Court Receiver is appointed to run the business of a partnership firm in dissolution, the business of the firm under the control of receivership may generate taxable revenues. (ii) Where the Court authorises the Court Receiver to let out the suit property on leave and license, the license fees paid may attract GST. (iii) Where the Court Receiver collects rents or profits from occupants of properties under receivership, the same will be liable to payment of GST. (iv) Consideration received for assignment, license or permitted use of intellectual property.

In such cases, GST may be collected from the Court Receiver as a representative assessee under Section 92 and as such the Court Receiver may be required to obtain registration under the relevant GST laws.

If Section 92 of the CGST Act is applicable in a given case, GST may be determined and recovered from the Court Receiver by reason of the Court Receiver being akin to a 'representative assessee'. However, whether or not GST is applicable depends on the nature of the cause of action pleaded by the Plaintiff or the order of the Court directing payment and which sets out the terms of receivership. **Re. Bai Mamubai Trust v. Suchitra - HC-GW-1106-2019-MH**

16.9 Special provisions regarding liability to pay tax, interest or penalty in certain cases. [Section 93]

<table>
<tr><td>Section 93(1)</td><td>01.07.2017 to till date</td><td colspan="2">Special provisions regarding liability to pay tax, interest or penalty where a person, liable to pay tax, interest or penalty under this Act, dies -</td></tr>
<tr><td></td><td></td><td>(a)</td><td>Where the business carried on by the deceased 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.

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;</td></tr>
<tr><td></td><td></td><td>(b)</td><td>Where 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 or is determined after his death.

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.</td></tr>
<tr><td>Section 93(2)</td><td>01.07.2017 to till date</td><td colspan="2">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, liable to pay tax, interest or penalty under CGST - Each member or group of members shall, jointly and severally,</td></tr>
</table>

		be liable to pay the tax, interest or penalty due from the taxable person under CGST Act up to 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. 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 up to 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.
Section 93(3)	01.07.2017 to till date	**Dissolved Firm liable to pay tax, interest or penalty under CGST Act - 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.** 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.
Section 93(4)	01.07.2017 to till date	**If there is anything contrary to section 93(4) in the Insolvency and Bankruptcy Code, 2016 (31 of 2016) then the provisions of Insolvency and Bankruptcy Code, 2016 (31 of 2016) will prevail over this sub - section. - Guardian of a ward on whose behalf**

		the business is carried on by the guardian or a trustee who carries on the business under a trust for a beneficiary - The guardianship or trust is terminated - Liability to pay tax, interest or penalty under CGST Act - The ward or the beneficiary 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. - 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.

16.9.1.1 Departmental Clarifications - Clarification in respect of transfer of input tax credit in case of death of sole proprietor- Circular No. 96/15/2019-GST dated 28th March, 2019

Doubts have been raised whether sub-section (3) of section 18 of the Central Goods and Services Tax Act, 2017 (hereinafter referred to as „CGST Act") provides for transfer of input tax credit which remains unutilized to the transferee in case of death of the sole proprietor. As per sub-rule (1) of rule 41 of the Central Goods and Services Rules, 2017 (hereinafter referred to as „CGST Rules"), the registered person (transferor of business) can file 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. Further, clarification has also been sought regarding procedure of filing of FORM GST ITC-02 in case of death of the sole proprietor. In order to clarify these issues and to ensure uniformity in the implementation of the provisions of the law, the Board, in exercise of its powers conferred by section 168 (1) of the CGST Act, hereby clarifies the issues raised as below.

2. Clause (a) of sub-section (1) of section 29 of the CGST Act provides that reason of transfer of business includes “death of the proprietor”. Similarly, for uniformity and for the purpose of sub-section (3) of section 18, sub-section (3) of section 22, sub-section (1) of section 85 of the CGST Act and sub-rule (1) of rule 41 of the CGST Rules, it is clarified that transfer or change in the ownership of business will include transfer or change in the ownership of business due to death of the sole proprietor.

3. In case of death of sole proprietor if the business is continued by any person being transferee or successor, the input tax credit which remains un-utilized in the electronic credit ledger is allowed to be transferred to the transferee as per provisions and in the manner stated below –

a. Registration liability of the transferee / successor: As per provisions of sub-section (3) of section 22 of the CGST Act, the transferee or the successor, as the case may be, shall be liable to be registered with effect from the date of such transfer or succession, where a business is transferred to another person for any reasons including death of the proprietor. While filing application in FORM GST REG-01 electronically in the common portal the applicant is required to mention the reason to obtain registration as “death of the proprietor”

b. Cancellation of registration on account of death of the proprietor: Clause (a) of subsection (1) of section 29 of the CGST Act, allows the legal heirs in case of death of sole proprietor of a business, to file application for cancellation of registration in FORM GST REG-16 electronically on common portal on account of transfer of business for any reason including death of the proprietor. In FORM GST REG-16, reason for cancellation is required to be mentioned as “death of sole proprietor”. The GSTIN of transferee to whom the business has been transferred is also required to be mentioned to link the GSTIN of the transferor with the GSTIN of transferee.

c. Transfer of input tax credit and liability: In case of death of sole proprietor, if the business is continued by any person being transferee or successor of business, it shall be construed as transfer of business. Sub-section (3) of section 18 of the CGST Act, allows the registered person to transfer the unutilized input tax credit lying in his electronic credit ledger to the transferee in the manner prescribed in rule 41 of the CGST Rules, where there is specific provision for transfer of liabilities. As per sub-section (1) of section 85 of the CGST Act, the transferor and the transferee / successor shall jointly and severally be liable to pay any tax, interest or any penalty due from the transferor in cases of transfer of business “in whole or in part, by sale, gift, lease, leave and license, hire or in any other manner whatsoever”. Furthermore, sub-section (1) of section 93 of the CGST Act provides that where a person, liable to pay tax, interest or penalty under the CGST Act, dies, then the person who continues business after his death, shall be liable to pay tax, interest or penalty due from such person under this Act. It is therefore clarified that the transferee / successor shall be liable to pay any tax, interest or any penalty due from the transferor in cases of transfer of business due to death of sole proprietor.

d. Manner of transfer of credit: As per sub-rule (1) of rule 41 of the CGST Rules, a registered person shall file FORM GST ITC-02 electronically on the common portal with a request for transfer of unutilized input tax credit lying in his electronic credit ledger to the transferee, in the event of sale, merger, de-merger, amalgamation, lease or transfer or change in the ownership of business for any reason. In case of transfer of business on account of death of sole proprietor, the transferee / successor shall file FORM GST ITC-02 in respect of the registration which is required to be cancelled on account of death of the sole proprietor. FORM GST ITC-02 is required to be filed by the transferee/successor before filing the application for

cancellation of such registration. Upon acceptance by the transferee / successor, the un-utilized input tax credit specified in FORM GST ITC-02 shall be credited to his electronic credit ledger.

16.10. Liability in other cases. [Section 94]

<table>
<tr>
<td>Section 94(1)</td>
<td>01.07.2017 to till date</td>
<td colspan="2">Liability for the tax, interest or penalty payable under CGST Act by an association of persons or a Hindu Undivided Family and such firm, association or family has discontinued business.
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—</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(a)</td>
<td>Determination of the tax, interest or penalty payable under CGST Act up to the date of such discontinuance as if no such discontinuance had taken place. - According to section 94(3) discontinuation of business in this sub section would mean -
• Dissolution in case of firm and AOP
• Partition in case of Hindi Undivided Family

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</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(b)</td>
<td>The partner of such firm, or a member of such association or family, shall, 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.- According to section 94(3) discontinuation of business in this sub section would mean -
• Dissolution in case of firm and AOP
• Partition in case of Hindi Undivided Family

every person who, at the time of such discontinuance, was a partner of such firm, or a member of such association or</td>
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			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.
Section 94(2)	01.07.2017 to till date		**Change in the constitution of a firm or an association of persons - Liability to pay tax, interest or penalty due from such firm or association for any period before its reconstitution - 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. – Some examples of change in constitution are: • Change in profit-sharing ratio • Admission of new partner or partners • Retirement of partners • Amalgamation of two or more firms • Conversion of partnership firm into sole proprietary or vice-versa • Conversion of firm into a company, etc.** 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 or penalty due from such firm or association for any period before its reconstitution.
Section 94(3)	01.07.2017 to till date		**The 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 - The provisions of sub-section (1) shall apply - The partner of such firm, or a member of such association or family, shall, 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 dissolution. 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.

16.11 Explanation to the Chapter XVI

Explanation.	01.07.2017 to till date	For the purposes 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.

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