

Handbook on Liability to Pay in Certain Cases under GST



GST & Indirect Taxes Committee
The Institute of Chartered Accountants of India
(Set up by an Act of Parliament)
New Delhi

Handbook on Liability to Pay in Certain Cases under GST



The Institute of Chartered Accountants of India
(Set up by an Act of Parliament)
New Delhi

© The Institute of Chartered Accountants of India

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted, in any form, or by any means, electronic, mechanical, photocopying, recording, or otherwise without prior permission, in writing, from the publisher.

DISCLAIMER:

The views expressed in this book are of the author(s). The Institute of Chartered Accountants of India may not necessarily subscribe to the views expressed by the author(s).

The information contained in this book has been drawn primarily from the www.cbic.gov.in and other sources. While every effort has been made to keep the information cited in this book error free, the Institute or any office of the same does not take the responsibility for any typographical or clerical error which may have crept in while compiling the information.

First Edition : November, 2020

Author Name : CA. Gaurav Gupta

Committee/Department : GST & Indirect Taxes Committee

E-mail : gst@icai.in

Website : <http://www.icai.org>; <https://idtc.icai.org/>

Price : ₹ 80/-

ISBN : 978-81-8441-

Published by : The Publication Department on behalf of the Institute of Chartered Accountants of India, ICAI Bhawan, Post Box No. 7100, Indraprastha Marg, New Delhi - 110 002.

Printed by : Sahitya Bhawan Publications, Hospital Road, Agra - 282 003.

Foreword

The introduction of Goods & Services Tax (GST) in India is one of the most significant indirect tax reforms since Independence. The reform that took more than a decade of mutual co-operation, continuous discussion and intense debate between Central and State Governments about implementation methodology, was finally implemented with effect from 1st July 2017, subsuming almost all indirect taxes at the Central and State levels. As the journey of GST implementation progressed in India, the authorities have been quick to address the various challenges faced by the Industry and public concerns by issuing a series of notifications, clarifications, press releases and FAQs, to resolve a wide range of concerns.

The GST along with its challenges have brought in various benefits also like creation of National market by bringing down fiscal barriers amongst the States and has mitigated the cascading effect of taxes by allowing seamless credit of input tax across goods and services.

The Institute of Chartered Accountants of India (ICAI) through its GST & Indirect Taxes Committee has been playing a vital role in the implementation of GST in India by providing suggestions to the Government at each stage of development of GST. Further, the Institute has been playing proactive role and is a catalyst in dissemination of knowledge and awareness through technical publications, newsletters, e-learning and organizing various programmes, certificate courses, webcasts etc. for all stakeholders.

I am happy to note that the GST & Indirect Taxes Committee of ICAI has now taken the initiative to issue a series of Handbooks covering various procedural aspects of GST and in that series is bringing out this **Handbook on Liability to Pay in Certain Cases under GST** with an objective to provide guidance to the readers on this subject matter. The Handbook explains the concepts / procedures relating to liability to pay in certain cases under GST in an easy to understand lucid language and is aimed at updating the knowledge base of members in a simple and concise manner.

I congratulate CA. Rajendra Kumar P, Chairman, CA. Sushil Kumar Goyal, Vice-Chairman and other members of GST & Indirect Taxes Committee for coming out with this Handbook and for taking active steps in providing regular guidance to the members and other stakeholders at large.

I am sure that Members will find this publication very useful in discharging the statutory functions and responsibilities under the GST laws in an efficient and effective manner.

Place: New Delhi

Date: 10th November, 2020

CA. Atul Kumar Gupta

President, ICAI

Preface

Goods and Services Tax (GST) was introduced in India from 1st July, 2017. It is one of the major tax reforms since Independence in the area of indirect taxation. It was introduced with the objective to mitigate the cascading effect of taxes by allowing seamless credit across goods and services, facilitate free flow of goods and services across India and boosting tax revenue from better compliance and widening the tax base. A remarkable feature of GST implementation is that all the States in India came together with the Centre to form a unique federal body called GST Council, which is entrusted with the objective of recommending policies and procedural matters in the formation and implementation of GST legislation. The spirit of co-operative federalism took deep roots thereby ensuring that large federal countries like India implement the GST Law.

In order to facilitate understanding of the various compliances under GST, the GST & Indirect Taxes Committee of ICAI has taken an initiative to prepare a handbook on procedural aspects like registration, refund, return, invoice etc. One of the results of such initiative is this **Handbook on Liability to Pay in Certain Cases under GST**. An attempt has been made here to cover all aspects related to liability to pay in certain cases at one place and is intended to give general guidance to all stakeholders and also help them in resolving issues they may face during the course of their compliances under the GST. This Handbook on Liability to Pay in Certain Cases under GST is comprehensive containing analysis of the entire provisions under the law including notifications, circulars or orders upto 31st October, 2020 issued by the Government from time to time along with FAQ's, MCQ's, Flowcharts, Diagrams, Illustrations etc. to make the reading and understanding easier.

We stand by the Government in our role as "Partners in GST Knowledge Dissemination" and have always been supporting the Government with our intellectual resources, expertise and efforts to make GST error-free.

We sincerely thank CA. Atul Kumar Gupta, President and CA. Nihar Niranjan Jambusaria, Vice-President, ICAI for their encouragement to the initiatives of the GST & Indirect Taxes Committee. We express our gratitude for the

untiring effort of CA. Gaurav Gupta who has shared her intellectual expertise and CA. Purushothaman J for reviewing this publication. We place on record the services and unstinted support provided by the Secretariat of the Committee.

We record here the dedicated and devoted work done by the Secretary of the Committee, CA. Sharad Singhal who passed away at a very young age of 36 on 26th September 2020. The World of GST in general and our Committee in particular will miss his intellectual expertise. The Will of the Almighty prevails over everything and all of us have to accept HIS decision with a bow.

We trust this Handbook will be of practical use to all the members of the Institute and other stakeholders. We also welcome suggestions at gst@icai.in and request you to visit our website <https://idtc.icai.org> and provide valuable inputs in our journey to make GST truly a good and simple tax.

CA. Rajendra Kumar P
Chairman
GST & Indirect Taxes Committee

CA. Sushil Kumar Goyal
Vice- Chairman
GST & Indirect Taxes Committee

Place: New Delhi
Date: 10th November, 2020

Table of Contents

Foreword	iii
Preface	v
1. Introduction	1
2. Liability in case of transfer of business (Section 85)	1
2.1 Bare law	1
2.2 Analysis	2
2.3 Certain cases of transfer of business and liabilities therein	10
3. Liability of agent and principal (Section 86)	11
3.1 Bare law	11
3.2 Analysis	11
4. Liability in case of amalgamation or merger of companies (Section 87)	17
4.1 Bare Law	17
4.2 Analysis	17
5. Liability in case of company in liquidation (Section 88)	21
5.1 Bare law	21
5.2 Analysis	21
6. Liability of Directors of private company (Section 89)	25
6.1 Bare law	25
6.2 Analysis	26
7. Liability of partners of firm to pay tax (Section 90)	28
7.1 Bare Law	28
7.2 Analysis	29
7.3 Examples	30
8. Liability of guardians, trustees or agents (Section 91)	30

8.1	Bare law.....	30
8.2	Analysis	31
9.	Liability of Court of Wards, etc (Sec 92)	32
9.1	Bare law.....	32
9.2	Analysis	32
10.	Special provisions regarding liability to pay tax, interest or penalty in certain cases (Section 93).....	33
10.1	Bare law.....	33
10.2	Analysis	34
11.	Liability in other cases (Section 94).....	37
11.1	Bare law.....	37
11.2	Analysis	38

Liability to Pay in Certain Cases under GST

1. Introduction

India has adopted a dual GST model which means that both Central and State Governments will levy tax under GST. Where any default is made in payment of any of these taxes, interest or penalty shall be imposed accordingly. Therefore, it is imperative to determine who is liable to pay the tax, interest or penalty. Usually, a supplier is liable to pay under forward charge. Generally, liability to pay tax is determined by the provisions of section 9 of Central Goods and Services Tax Act, 2017 (hereinafter referred as 'CGST Act') and section 5 of Integrated Goods and Services Tax Act, 2017 (hereinafter referred as 'IGST Act'). These sections specify two kinds of mechanism to pay taxes i.e. forward charge and reverse charge. Under forward charge, the liability to pay taxes is on the supplier whereas under reverse charge, the liability to pay taxes is on the recipient. Accordingly, the liability to pay interest or penalty arises on the person who is liable to pay taxes.

However, in certain cases, liability to pay taxes is not restricted to supplier or recipient merely; rather it is extended beyond them. Sections 85 to 94 of the CGST Act deal with certain cases where specific persons in certain cases are made liable to pay taxes, interest or penalty. These are discussed in the ensuing paragraphs. :

2. LIABILITY IN CASE OF TRANSFER OF BUSINESS (SECTION 85)

2.1 Bare law

(1) 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 up to 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.

(2) 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

2.2 Analysis

Section 85 of the CGST Act talks about the liability to pay taxes, interest or penalty in case of transfer of business. Sub-section (1) states that where any taxable person liable to pay tax under the CGST Act, transfers his business, he and the person to whom the business is so transferred shall be jointly and severally liable to pay tax, interest or any penalty due upto the time of transfer. The key requisites of this provision are -:

- There is a transfer
- By a taxable person
- The transfer is of business,
- The transfer can be in whole or in part
- The transfer be by way of sale, gift, lease, leave and license, hire or in any other manner whatsoever

In the above cases, the transferor and transferee 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.

We shall now examine the different requisites in the following paragraphs.

- (a) **There is a transfer:** A 'transfer' includes a sale at full value, a sale at an under value, an exchange and a gift. Therefore, a transferor may be a seller or donor. A transferee may be a purchaser or donee. The transfer can be to a person with no previous interest in the business, e.g. a third-party purchaser. It can be a change of legal entity, e.g. when a sole proprietor converts the entity into a partnership or private limited company. It can also be in the form of a succession, or transfer under will etc. Transfer of ownership is not always transfer of business; for eg., in case a person transfers 100% shares of a private limited company to another person, the same would not amount to transfer of business but transfer of securities or his interest in such

Handbook on Liability to Pay in Certain Cases under GST

business. The disposal of shares, unaccompanied by the transfer of assets, does not allow the transferee to carry on an independent economic activity as the transferor's successor. Similarly, transfer of property is not equal to transfer of business. For eg., if a doctor had rented a shop to a tenant who starts and run a shoe retail shop in such shop and after some years sells the property to the tenant. This case, is not a transfer of a business but transfer of the premises only. The business of the doctor is rental and not show retail.

- (b) **By a taxable person:** It is important to note that the liability in case of transfer of business is not limited to a registered person (person who is registered under GST laws). However, if the transferor is a taxable person, the present section would apply. A taxable person has been defined in Section 2(107) of the CGST Act, 2017 to mean a person who is registered or liable to be registered under section 22 or section 24.
- (c) **Transfer is of business:** The Term business has been defined under Section 2(17) of the CGST Act, 2017 as under-
 - (17) "business" includes—
 - (a) *any trade, commerce, manufacture, profession, vocation, adventure, wager or any other similar activity, whether or not it is for a pecuniary benefit;*
 - (b) *any activity or transaction in connection with or incidental or ancillary to sub-clause (a);*
 - (c) *any activity or transaction in the nature of sub-clause (a), whether or not there is volume, frequency, continuity or regularity of such transaction;*
 - (d) *supply or acquisition of goods including capital goods and services in connection with commencement or closure of business;*
 - (e) *provision by a club, association, society, or any such body (for a subscription or any other consideration) of the facilities or benefits to its members;*
 - (f) *admission, for a consideration, of persons to any premises;*

Handbook on Liability to Pay in Certain Cases under GST

- (g) *services supplied by a person as the holder of an office which has been accepted by him in the course or furtherance of his trade, profession or vocation;*
- (h) *activities of a race club including by way of totalisator or a license to book maker or activities of a licensed book maker in such club; and*
- (i) *any activity or transaction undertaken by the Central Government, a State Government or any local authority in which they are engaged as public authorities;*

The consideration for transfer of business should be a lump sum consideration. This consideration should be arrived at without assigning values to individual assets and liabilities. In the case of *CIT v. Artex Manufacturing Co.*, [(1997) 227 ITR 260 (SC)], it was held that if in a business sale transaction, there is a possibility of attribution of price to individual items (plant, machinery and dead stock), such transaction may not qualify as transfer of business. Transfer of business is a supply of services. Goods has been defined in Section 2(102) of CGST Act, 2017 to mean 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. The term 'Services' has been defined in Section 2(102) of CGST Act, 2017 to mean 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.

Moreover, in the case of *Paradise Food v. State of Telangana* (2017) 81 taxmann.com 331; 63 GST 86 (AP) it was held that the transfer of business as a whole could not be considered as sale of goods.

Is transfer of business a 'supply'?

Section 7 of CGST Act, 2017 provides as under-

- (1) *For the purposes of this Act, the expression "supply" includes—*
 - (a) *all forms of supply of goods or services or both such as sale,*

Handbook on Liability to Pay in Certain Cases under GST

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;

Thus, any transfer which is done for a consideration in the course or furtherance of business shall fall within the ambit of 'supply'. Thus, we can say that the activity of transfer of a business is a supply.

- (d) Transfer can be whole in or in part: The transfer of business may be in whole or part. Thus, the transferor can transfer the business wholly or he can also transfer a part of his business to another person. A part of business does not mean few assets; a part of business means an independent part of business which itself is capable of being continued as a going concern. For eg., a logistics company transfers its warehousing segment to another company.
- (e) **Transfer can be by way of sale, gift, lease, leave and license, hire or in any other manner.**

The transfer can happen by many ways including but not limited to sale, gift, lease, leave, license, succession etc. We shall discuss some common ways of business transfer in the following paragraphs:

Transfer of business by gift

Such transfers generally happen in case of family businesses where a person intends to discontinue the business on his own and transfers his business to another family member by giving it as a gift as a whole or may choose to transfer business partly.

Further, Schedule I of the CGST Act, 2017 provides certain activities to be considered as a supply even if made without consideration. The relevant entry is reproduced below-

1. *“Permanent transfer or disposal of business assets where input tax credit has been availed on such assets.”*

This means where business assets are transferred permanently or disposed of permanently on which input tax credit was claimed, such permanent transfer or disposal shall be considered as a supply even though no consideration is received for such transfer or disposal.

We can conclude that in case of transfer by way of gift, the element of consideration is absent and thus in such a scenario when business

Handbook on Liability to Pay in Certain Cases under GST

assets are transferred by way of gift where no consideration is received, such activity shall be a supply.

Transfer of business by sale

Now, there can be transfer of business by sale in two ways i.e. asset transfer or business transfer. When there is a sale of business assets, one intends to purchase only the business assets without the liabilities of the business. The transferor, still, has the legal ownership over his business but not over the assets, whether tangible or intangible. Transfer of business assets can be an example where a business is not transferred wholly but partly which further means it is not a slump sale.

Further, Schedule II of CGST Act deals with the activities or transactions to be treated as supply of goods or services. We shall discuss the clauses under para 4 of this Schedule which deals with transfer of business assets, provided as under-

4. "Transfer of business assets

(a) where goods forming part of the assets of a business are transferred or disposed of by or under the directions of the person carrying on the business so as no longer to form part of those assets, such transfer or disposal is a supply of goods by the person;"

This clause provides that when goods that form part of the business assets are transferred or disposed of as per the instructions of the person who carries such business, such transfer or disposal of goods shall be a supply of goods made by such person.

(b) where, by or under the direction of a person carrying on a business, goods held or used for the purposes of the business are put to any private use or are used, or made available to any person for use, for any purpose other than a purpose of the business, the usage or making available of such goods is a supply of services;

This clause provides that where a person carrying on a business gives direction to put goods for a personal use which were earlier held for carrying the business or to make them available to any other person for personal use excluding the business purpose, such usage or making the goods available to another person shall be a supply of services.

Handbook on Liability to Pay in Certain Cases under GST

c) where any person ceases to be a taxable person, any goods forming part of the assets of any business carried on by him shall be deemed to be supplied by him in the course or furtherance of his business immediately before he ceases to be a taxable person, unless-

- (i) the business is transferred as a going concern to another person; or*
- (ii) the business is carried on by a personal representative who is deemed to be a taxable person.*

It provides that where a person has ceased to be a taxable person, it shall be deemed that the assets of the business carried on by him have been supplied by him in the course or furtherance of his business before he ceased to be a taxable person. It should be noted that transfer of assets is considered as a supply of goods whereby only assets are transferred and not the whole business. However, an exception has been provided which states that when such taxable person transfers the business as a going concern to another person before he ceases to be a taxable person, then such transfer of assets shall not be considered to be supplied by him. Another exception provides that where the business of such taxable person is carried on by a personal representative who is considered as a taxable person then such transfer of assets shall not be considered as a supply.

Further, Notification 12/2017-central tax (rate) dated 28.06.2017 provides as under-

S. No.	Chapter, Section, Heading, Group or Service Code (Tariff)	Description of Services	Rate (per cent)	Condition
2	Chapter 99	Services by way of transfer of a going concern, as a whole or an independent part thereof	NIL	NIL

Handbook on Liability to Pay in Certain Cases under GST

Thus, there are two conditions to avail this notification namely-

1. Transfer of a going concern
2. Such transfer shall be as a whole or an independent part

This means that transfer of a business as a going concern shall be such that the business activity is capable of being run as an independent unit.

Now, on the other hand, in a business sale, a business is transferred in its entirety including the capital, workers, assets, liabilities, goodwill, licences, products and services and other benefits associated with the business and thus, it will get covered under slump sale.

Transfer of assets v transfer of business: The difference was highlighted by Supreme Court in the case of *Karnataka and Another v. Shreyas Papers (P) Ltd.* (2006) 1 SCC 615. The Supreme Court did not accept the contention that "business" could not be separated from the assets of the business. It was held that 'business' is an activity, directed with a certain purpose, more often towards producing income or profit and ownership of assets is merely an incident rather than a characteristic of business. Hence, the mere transfer of one or more species of assets does not necessarily bring about the transfer of the "ownership of the business". "Ownership of a business" is much wider than mere ownership of discrete or individual assets. In fact, "ownership of business" is wider than the sum total of the ownership of a business' constituent assets. Above all, transfer of "ownership of business" requires that the business be sold as a going concern.

Transfer of business in case of death of sole proprietor

In this context, *Circular No. 96/15/2019-GST dated 28.03.2019* clarifies as under –

“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.”

Handbook on Liability to Pay in Certain Cases under GST

Thus, it was 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.

Sub-section (2) states that where the transferee carries on such transferred business in his own name or in some other name he will be liable to pay the taxes on supply of goods or services or both effected by him with effect from the date of such transfer, which means that the liability to pay tax on supply after the transfer took place is solely on the transferee. Further if the transferee is a registered person, he has to apply for amendment of his registration certificate within the prescribed time.

Where the business is transferred by the reason of death of sole proprietor, *Circular No. 96/15/2019 dated 28.3.2019* has clarified the provisions in respect of transfer of unutilised input tax credit lying in electronic credit ledger to the transferee, the liability to pay any tax, interest and/or penalty due from the transferor. The process mentioned in the circular is as follows:

- *Registration liability of transferee / successor:* As per the provisions of section 22(3) of the CGST Act the transferee / successor is liable to be registered with effect from the date of such transfer or succession by filing application in FORM GST REG-01. While filing the application, the applicant is required to mention the reason to obtain registration as “death of the proprietor”.
- *Cancellation of registration on account of death of the proprietor:* As per clause (a) of section 29(1) of the CGST Act the legal heirs have to file the 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.
- *Transfer of input tax credit and liability:* Section 18(3) of the CGST Act, allows the transfer of the unutilized input tax credit

Handbook on Liability to Pay in Certain Cases under GST

lying in electronic credit ledger of transferor to the transferee in the manner prescribed in rule 41 of the CGST Rules, where there is specific provision for transfer of liabilities. It is also clarified that the transferee / successor shall be liable to pay any tax, interest and/ or any penalty due from the transferor in cases of *transfer of business due to death of sole proprietor*.

- *Manner of transfer of credit (Rule 41(1) 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 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 in FORM GST REG-16.
 - The transferee /successor shall accept the details so furnished on the common portal. On acceptance, the un-utilized input tax credit specified in FORM GST ITC-02 shall be credited to the electronic credit ledger of the transferee / successor.
 - The inputs and capital goods so transferred shall be duly accounted for by the transferee in his books of account.

2.3 Certain cases of transfer of business and liabilities therein

Example 1 Assume A transfers his business to B with effect from 01/07/2019 and the tax, interest or penalty due from A totals Rs.500,000/- before 01/07/2019 and remains unpaid till transfer. In this situation, A and B are jointly and severally liable to pay Rs. 500,000/-.

If another Rs. 5,000/- is determined after the transfer took place then also both A and B will be jointly and severally liable.

Example 2. X registered under GST carrying on business dies on 01/03/2019. The business gets automatically transferred to his legal heir Y. The taxes due on 01/03/2019 are Rs. 300,000/-.

In this case, Y being transferee is liable to pay Rs. 300,000/-.

3. LIABILITY OF AGENT AND PRINCIPAL (SECTION 86)

3.1 Bare law

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.

Section 86 of the CGST Act deals with the liability to pay tax on supplies made by the agent on behalf of his principal. The goods basically belong to the principal and are supplied or received by the agent and in such cases, the first liability lies with agent (if registered under his own GSTIN and not that of the Principal). However, the provision creates a joint and several liabilities on Principal as well in case of default by such agent. We shall now discuss the same in detail hereunder.

3.2. Analysis

- **Who is an agent?**

Section 2(5) of the CGST Act, 2017 provides the meaning of 'agent' as under-

“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;

Thus, an agent is a person who undertakes to engage in the business of supply or receipt of goods or services or both on behalf of another person. An agent includes the following persons-

- Factor
- Broker

Handbook on Liability to Pay in Certain Cases under GST

- Commission agent
- *Arhatia*
- *Del credere* agent
- Auctioneer
- Any other mercantile agent

It is pertinent to mention that the term 'agent' has also been included in the definition of intermediary under the Integrated Goods & Services Tax Act, 2017 which reads thus:

(13) "intermediary" means a broker, an agent or any other person, by whatever name called, who arranges or facilitates the supply of goods or services or both, or securities, between two or more persons, but does not include a person who supplies such goods or services or both or securities on his own account;

Thus, an agent is also included in the definition of an intermediary as a person who arranges the supply of goods or services or both excluding such supply of goods or services or both is not on his own account.

In both the above terms, it is pertinent to mention that agent undertakes supply on behalf of another person. He does not make a supply on his own account. The basic difference is that an agent is in a position to effect a supply on behalf of another person. For instance X received 100 bags of cement from Y to be sold in local market. Whatever sales he makes, he will get 5% of such sale value as his commission. In this case, whenever the sale is made, the sale value accrues to Y and only the commission accrues to X. The important features of being an agent are as follows:

- The agent receives the custody of goods or services to be supplied but not their ownership
 - The risk and reward of such goods or services (including unsold inventory) remains with the principal
 - The principal has direct privity with the customer as the agent does not sell in his own capacity but as an agent of the principal and on behalf of principal
- **Who is a principal?**

Section 2(88) of the CGST Act provides the meaning of 'principal' as under-

Handbook on Liability to Pay in Certain Cases under GST

“principal” means a person on whose behalf an agent carries on the business of supply or receipt of goods or services or both;

Thus, a principal is a person who appoints an agent to carry on his business of supply or receipt of goods or services or both on his behalf.

Supply of Goods by a Principal to his Agent or Vice Versa

Schedule I of CGST Act, 2017 provides as under-

“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.”*

Thus, supply of goods by a principal to his agent where agent undertakes to supply such goods on behalf of the principal or by an agent to his principal where agent undertakes to receive such goods on behalf of the principal shall be treated as supply even though the element of consideration is not present in such a transaction.

It should be noted that the above entry excludes supply of services by a principal to his agent or vice-versa from the ambit of supply when such supply is made without consideration.

Whether or not the agent has the authority to pass or receive the title of the goods on behalf of the principal

Circular No. 57/31/2018-GST [CBEC-20/16/4/2018-GST], Dated 4-9-2018 provides clarification as to how to determine whether an agent acts in the capacity of a representative of the principal or not, in supplying or receiving goods? The relevant paragraph from the circular is reproduced below-

7. “...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

Handbook on Liability to Pay in Certain Cases under GST

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.”

It provides that to determine the relationship between the principal and agent, it is required to check whether the invoice for further supply of goods on behalf of the principal is issued by the agent or not. In first scenario, if an agent supplies goods but raises invoice in his own name then provision of goods from principal to agent would fall within the ambit of the Entry No. 3 under Schedule I of CGST Act, 2017. In the same manner, if goods are received by the agent on behalf of a principal and the invoice is made in the name of agent then provision of such goods by agent to principal would be covered by the said entry.

In the second scenario, if an invoice is issued by an agent directly in the name of the principal then he is not acting as an agent and shall be outside the ambit of entry no. 3 under Schedule I of CGST Act, 2017.

The Department had given various examples in the circular itself to make the understanding more clear. Such examples are mentioned below-

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.

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.

Need for registration under GST Act being an agent

If we refer Scenario 1 and Scenario 2 as mentioned above in the examples, there is no need for registration since the invoice was generated in the name of principal directly. However, under Scenario 3 and Scenario 4, there is a need for registration since services of being an agent are undertaken. Moreover, Section 24(vii) of the CGST Act provides as under-

Compulsory registration in certain cases.

24. Notwithstanding anything contained in sub-section (1) of section 22, the following categories of persons shall be required to be registered under this Act,—

(vii) persons who make taxable supply of goods or services or both on behalf of other taxable persons whether as an agent or otherwise

Thus, an agent who supplies taxable goods or services or both *on behalf of another person* is required to take registration compulsorily under the GST Act irrespective of the fact that his aggregate turnover does not exceed the threshold limit.

Handbook on Liability to Pay in Certain Cases under GST

However, section 23(1) (a) of CGST Act,2017 provides as under-

“Persons not liable for registration

23. (1) *The following persons shall not be liable to registration, namely:–*

- (a) any person engaged exclusively in the business of supplying goods or services or both that are not liable to tax or wholly exempt from tax under this Act or under the Integrated Goods and Services Tax Act;*
- (b) an agriculturist, to the extent of supply of produce out of cultivation of land.”*

Thus, any person who is exclusively engaged in the supply of goods or services or both that do not attract taxes or exempt from the levy of GST under CGST Act or IGST Act, such person shall not be liable for registration under the Act. Further, an agriculturist who is supplying produce out of cultivation of land is exempted from registration. This means that a commission agent providing services related to agricultural produce on behalf of the agriculturist who himself is not liable for registration shall be exempt from obtaining registration under the Act.

An agent makes two supplies – one of goods and services on behalf of the principal to the customer and the other of his own services as a commission agent (as a supplier) to the principal. It is important to note that even when agent supplies exempted goods or services, his supply to principal shall be independent and shall not be exempt (unless specific exemption distinct from exemption of goods and services supplies is available to him). [Refer Circular No 73/47/2018-GST [No. CBEC/20/16/04/2018-GST], dated 5-11-2018].

Liability in case of Principal- Agent

In this case, both A and B shall be jointly and severally liable to pay the taxes on taxable goods being sold. Further, it should be noted that this section talks only about the liability to pay taxes if the agent supplies or receives any taxable goods on behalf of the principal. It does not mention about liability to pay taxes in case of services. Furthermore, this section only applies in case of taxes; there is no mention of interest or penalty. Thus, any taxable goods which belong to principal when sold by the agent, in such case, the liability of GST which accrues on sale of such goods, both principal and agent shall be liable to pay GST on such supplies. For eg., X sold goods worth Rs.

10,00,000 taxable @18% on behalf of .Y, his principal. X and Y are both jointly and severally liable to pay GST of Rs. 180,000 on such transaction. Even if X absconds with the entire sale proceeds and tax collected, Y shall be held liable for payment of such GST.

4. LIABILITY IN CASE OF AMALGAMATION OR MERGER OF COMPANIES (SECTION 87)

4.1 Bare Law

(1) When two or more companies are amalgamated or merged in pursuance of an order of court or of Tribunal or otherwise and the order is to take effect from a date earlier to the date of the order and any two or more of such companies have supplied or received any goods or services or both to or from each other during the period commencing on the date from which the order takes effect till the date of the order, then such transactions of supply and receipt shall be included in the turnover of supply or receipt of the respective companies and they shall be liable to pay tax accordingly.

(2) 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.

4.2 Analysis

Section 87 states the liability to pay taxes in case of amalgamation or merger of two or more companies where the following conditions are also present:

- The amalgamation or merger takes place pursuant to an order of court or order of Tribunal or otherwise
- Such order is to take effect from a date earlier to the date of the order
- Any two or more of such companies have supplied any goods or services or both to each other or received any goods or services or both from each other during the period commencing on the date from which the order takes effect till the date of order.

In this situation such transactions of supply and receipt between the companies (which are amalgamated or merged) during the period

Handbook on Liability to Pay in Certain Cases under GST

commencing on the date from which the order takes effect till the date of order will be included in the turnover of supply or receipt of the respective companies and they will be liable to pay tax accordingly.

Example 1. A Ltd. and B Ltd. are merged by the order of court to Form AB Ltd. The date of passing the order is 01/12/2019 but the order is to take effect from 01/04/2019 i.e. earlier to the date of order. A Ltd. supplied goods worth Rs.500,000/- to B Ltd. on 10/04/2019 (i.e. between 01/04/2019 and 01/12/2019). Then such here the amount of Rs.500,000/- will be included in the turnover of A Ltd. as supply of goods and turnover of B Ltd. as receipt of goods and accordingly A Ltd. and B Ltd. shall be liable to pay taxes on it. Also, A Ltd. and B Ltd. will be treated as distinct companies up to 01/12/2019 and their registration certificates will be cancelled with effect from 01/12/2019

Amalgamating Companies shall be considered as Distinct Persons till the date of order

For the purposes of the CGST Act, 2017 the said companies shall be treated as distinct companies for the period up to the date of said order which means that both the two companies shall be considered as a single entity from the appointed date. Moreover, their registration certificates shall be cancelled with effect from the date of said order. Further, Schedule I of the CGST Act, 2017 provides as under-

2. Supply of goods or services or both between related persons or between distinct persons as specified in section 25, when made in the course or furtherance of business

Since, the companies under this section have been treated as distinct persons, any supply of goods or services or both between such companies shall be considered as a supply even if it is made without consideration. However, such transaction should be made in the course of or in furtherance of the business.

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 Act states that the scheme shall be deemed to be effective from the 'appointed date' and not a

Handbook on Liability to Pay in Certain Cases under GST

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.

Requirement of registration under GST Act

Further, Section 22(4) of the CGST Act relating to persons liable for registration reads thus :

4) Notwithstanding anything contained in sub-sections (1) and (3), in a case of transfer pursuant to sanction of a scheme or an arrangement for amalgamation or, as the case may be, de-merger of two or more companies pursuant to an order of a High Court, Tribunal or otherwise, the transferee shall be liable to be registered, with effect from the date on which the Registrar of Companies issues a certificate of incorporation giving effect to such order of the High Court or Tribunal.

The above sub-section provides that if the business is transferred consequent to an order of a High court, Tribunal, or otherwise pursuant to arrangements for amalgamation or de-merger of two or more companies, the transferee shall be liable to be registered, with effect from the date on which the Registrar of the Companies issues a certificate of incorporation. Thus, on a harmonious construction of both provisions, one can say that the amalgamating / merging entities would remain distinct entity till the date of issuance of certificate of incorporation of the new entity and thereafter the new entity would be required to obtain registration and the business of the amalgamating / merging entities would cease thereafter.

Handbook on Liability to Pay in Certain Cases under GST

Provisions of Input Tax Credit in case of amalgamation or merger

Section 18 of the CGST Act 2017 deals with the availability of credit in special circumstances. The section provides as under-

(3) 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.

Thus, when constitution of a business of a registered person is changed due to merger or amalgamation, such registered person is allowed to transfer the unutilised input tax credit lying in his electronic ledger to such merged or amalgamated company in a manner as prescribed under Rule 41 of CGST Rules, 2017. However, it should be noted that such transfer shall be allowed only if there is a specific provision for transfer of liabilities else input tax credit cannot be transferred.

The manner of transfer of the credit on account of merger or amalgamation has been prescribed under Rule 41 of the CGST Rules, 2017 as follows:-

- The registered person/transferor whose business is to be merged or amalgamated shall furnish the details of such merger or amalgamation in *FORM GST ITC-02*, electronically, along with a request for transfer of unutilized input tax credit lying in his electronic credit ledger to the transferee.
- The registered person/transferor shall also submit a copy of a certificate issued by a practicing chartered accountant or cost accountant certifying that the merger or amalgamation as the case may be has been done with a specific provision for the transfer of liabilities.
- The transferee shall accept the details so furnished by the transferor and after such acceptance, the amount of unutilised input tax credit as mentioned by the transferor in the *FORM GST ITC-02* shall be credited to the electronic credit ledger of transferee.
- The inputs and capital goods so transferred must be duly accounted for by the transferee in his books of account

Further, a transferor is required to file *FORM GST ITC-02* only in those States where both transferor and transferee are registered.

[Refer CBIC&C Circular No.133 03/2020-GST dated 23.03.2020]

A point to note is that Section 87 is applicable in the case of amalgamation and merger of companies only and in no other form of business organisation. The provision is brought to clarify the liabilities during the period between the application and order for amalgamation.

5. LIABILITY IN CASE OF COMPANY IN LIQUIDATION (SECTION 88)

5.1 Bare law

1) When any company is being wound up whether under the orders of a court or Tribunal or otherwise, every person appointed as receiver of any assets of a company (hereafter in this section referred to as the "liquidator"), shall, within thirty days after his appointment, give intimation of his appointment to the Commissioner.

(2) The Commissioner shall, after making such inquiry or calling for such information as he may deem fit, notify the liquidator within three months from the date on which he receives intimation of the appointment of the liquidator, the amount which in the opinion of the Commissioner would be sufficient to provide for any tax, interest or penalty which is then, or is likely thereafter to become, payable by the company.

(3) When any private company is wound up and any tax, interest or penalty determined under this Act on the company for any period, whether before or in the course of or after its liquidation, cannot be recovered, then every person who was a director of such company at any time during the period for which the tax was due shall, jointly and severally, be liable for the payment of such tax, interest or penalty, unless he proves to the satisfaction of the Commissioner that such non-recovery cannot be attributed to any gross neglect, misfeasance or breach of duty on his part in relation to the affairs of the company.

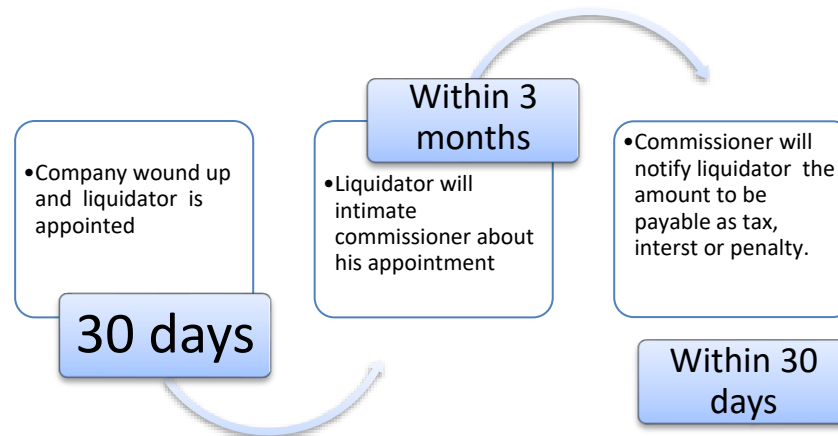
5.2 Analysis

Section 88 deals with the liability to pay tax, interest or penalty in case of liquidation of companies.

Handbook on Liability to Pay in Certain Cases under GST

Section 88(1) and Section 88(2) provide that when any company is being wound up whether under the order of court or order of tribunal or otherwise, then every liquidator appointed has to give intimation of his appointment to the Commissioner within 30 days of his appointment. Then the Commissioner shall after calling for information as he deems fit notify the liquidator the amount towards any tax, interest or penalty which is then payable or likely to become payable by the company within 3 months from the date of receipt of intimation of the appointment.

The above clause has been summarized in the following flowchart:



Liability on Directors in case of non-recovery from liquidating Company

Section 88(3) states that when any private company is wound up and any tax, interest or penalty for any period determined under CGST Act 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 to pay such tax, interest or penalty.

However, an exception has been carved out of the above provision that if the director 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 then he will not be held liable for payment of such tax, interest or penalty. *It should be noted that Section 88(3) covers only private companies.*

Handbook on Liability to Pay in Certain Cases under GST

Further Rule 160 of CGST Rules, 2017 mentions as under-

“Recovery from company in liquidation.-

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

Thus, a Commissioner shall issue intimation to the liquidator for recovery of tax, interest, penalty or any other dues under the GST Act by issuing FORM GST DRC-24 before the final winding up of the company.

Example 1

A, B and C are directors of XYZ Ltd., a company which has gone into liquidation. D, the liquidator is appointed on 01.04.2020. Now, D within 30 days of his appointment shall inform the Commissioner about his appointment. He informs about his appointment on 29.04.2020

Thereafter, the Commissioner shall within three months of receiving the intimation inform the liquidator about the recovery amount in FORM GST DRC-24 i.e. up to 28.07.2020. He informs the GST liability on 29.06.2020. Now the company shall pay the dues before final winding up of the company.

Example 2

XYZ Ltd. is a private company and it decides to wind up. In such case, all the directors i.e. A, B and C who were directors of the private company during such period for which tax amount is to be paid shall be jointly and severally be liable for the payment of GST liability. Further, if A fails to pay the liability, then B&C shall be liable to pay the amount. But in case, B proves to the satisfaction of the Commissioner that such liability is not due to his neglect then he can be exonerated from the liability to make the payment and in such scenario only C shall be liable to pay the dues.

Certain important definitions

- **Commissioner**

Section 2(24) of the CGST Act, 2017 provides as under-

“Commissioner” means the Commissioner of Central Tax and includes the Principal Commissioner of Central Tax appointed under section 3 and the Commissioner of Integrated Tax appointed under the Integrated Goods and Services Tax Act;

Handbook on Liability to Pay in Certain Cases under GST

Thus, a Commissioner is a Commissioner of Central Tax and also includes –

- Principal Commissioner of Central Tax appointed under section 3 of CGST Act, 2017
- Commissioner of Integrated Tax appointed under the Integrated Goods and Services Tax Act

The terms 'private company' and 'director' are not defined under the CGST Act and therefore one could refer to the Companies Act, 2013 for their meaning.

As per section 2(68) of the Companies Act, 2013 "private company" means a company having a minimum paid-up share capital as may be prescribed, and which by its Articles,—

- (i) restricts the right to transfer its shares;
- (ii) except in case of one person company, limits the number of its members to two hundred:

Provided that where two or more persons hold one or more shares in a company jointly, they shall, for the purposes of this clause, be treated as a single member:

Provided further that—

- (A) persons who are in the employment of the company; and
- (B) persons who, having been formerly in the employment of the company, were members of the company while in that employment and have continued to be members after the employment ceased,

shall not be included in the number of members; and

- (iii) prohibits any invitation to the public to subscribe for any securities of the company;

Thus, the essentials of a private company are as under-

- Minimum paid-up share capital
- Right to transfer shares cannot be exercised
- Maximum two hundred members except in case of one person company where only one person is a member. However, the First Proviso

mentions that if two or more persons hold one or more shares in a company jointly, they shall be treated as single member. The Second Proviso mentions that employees of the company and such persons who were employees of the company and also members of the company during their employment and after their employment have continued to be members of the company shall not be included in the number of members.

- Public cannot subscribe to the securities of the company

Section 2(34) of the Companies Act, 2013 provides as under –

"director" means a director appointed to the Board of a company.

Thus, director is a person who is appointed to the board of a company who shall act to promote the objects of the company.

Liquidator has nowhere been defined under CGST Act, 2017, but under Companies Act, 2017 it has been defined as under—

(23) – Company Liquidator, in so far as it relates to the winding up of a company, means a person appointed by—

(a) the Tribunal in case of winding up by the Tribunal; or

(b) the company or creditors in case of voluntary winding up,

as a Company Liquidator from a panel of professionals maintained by the Central Government under subsection (2) of section 275

Thus, in the case of winding up of a company by the order of Tribunal, a liquidator is appointed by the Tribunal itself or in case of voluntary winding up, a liquidator is appointed by the company or creditors. The appointment is done by choosing from the panel of professionals maintained by the Central Government under sub-section (2) of section 275 of the Act.

6. LIABILITY OF DIRECTORS OF PRIVATE COMPANY (SECTION 89)

6.1 Bare law

(1) Notwithstanding anything contained in the Companies Act, 2013 (18 of 2013), where any tax, interest or penalty due from a private company in respect of any supply of goods or services or both for any period cannot be recovered, then, every person who was a director of the private

company during such period shall, jointly and severally, be liable for the payment of such tax, interest or penalty unless he proves that the non-recovery cannot be attributed to any gross neglect, misfeasance or breach of duty on his part in relation to the affairs of the company.

(2) Where a private company is converted into a public company and the tax, interest or penalty in respect of any supply of goods or services or both for any period during which such company was a private company cannot be recovered before such conversion, then, nothing contained in sub-section (1) shall apply to any person who was a director of such private company in relation to any tax, interest or penalty in respect of such supply of goods or services or both of such private company:

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

6.2 Analysis

Section 89 imposes liability on directors of private company to pay tax, interest or penalty in case such amount is not paid by such company.

Section 89(1) starts with the phrase '*Notwithstanding anything contained in the Companies Act, 2013 (18 of 2013)*' which means that provisions of this sub-section overrides the Companies Act, 2013. This sub-section states that if any tax, interest or penalty in respect of any supply of goods or services or both is due from a private company for any period and cannot be recovered then every person who was a director for such period will be jointly and severally liable for payment of such tax, interest or penalty. We can say that a vicarious liability is imposed on the directors in case of a private company although a private company is a separate entity.

No liability on directors in certain cases

But the directors cannot be held liable if they prove that the non-recovery of the tax, interest or penalty cannot be attributed to any gross neglect, misfeasance or breach of duty on their part in relation to the affairs of the company.

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

Handbook on Liability to Pay in Certain Cases under GST

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.

Section 89(2) deals with the situation when a private company gets converted into a public company. In such case if any tax, interest or penalty in respect of supply of goods or services or both cannot be recovered for any period during which the company was a private company, then anything contained in section 89(1) will not apply in relation to any tax, interest or penalty to any person who was a director of such private company. This means that when a private company gets converted into a public company then after the conversion if there is any unrecovered tax, interest or penalty due for any period when the company was a private company then the persons who were the directors at that time cannot be held liable for payment of such tax, interest or penalty. But it is provided that these provisions will not apply in case of any personal liability imposed on such directors. Section 89 of CGST Act, 2017 is similar to Section 179 of Income Tax Act, 1961 which reads as under-

"Liability of directors of private company in liquidation.

179. (1) *Notwithstanding anything contained in the Companies Act, 1956 (1 of 1956), where any tax due from a private company in respect of any income of any previous year or from any other company in respect of any income of any previous year during which such other company was a private company cannot be recovered, then, every person who was a director of the private company at any time during the relevant previous year shall be jointly and severally liable for the payment of such tax unless he proves that the non-recovery cannot be attributed to any gross neglect, misfeasance or breach of duty on his part in relation to the affairs of the company.*

(2) *Where a private company is converted into a public company and the tax assessed in respect of any income of any previous year during which such company was a private company cannot be recovered, 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 due*

Handbook on Liability to Pay in Certain Cases under GST

in respect of any income of such private company assessable for any assessment year commencing before the 1st day of April, 1962.

Explanation.—For the purposes of this section, the expression "tax due" includes penalty, interest or any other sum payable under the Act."

Thus, Section 179(1) provides that when any tax dues are unable to be recovered from a private company or any company in relation to an income relating to previous year during such period when it was a private company then every person who was a director of the company during such period shall be jointly and severally liable for the payment of such tax. However, he can be protected from the liability if he proves to the Commissioner that such gross neglect, misfeasance or breach of duty has not happened due to his action.

No liability in case of conversion into a Public Limited Company

Further, Section 179(2) provides that when a private company is converted into a public company, then the persons who were directors during such period when it was a private company, cannot be held liable for payment of tax dues for any assessment year prior to the assessment year 1962-63.

After discussing both the sections we can say, that section 89(2) under CGST Act, restricts the recovery of tax dues from the directors of a private company which has been converted into public company irrespective of putting any condition related to time period. While on the other hand, under Section 179(2) of Income Tax Act, personal liability can be imposed on such directors only for the tax dues after the commencement of the assessment year 1962-63. Thus, Section 89 of CGST Act, 2017 and Section 179 of Income Tax Act, 1961 appear to be *pari-materia* but such is not the case.

7. LIABILITY OF PARTNERS OF FIRM TO PAY TAX (SECTION 90)

7.1 Bare Law

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:

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

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

7.2 Analysis

Section 90 states the liability of partners of firm to pay tax, interest or penalty.

If any firm is liable to pay any tax, interest or penalty under the CGST Act, then the firm and each of the partners of the firm will be jointly and severally liable for payment of such tax, interest or penalty. The liability has been fastened irrespective of the amount of share of such partner in the partnership firm. Also, the liability has been fastened without giving protection as given to directors that in case a partner 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.

Liability of Partner to intimate his retirement

When any partner retires from the firm he or the firm will have to intimate the date of retirement to the Commissioner by a notice in writing. Then the retiring partner will be only liable for payment of tax, interest or penalty due up to the date of retirement whether such liability is determined on the date of retirement or thereafter. But if such intimation is not given within one month from the date of retirement then the liability of the retiring partner will continue till the date on which the intimation is received by the Commissioner. The terms 'partners' and 'firm' are not defined in the CGST Act and therefore one has to refer to section 4 of the Indian Partnership Act, 1932. 'Partner' has been defined under Section 4 of the Indian Partnership Act, 1932 as under-

Persons who have entered into partnership with one another are called individually, "partners" and collectively "a firm".

Handbook on Liability to Pay in Certain Cases under GST

Further, partnership has been defined under the Act as under-

"Partnership" is the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all.

It is important to note that the intimation of retirement of partner is required to be filed to relieve him of future liabilities notwithstanding the fact that such partner has intimated his joining earlier or not.

7.3 Examples

Suppose there is a partnership firm MNO & Co. with partners M, N and O and O retires on 3/7/2019. Tax, interest or penalty due till 3/7/2019 is Rs 400,000 and tax, interest or penalty due from 3/7/2019 to 2/8/2019 is Rs 100,000.

Case I: O intimated his date of retirement to Commissioner on 20/7/2019 (i.e. within one month).

In this case O will only be liable to pay tax, interest or penalty due till 3/7/2019 (i.e. the date of retirement) which equals Rs 400,000.

Case II: O intimated his date of retirement to Commissioner on 10/8/2019 (i.e. after one month) and the Commissioner received it on this date only.

In this case O will be liable to pay tax, interest or penalty due till 10/8/2019 (i.e. on receipt of intimation by the Commissioner) which will be 400,000 + 100,000 = Rs 500,000.

8. LIABILITY OF GUARDIANS, TRUSTEES OR AGENTS (SECTION 91)


8.1 Bare law

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.

8.2 Analysis

Section 91 deals with the liability to pay tax, interest or penalty of business carried on by guardian, trustee or agent of minor or other incapacitated person on behalf of such minor or other incapacitated person.

It says that in case of a business which is carried on behalf of and for the benefit of a minor or incapacitated person by

- Guardian,
 - Agent, or
 - Trustee
- 
- of such minor or incapacitated person,

any, tax, interest or penalty which is payable with respect to such business will be levied upon and recoverable from such guardian, agent or trustee.

The tax, interest or penalty will be levied and recoverable 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

- The minor is a major or,
- The incapacitated person is capacitated person.

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.

9. LIABILITY OF COURT OF WARDS, ETC (SEC 92)

9.1 Bare law

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.

9.2 Analysis

Section 92 deals with the liability of Court of Wards, the Administrator General, the Official Trustee or any receiver or manager to pay tax, interest or penalty.

It states that where the estate or any portion of the estate of a taxable person owning a business in respect of which tax, interest or penalty is payable under CGST Act is under the control of:

- Court of Wards,
 - The Administrator General,
 - The official Trustee
 - Receiver
 - Manager, or
 - Any other person who manages the business
- } appointed by or
under any order
of court

then such tax, interest or penalty will be leviable and recoverable from such:

- Court of Wards,
- The Administrator General,
- The official Trustee,

- Receiver,
- Manager, or
- Any other person who manages the business

in the like manner and to the same extent as it would be determined and be recoverable from the taxable person as if he was conducting the business himself.

10. SPECIAL PROVISIONS REGARDING LIABILITY TO PAY TAX, INTEREST OR PENALTY IN CERTAIN CASES (SECTION 93)

10.1 Bare law

(1) Save as otherwise provided in the Insolvency and Bankruptcy Code, 2016 (31 of 2016), where a person, liable to pay tax, interest or penalty under this Act, dies, then—

- (a) if a business carried on by the person is continued after his death by his legal representative or any other person, such legal representative or other person, shall be liable to pay tax, interest or penalty due from such person under this Act; and*
- (b) if the business carried on by the person is discontinued, whether before or after his death, his legal representative shall be liable to pay, out of the estate of the deceased, to the extent to which the estate is capable of meeting the charge, the tax, interest or penalty due from such person under this Act,*

whether such tax, interest or penalty has been determined before his death but has remained unpaid or is determined after his death.

(2) Save as otherwise provided in the Insolvency and Bankruptcy Code, 2016 (31 of 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.

(3) Save as otherwise provided in the Insolvency and Bankruptcy Code, 2016 (31 of 2016), where a taxable person, liable to pay tax, interest or penalty under this Act, is a firm, and the firm is dissolved, then, every person who was a partner shall, jointly and severally, be liable to pay the tax, interest or penalty due from the firm under this Act up to the time of dissolution whether such tax, interest or penalty has been determined before the dissolution, but has remained unpaid or is determined after dissolution.

(4) Save as otherwise provided in the Insolvency and Bankruptcy Code, 2016 (31 of 2016), where a taxable person liable to pay tax, interest or penalty under this Act,—

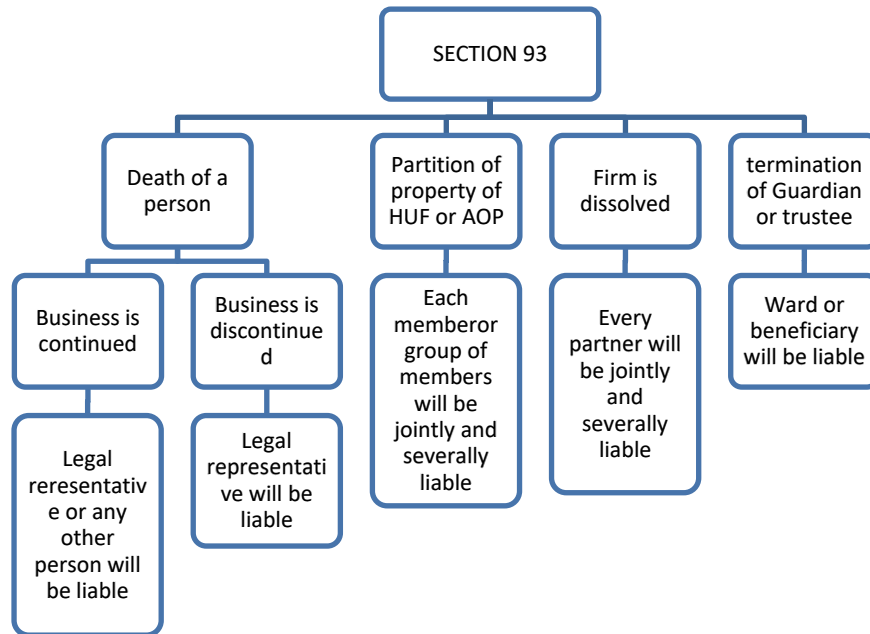
(a) is the guardian of a ward on whose behalf the business is carried on by the guardian; or

(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 up to 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.

10.2 Analysis

This Section provides for liability in case of death of an individual or dissolution of a HUF or termination of guardianship or liability on dissolution of firm etc. The cases covered are as under:



Liability on death of the proprietor

Section 93(1) states that if any person liable to pay tax, interest or penalty under CGST Act dies then,

- *If his business is continued after death*

If the business carried on by the person is continued after his death by legal representative or any other person then such legal representative or other person will be liable to pay tax, interest or penalty due from such person.

- *If the business is discontinued after death*

If the business carried on by the person is discontinued (whether before or after death) then his legal representative will be liable to pay tax, interest or penalty due from such person. The legal representative will make payment out of the estate of the deceased to the extent to which the estate is capable to meeting the liability. In such case, the liability has been limited to the recovery from the estate of the deceased.

Handbook on Liability to Pay in Certain Cases under GST

A legal representative has been defined under Section 2 of the Code of Civil Procedure, 1908 as under-

(11) "legal representative" means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued;

Thus, a legal representative can be defined as a person who has the authority to represent the estate of a deceased person in law and it also includes-

- A person who has the authority to handle the estate of the deceased person
- A person on whom the property of the deceased person is transferred after his death

As per Circular No. 96/15/2019 GST dated 28.03.2019 in case of transfer of business due to death of sole proprietor the successor shall be liable to pay any tax, interest or penalty due from such transferor.

Liability on partition of HUF

Section 93(2) deals with the liability of Hindu Undivided Family or association of persons to pay tax, interest or penalty in case of partition of property. It states that if any Hindu Undivided Family or association of persons

- is a taxable person, and
- is liable to pay tax, and
- has partitioned the property amongst the various members or group of members,

then each member or group of members shall, jointly and severally, be liable to pay any tax, interest or penalty due from the Hindu Undivided Family or association of persons up to the time of the partition. It will not matter if such tax, penalty or interest has been determined before partition but has remained unpaid or is determined after the partition.

Liability on dissolution of firm

Section 93(3) deals with the liability of the firm to pay tax, interest or penalty in case of dissolution. It states that where a firm

Handbook on Liability to Pay in Certain Cases under GST

- is taxable person, and
- is liable to pay tax, and
- 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 up to the time of dissolution. It will not matter if such tax, interest or penalty has been determined before the dissolution, but has remained unpaid or is determined after dissolution.

Liability on termination of guardianship

Section 93(4) is about the liability to pay tax, interest or penalty where the taxable person:

- is the guardian of a ward on whose behalf the business is carried on by the guardian; or
- is a trustee who carries on the business under a trust for a beneficiary

In this situation if the guardianship or trust is terminated, the ward or the beneficiary will be liable to pay the tax, interest or penalty due from the taxable person up to the time of the termination of the guardianship or trust. It will not matter if such tax, interest or penalty has been determined before the termination of guardianship or trust but has remained unpaid or is determined thereafter.

IBC to prevail over present Section

If there is anything contrary to section 93 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 section.

11. LIABILITY IN OTHER CASES (SECTION 94)

11.1 Bare law

(1) Where a taxable person is a firm or an association of persons or a Hindu Undivided Family and such firm, association or family has discontinued business—

- (a) the tax, interest or penalty payable under this Act by such firm, association or family up to the date of such discontinuance may be determined as if no such discontinuance had taken place; and*
- (b) every person who, at the time of such discontinuance, was a partner*

of such firm, or a member of such association or family, shall, notwithstanding such discontinuance, jointly and severally, be liable for the payment of tax and interest determined and penalty imposed and payable by such firm, association or family, whether such tax and interest has been determined or penalty imposed prior to or after such discontinuance and subject as aforesaid, the provisions of this Act shall, so far as may be, apply as if every such person or partner or member were himself a taxable person.

(2) Where a change has occurred in the constitution of a firm or an association of persons, the partners of the firm or members of association, as it existed before and as it exists after the reconstitution, shall, without prejudice to the provisions of section 90, jointly and severally, be liable to pay tax, interest or penalty due from such firm or association for any period before its reconstitution.

(3) The provisions of sub-section (1) shall, so far as may be, apply where the taxable person, being a firm or association of persons is dissolved or where the taxable person, being a Hindu Undivided Family, has effected partition with respect to the business carried on by it and accordingly references in that sub-section to discontinuance shall be construed as reference to dissolution or to partition.

Explanation.—For the purposes of this Chapter,—

- (i) a “Limited Liability Partnership” formed and registered under the provisions of the Limited Liability Partnership Act, 2008 shall also be considered as a firm;*
- (ii) “court” means the District Court, High Court or Supreme Court.*

11.2 Analysis

Section 94(1) will be operative where a taxable person is

- a firm
 - association of persons
 - Hindu Undivided Family
- } and has
discontinued
business

The tax, interest or penalty payable under CGST Act by such firm, association or family will be determined as if no discontinuance has taken place. Every person who was a partner or member will jointly and severally

Handbook on Liability to Pay in Certain Cases under GST

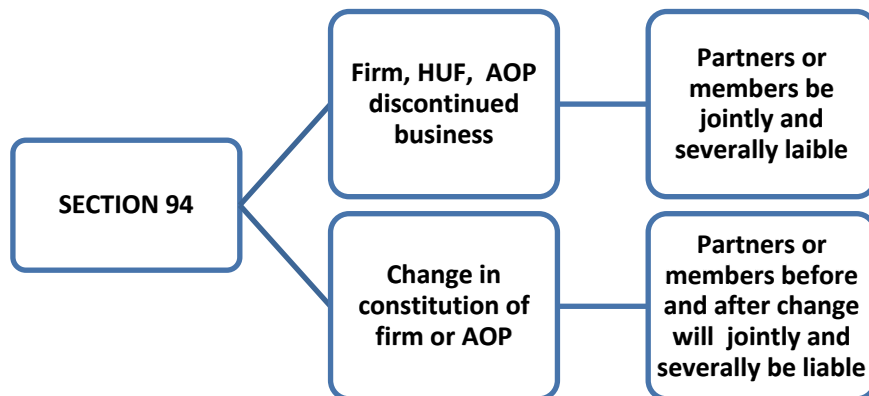
liable be for payment of such tax, interest or penalty whether imposed before or after discontinuance. Also, such partner or member will be deemed to be a taxable person himself. According to section 94(3) discontinuation of business in section 94(1) would mean:

- Dissolution in case of firm and AOP
- Partition in case of Hindi Undivided Family

Section 94(2) deals with the case when there is change in constitution of a firm or association of persons (AOP). 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.

Whenever there is a change in constitution of firm or AOP, the members or partners before the constitution as well as after the constitution will be liable to pay the tax, interest or penalty due for any period before the reconstitution. But if any partner retires from the firm, then the provisions of section 90 will override this section.



Handbook on Liability to Pay in Certain Cases under GST

For the purposes of Chapter XVI (Sections 85 to 94) of the CGST Act

- a “Limited Liability Partnership” formed and registered under the provisions of the Limited Liability Partnership Act, 2008 will also be considered as a firm
- “court” would mean the District Court, High Court or Supreme Court.