

# GST ON TRANSFER OF BUSINESS DUE TO DEATH, AMALGAMATION, MERGER, RECONSTRUCTION OF TAXABLE PERSON



**CMA R.K. Khurana**

**Advocate**

## 1. Introduction to transfer of business

**C**ovid-19 has impacted businesses in many ways. Apart from disruptions due to closure of business offices, factories, markets, etc., the disease has caused death of many proprietors, partners of firms and members/directors of companies. The treatment under GST laws on account of the death of the registered taxable persons will depend upon:

- i. the nature or forms (i.e. whether sole proprietor, or partner of a partnership firm or director of a company) of taxable persons
- ii. Whether the death of a person involves (or does not involve) the transfer of the business
- iii. whether the legal successors of proprietor or the remaining partners of the partnership firm decide to carry on the existing businesses or would like to close the business entities

The death of one or more members or directors of a company do not impact the perpetual succession of the company, as the same company continues to carry one business. The Covid-19 has however, brought about slowdown in the business and in some cases closure of businesses by companies. This has also compelled many companies to look for closers, amalgamation, mergers, reconstruction of companies.

This article attempts to outline the compliance required under the GST laws in case of death of sole proprietor or a partner in case of partnership or amalgamation, merger and reconstruction of companies.

## 2. Transfer of business on the death of sole proprietor.

The GST laws involve PAN based registration. The permanent account number (PAN) allotted to a business entity under the Income Tax Act, 1961 is a unique number and is not transferable to the legal heirs. Therefore, GST registration number allotted to an individual is also not transferable. The transferee or successor of the business entity has to obtain a fresh PAN and GST registration number. However, Section 18(3) of Central Goods and Service Tax (CGST) Act, 2017 provides facility for transfer of input tax credit (ITC) in the electronic credit ledger of the deceased proprietor to his legal successors. Likewise, Section 85 of the Act obliges the transferor and the transferee/ successor to be jointly and severally liable to pay any tax, interest or any penalty due from the transferor in cases of transfer of such business. The treatment under the GST laws will also depend upon whether the legal successor proposes to (i) close the business or (ii) carry on the business of the deceased proprietor.

### 2.1 Legal successor proposes to close the business

The closure of the business of the deceased will require disposal of assets such as plant and machinery, finished and semi-finished goods etc. It will also require up-to-date filing of returns and payment of taxes of the deceased, making application for cancellation of the GST registration and filing of final return in Form GSTR- 10 of the deceased. The following issues will require consideration under the CGST Act, 2017.

- i. Whether the disposal of assets on permanent closure of business of the deceased is supply under Section 7(1) of the CGST Act?
- ii. Whether the said supply is in the course or further of the business of the deceased proprietor?
- iii. If so, whether the said supply is of goods or of services?
- iv. On the death of the registered taxable person, who is liable to meet the obligations of the deceased?

Section 7(1) read with paragraph 1 of Schedule I of the CGST Act, 2017 covers “Permanent transfer or disposal of business assets where input tax credit has been availed on such assets” within the definition of supply. Paragraph 4(c) of Schedule II to the Act further provides that “Where any person ceases to be taxable person, any goods forming part of the assets of any business carried on by him shall be deemed to be supply by him in the furtherance of his business immediately before he ceases to be a taxable person.” In the light of this, the disposal or not of the assets of the deceased will be deemed to be supply of goods in the furtherance of business and is liable to payment of GST.

2.1.1 Compliances by the legal successors: The legal successors of the deceased (even if they do not propose to carry on with the business) will have to comply with the following obligations:

- i. Inform the jurisdictional GST officer of the death of the registered taxable person along with a copy of the death certificate;
- ii. Request the jurisdictional officer to allot a new user id and pass word for completing compliances on behalf of the deceased.
- iii. This will also require recording of the email id and mobile number of the legal successors in place of those of the deceased.
- iv. Before allowing new user id and password, the jurisdictional officer may insist upon the production of a succession certificate from the legal heir.

- v. In case the deceased had more than one legal successor, The family may have to decide upon the legal successor and authorise one of them to comply with GST obligations.
- vi. Appointment of legal successor will have to be done according to personal law of the deceased.
- vii. Disposal of the assets (including finished and semi-finished goods) of the deceased with appropriate payment of CGST/SGST/UTGST/IGST;
- viii. Filing of up-to-date returns: GSTR-1, GSTR-3-B, GSTR-9/9A/9C with due payment of tax liability;
- ix. Filing application in Form GSTR REG -16 for cancellation of the registration number of the deceased;
- x. Filing of Final Return in Form GSTR-10 within three months of the cancellation of registration of the deceased.

2.2 Legal successor(s) propose to carry on with the business of deceased: If the legal successor proposes to carry on with the business of the deceased, he cannot do so in the name of the deceased. He will apply for a fresh registration based on his own PAN, transfer business as a 'going concern' (including ITC available in the Electronic Credit Ledger of the deceased) to his own account, file up-to-date returns in respect of the business of the deceased till the date of his death, apply for the cancellation of the registration number and file the final return of the deceased.

The CGST Act does not define the term 'transfer of a going concern'. In general parlance, transfer of business as a 'going concern' means where the seller (the vendor) sells his business together with all of the things that are necessary to the purchaser for the later to continue operating the business. All assets along with all the liabilities must be transferred. If there is a slump sale and no transfer of liabilities, it is a slump sale and the exemption from payment of GST would not be available. The rate of tax applicable on sale of assets will be leviable. The relevant provisions of the CGST Act are summarised as under:

Section/Rule of CGST Act, 2017	Description
Schedule II: Para 4(c), first exception read with	Transfer/ sale of business as a 'going concern' (commonly called, lock-stock-barrel basis) is not supply of goods. There is no tax liability for transfer of business of the deceased proprietor as a going concern.
Section 18(3)	Transfer of unutilised ITC in the electronic credit ledger of the transferor can be made to the transferee's GSTIN.
Section 22(3)	The transferee of the business is liable for registration (if not already registered) in order to carry on the business of the deceased.
Sections 37, 39 and 44	Up-to-date filing of returns and payment of tax till the date of death of the deceased proprietor.
Rule 41	Filing of GSTR-ITC02 for transfer of the unutilised input tax credit from the account of the deceased to transferee's (GSTIN) account.
Section 29(1(a))	Filing application in Form REG-16 for cancellation of registration number of the deceased proprietor
Section 45	Filing of final return of the deceased proprietor in Form GSTR-10 within three months of the cancellation of registration
Section 85	Joint and several liabilities of the transferor and transferee to pay any tax, interest or any penalty due from the deceased up to the date of transfer.
93(1)	Liability of the legal representative/successor to pay tax interest, or penalty due from the transferor.

- 2.2.1 Procedure for transfer of business of the deceased to the transferee
- 2.2.2 Intimation to the jurisdictional officer of the death of the registered taxable person and obtaining fresh user id and password: The procedure would be similar as explained in paragraphs 2.1 (i) to 2.1(iv) above.
- 2.2.3 Filing of Returns on behalf of the deceased: The legal representative will be required to file up-to-date returns (GSTR-1: Details of outward supplies, GSTR-3B: Monthly/quarterly return, GSTR-9/9B/9C: Annual return.
- 2.2.4 Transfer of ITC in Electronic Credit Ledger of the deceased: Section 18(3) of the CGST Act, provides that “Where there is a change in the constitution of a registered person on account of sale, merger, demerger, amalgamation, lease or transfer of the business with the specific provisions for transfer of liabilities, the said registered person shall be allowed to transfer the input tax credit which remains unutilised in his electronic credit ledger to such sold, merged, demerged, amalgamated, leased or transferred business in such manner as may be prescribed.”
- 2.2.5 Procedure for transfer ITC in the electronic credit ledger of the transferor: Rule 41 (1) of the CGST Rules, 2017 lays down the procedure for transfer of ITC of the transferor (deceased taxable person) to the transferee (his legal successor) as under:

“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, 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. The transferee is required to accept this Form GST ITC-02. Upon acceptance of the Form by the transferee/successor, the un-utilized input tax credit specified in FORM GST ITC-02 shall be credited to his electronic credit ledger.

The CBIC circular No. 96/15/2019-GST dated 28 March 2019 further clarifies that the 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. As per paragraph 3 of the said circular, “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”

- 2.2.6 Liability for registration of the transferee: Section 22 (3) of the CGST Act, 2017 provides that “Where a business carried on by a taxable person registered under this Act is transferred, whether on account of succession or otherwise (including due to death of the taxable person), to another person as a going concern, the transferee or the successor, as the case may be, shall be liable to be registered with effect from the date of such transfer or succession.”

CBIC Circular no 96/15/2019-GST (ibid) lays down that “ While filing application in FORM GST REG-01 electronically in the common portal, the applicant (transferee) is required to mention the reason to obtain registration as “death of the proprietor”.

- 2.2.7 Cancellation of registration on the death of the proprietor: Clause (a) of sub-section (1) of section 29 of the CGST Act, authorises 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, the reason for cancellation is required to

be mentioned as “death of sole proprietor”. The GSTIN of the transferee to whom the business is proposed to be transferred is also required to mention to link the GSTIN of the transferor with the GSTIN of transferee.

2.2.8 Liabilities of the deceased: Section 85(1) of the CGST Act provides that in case of death of sole proprietor, if the business is continued by any transferee or successor of business, 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 Act provides that where a person, liable to pay tax, interest or penalty under the CGST Act, dies, then the person who continues business (transferee) after his death, shall be liable to pay tax, interest or penalty due from such person under this Act. In other words, 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.

3. Transfer of business on account of reconstitution of partnership: The partnership is an agreement between two or more persons for sharing the profits of a business carried on by all or any one of them acting for all. Any change in the existing agreement is known as reconstitution of the partnership firm. The reconstitution of the partnership may take place for any of the following reasons:

- i. Death or insolvency of one or more of the existing partners
- ii. Retirement of any partner
- iii. Admission of the new partner
- iv. Change in the profit sharing ratio amongst the existing partners

In all these cases, it will have to be seen whether the said reconstitution amounts to continuation of the existing reconstituted firm or dissolution of the existing firm and starting a new firm.

In case, it amounts to continuation of existing firm. For instance, if the partnership agreement provides that in case of death or disability of an existing partner, his legal successor will be automatically admitted into the partnership, the existing partnership may continue and may not be dissolved. The partners will have to incorporate the change in the profile of the firm’s GST number at the GST portal.

In case, the reconstitution results in dissolution of the existing firm and starting of new firm, the procedure mentioned in paragraph 2 above will mutatis mutandis apply to the obtaining new registration number (based on new PAN of restructured firm), transfer of business, including ITC available on the electronic credit ledger of the old firm, filing of the returns of the existing firm and cancellation of the registration number of the existing firm.

4. Reconstruction, amalgamation, merger, demerger, of companies: The provisions relating to compromise, arrangement and reconstruction of companies is given in Chapter XV (Sections 230 to 240) of the Companies Act, 2013.

4.1 Compromise or arrangement: Section 230 provides for a compromise or arrangement between:

- i. the company and its creditors or any class of them; or
- ii. between the company and its members or any class of them

In this case, there generally is no change in the legal entity of the existing company. The company continues with its original Company Identification Number (CIN) under the Companies Act 2013, permanent account number (PAN) under the Income Tax Act, 1961 and GSTIN under the CGST, Act, 2017. Therefore, it will not involve any major compliance under the GST laws. However, if the compromise or arrangement results in to change in one or more directors, the names of the new directors (in place of the old directors) shall be intimated in profile change section of the company at the GST portal.

4.2 Compromise or arrangement resulting into merger, demerger amalgamation etc into new company: Normally the compromise or arrangement resulting into merger or amalgamation of two or more companies, involves transfer of business of one existing registered company to another company. The issue may fall into any one of the following categories:

4.2.1 Merger: In case of merger, the assets, including ITC to the credit of electronic credit ledger, of transferor company is transferred to the merged (transferee) company. In this case, the transferee or merged company is generally an existing company. Such existing company is expected to already have a GST registration number. Therefore, the procedure mentioned in paragraph 2, except for obtaining GST registration of a new company, will have to be complied with. The GST registration number of the transferor company shall require to be got cancelled after filing of necessary return and payment of taxes.

4.2.2 Amalgamation: In case of amalgamation, the business of two or more companies is generally amalgamated/merged into a newly formed company. The newly formed company may not be having its registration under the CGST Act, 2017. If so, the complete procedure mentioned in paragraph 2 will be complied with.

4.2.3 Demerger: In the case of demerger, the whole or any part of the undertaking, property and liabilities of an existing company is transferred to another company, or divided among and transferred to two or more companies. In such case the transferee companies are newly incorporated. The new companies will not normally be having their registration number. All such new companies to which the assets or undertakings of the existing companies are to be transferred, will require to obtain new GST registration numbers.

In case of demerger, proviso to Rule 41 (1) of the CGST Rules, 2017 provides that the ITC shall be apportioned in the ratio of the value of assets of the new units as specified in the demerger scheme. The explanation to the said rule further clarifies 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. Therefore, in case of demerger, the Form GST ITC-02 will mentioned the GSTIN number and the name of each of the demerged (transferee) company to which the unutilised amount of ITC is proposed to be transferred and this GST ITC-2 will have to be accepted on behalf of each of the demerged company.

5. Compliance commonly applicable to transfer of ITC in all the above cases: The transferor shall submit a copy of a certificate issued by a practicing chartered accountant or cost accountant certifying that the sale, merger, demerger, amalgamation, lease or transfer of business has been done with a specific provision for the transfer of liabilities.

- 5.1 Acceptance by the transferee: The transferee shall, on the common portal, accept the details so furnished (in GSTR-ITC 02) by the transferor, and upon such acceptance, the un-utilised credit specified in FORM GST ITC-02 shall be credited to his/its electronic credit ledger.
- 5.2 Accounting of inputs and capital goods by the transferee: The inputs and capital goods transferred by the transferor shall be duly accounted for by the transferee in his/its books of accounts.
- 5.3 Transfer of credit on obtaining separate registration for multiple places of businesses within a State or Union Territory: business within a State or Union territory.-Notification No. 03/2019-Central Tax dated 29th January, 2019 adds a new Rule 41-A. According to this rule a registered person who has obtained separate registration for multiple places of business in accordance with the provisions of rule 11 (Separate registration for multiple places of businesses within the same state or UT) 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.
- 5.4 Liability in case of amalgamation or merger of companies: Section 87(1) of the CGST Act, 2017 provides that 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 date of the 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 transaction of supply and receipt shall be included in the turnover of supply or receipt of the respective companies and they shall be liable to pay tax accordingly. The said two or more companies shall be treated as distinct companies for the period upto the date of the said order and the registration certificates of the said companies.
6. Conclusion:
- 6.1 The various forms of transfer of business under the GST may be on account of:
- i. Death of proprietor/partner
  - ii. Merger or amalgamation of business
  - iii. Demerger of business
  - iv. Complete sale of business to another taxable person
- 6.2 In the case of the death of the proprietor, his legal successor may decide not to carry on and to close the business. He should therefore obtain from the jurisdictional officer, the user id and pass word of the deceased, file up-to-date return (GSTR-1, 3-B, 9-B/9-C whichever applicable), pay tax due, file application for cancellation (GSTR REG-16) of return and file final return (GSTR-10).
- 6.3 In case the legal successor proposes to carry on with the business, he will apart from compliances mentioned at 6.2, will also have to file GSTR ITC-02 or GSTR ITC-2A as the case may be.
- 6.4 In case of transfer of business due to death of a partner of the partnership firm, the existing partners will comply

with requirements mentioned in paragraph 3 above.

- 6.5 In case of transfer of business on account of reconstruction of companies involving amalgamation, merger, demerger of companies, the Board of Directors of the transferee/merged company will have to comply with requirements mentioned in paragraph 4 above.
7. Issues for consideration and on which no clear answer emerge on present reading of GST law: Whenever transfer of business due to death of proprietor or of one or more partners of partnership firm, or due to amalgamation, merger, demerger etc of one or more companies is involved, the important issues for consideration would be:
- i. While the Act provides for transfer of credit balance in the electronic credit ledger from the account of transferor to the account of transferee, there is no mention about what will happen to the credit balance in the electronic cash ledger. Will it lapse to the government?
  - ii. Will the legal representative succeed in getting refund against the application filed by the transferor before he ceases to be taxable person? If such an application is pending with the department for zero rated or inverted duty structure tax? This is because the GST network does not allow transfer of Cash Ledger balance.
  - iii. What happens in case there is a dispute as to who should be the legal heir. In this connection the GST jurisdictional officer may not be the right person to decide. For this, the legal successors should obtain proper probate from the appropriate authority.
  - iv. What happens in case the legal successor is a minor? There would be the need for appointment of a guardian of the legal heir.