

The background of the slide is a blurred image of a stack of books. On the right side, the spines of several books are visible, including one with a yellow cover and others in dark and light colors. On the left side, there are two red vertical bars, one near the top and one near the bottom.

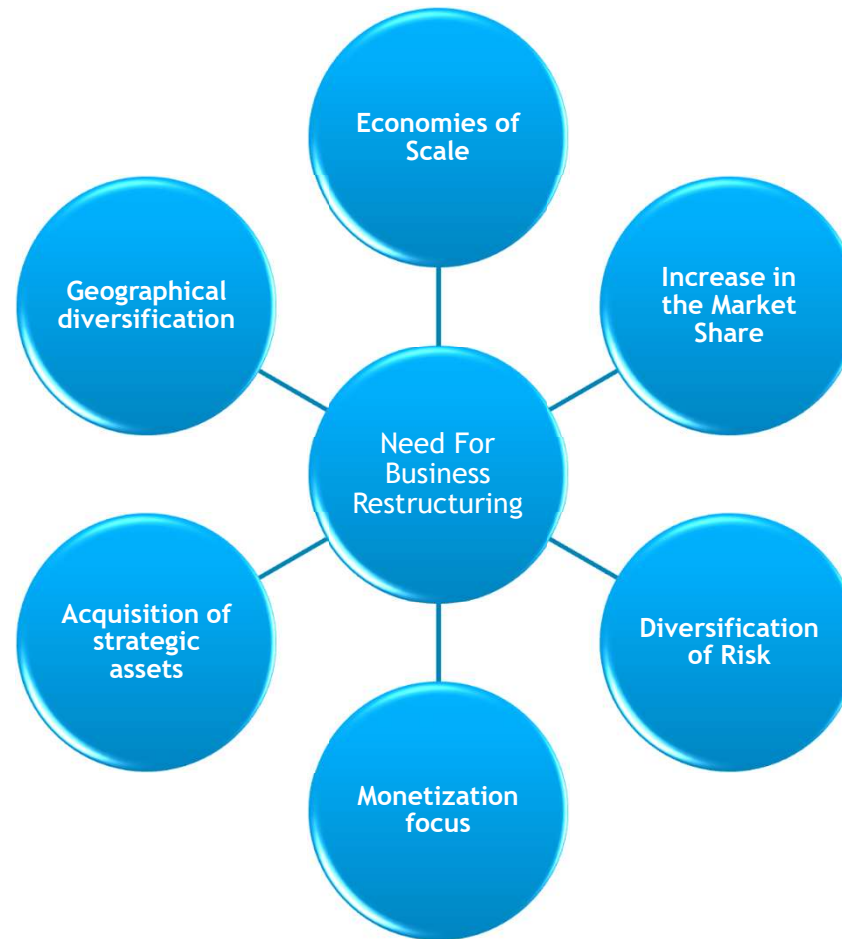
# Business Restructuring

## GST Implications

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## Need for business restructuring



# Types of Business Restructuring

## Mergers & Amalgamations

Combination of two or more entities into one entity, through NCLT

## Demergers or Hive off

Identified business undertaking transferred from one Co. to another and transferor Co. continues to remain in existence - Demergers also through NCLT

## Share Acquisition

Acquirer purchases shares/ securities of target entity from selling shareholders

## Slump Sale

Transfer of business undertaking from one Co. to another on a going concern basis against lumpsum consideration

## Itemised Sale

Acquirer only acquires identified assets from seller at agreed consideration against each of the individual assets

## Key GST provisions relating to business restructuring

Ref	Content
Section 18(3)	Transfer of unutilized ITC in case of transfer of business on going concern basis
Section 22(3), (4)	Transferee to get registered wef the date of transfer, In case of amalgamation/demerger scheme wef COI by ROC
Section 81	Transfer of property to be void in certain cases
Section 85	Joint and several liability of transferor and transferee for tax dues
Section 87	GST on transaction between transferor and transferee during the intervening period
Rule 41	Transfer of ITC in case of Sale, Merger, Amalgamation, Lease of Transfer of business
Circular No. 133/03/2020	Clarifications relating to transfer of ITC in case if merger/demerger
Notification No. 12/2017	GST exemption for transfer of business on going concern basis (Entry 2)

## Key judicial precedents relating to business restructuring

Citation	Summary
<b>Shilpa Medicare - 2020 (39) G.S.T.L. 334 (A.A.R. - GST - A.P.)</b>	Transfer of ITC in case of shifting of business from one State to another State of the same entity
<b>SCV Sky Vision - 2021 (54) G.S.T.L. 339 (A.A.R. - GST - A.P.)</b>	Transfer of business without transfer of liabilities does not qualify for exemption from GST
<b>Airports Authority of India - (2023) 6 Centax 26 (A.A.R. - GST - Raj.)</b>	Transfer of Jaipur International Airport to SPV under concession agreement qualifies for GST exemption
<b>Umicore Autocat india Pvt Ltd vs Union of India (2025) 32 Centax 416 (Bom.)</b>	Transfer of unutilized ITC lying in ECL of transferor company to amalgamated company is allowed irrespective of fact that companies are located in different States

## GST implications on transfer of business by way of going concern/ slump sale

Exemption Entry - Entry 2 of Notification No. 12/2017-Central Tax (Rate)  
*'Services by way of transfer of going concern, as a whole or an independent part thereof'*

### Prerequisites of exemption entry:

- There should be a transfer of entire business/concern (referred as 'undertaking') or an independent part thereof; and
- Such undertaking or an independent part should be transferred on going concern basis.

## Important concepts - going concern & slump sale

Going concern' is an **accounting concept**.

Accounting standards list down certain indicators of an entity that can be said to be going concern.

Transferred business should be an on-going business.

Guidelines of transfer of business as going concern:

- Asset must be sold as a part of a 'business' as a 'going concern';
- Purchaser intends to use asset to carry on same kind of business as seller;
- Where only part of business is sold, it must be capable of separate operation;
- There must not be series of immediately consecutive transfers.

**What is slump sale** - not defined under GST law.

Defined Income Tax Act, to mean transfer of one or more undertakings as a result of the sale for a lump sum consideration without values being assigned to the individual assets and liabilities in such sales

Transfer of business as a going concern as a whole is known as a slump sale in common parlance.



## Practical issues to avail exemption

**Transfer of all assets and liabilities is necessary?**

- No, provided transferee is in position to continue same business even such assets

**When only a division, unit or branch is transferred**

- Yes, business is said to be transferred on slump sale basis even if only a part of undertaking i.e., a unit or division is transferred

**Can allocation of consideration to various assets jeopardise exemption?**

- Ascribing value to various assets for justifying valuation of business or for accounting purpose would not jeopardize exemption



## ITC implications on transfer of business as going concern

- Section 17(2) of CGST Act read with Rule 42 of CGST Rules mandates reversal of ITC attributable to exempt supplies - as slump sale is exempt supply - ITC reversal required;
- Common ITC is reversed proportionate to value of business transfer which is usually very high;
- Can it be argued that till date of transfer of business, entity was engaged exclusively in taxable supply and same position continues even after the transfer of business - therefore, there is no common ITC and hence, no reversal ?
- No ITC on expenditure incurred exclusively for transfer of business.



## GST implications on Itemized sale

- This will amount to supply of each of the individual items of goods and GST applicable on such items at respective rates;
- No GST on transfer of land, building if the same are transferred as part of business;
- In case of transfer of capital goods - ITC to be reversed as per Sect 18(6) i.e., higher of the following:
  - Tax payable on transaction value; or
  - ITC to be reversed [as per rule 44(6) of CGST Rules] - which is ITC equal to ITC involved in remaining useful life (in months) computed on pro-rata basis taking total useful life as five years.



## GST implications on transfer of business by way of share transfer

- Under GST law definition of both 'goods' as well as 'services' excludes securities.
- No GST levy on sale of shares/ securities;
- Sec 17(3) - value of exempt supplies to include transaction in securities. Hence, ITC reversal required on sale of shares/ securities;
- Value of exempt supply for purpose of ITC reversal to be taken as 1% of the sale value as per Explanation to rule 45.



## GST implications on Mergers & Demergers

- **Mergers - GST neutral** - other common issues discussed in ensuing slides;
- **"Demerger** - term 'demerger' has not been defined in the GST laws or Company Laws. General meaning of said term implies transfer of an undertaking on a going concern basis by an existing company to a transferee company;
- Implications as discussed for transfer of business on a going concern basis will apply for demerger as well.

## Common procedural points/ issues

### Transfer of un-utilized ITC:

#### - Is the transfer mandatory?

- Section 18(3) **allows** transfer of ITC where there is change in constitution of registered person on account of sale, merger, demerger, amalgamation, lease or transfer of business, which remains unutilised in his electronic credit ledger

#### - Process of ITC transfer - Rule 41

- ITC 02 - to be filed by transferor - no timeline for filing this form but should be filed within reasonable time;
- CA certificate certifying specific provision for transfer of liabilities;
- Transferee to accept the details of ITC transferred for credit of ITC to his Electronic Credit Ledger;
- Transferee to account for inputs/ capital goods in his books of accounts.

## Common procedural points/ issues

**Circular No. 133 03/2020-GST dt 23 March 20 - Issues relating to transfer of ITC balance in case of transfer of business as going concern**

- For apportionment of ITC pursuant to a demerger, value of assets of new units to be taken at the State level and not at all-India level;
- Transferor can file Form ITC-02 only in those States where both transferor and transferee are registered;
- Ratio of value of assets transferred not to be applied for each head of taxes but to total balance of all heads of taxes and cesses;
- Transferor at liberty to determine amount of ITC to be transferred in each head of taxes, subject to availability of balance in such head;
- Formula for transferring the unutilised ITC to new unit has to be applied on ITC balance lying in electronic credit ledger as on the date of filing of Form GST ITC-02;
- For purpose of apportionment of ITC u/r 41(1), the ratio of value of assets should be taken as on the “appointed date of demerger” as specified in scheme of demerger.

## Common procedural points/ issues

### Obtaining new registration and Cancellation of registration by Transferor Co.

- **Appointed date** - date indicated in scheme from which the said scheme shall come into force - For E.g. 1 April 23
- **Effective date** - date on which a copy of the NCLT order sanctioning the scheme is filed with the ROC and COI has been issued (for new entity) - For E.g. 15 July 23
- **Order date** - Date of Court or Tribunal Order - For E.g. 30 June 23;
- As per section Sec 87 (2) - Two or more companies shall be treated as distinct companies for the period up to 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 i.e. 30 June 23;
- As per Sec 22 (4) - 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 i.e. 15 July 23;





## Common procedural points/ issues

### Non-compete clause

- **With Consideration**

- This would amount to supply as covered under “agreeing to refrain from doing an act” - subject to GST;
- Clarified vide Circular No. 178/10/2022 dated 3 August 2022;

- **Without Consideration**

- May be treated as part of overall transaction, as a condition to sale of business;
- In case sale of business is between related parties - non-compete will have to be valued and GST would be applicable.

## Key considerations relating to business restructuring

Particulars	Description
ITC transfer	File form ITC-02 based on ratio of assets transferred state-wise
Registration of transferee	Apply for registration in terms of Section 22(3)
Tax on transaction between merging entities	Considered as distinct persons and GST is applicable
Claim of exemption	GST exemption to be claimed only if going concern criteria is met
Cut off date	Cut off transaction to be carefully planned to avoid disputes relating to GST liability, claim of ITC, adjustment of credit notes etc.,
Pending disputes	Pending disputes to be carefully evaluated by transferee considering joint and several liability

## Common Practical Challenges (1 of 3)

Practical Challenges	Possible Solution
Invoice by Transferor Co. but CN issued by Transferee Co. post merger/ amalgamation	Recipient of CN to justify GSTR 2B mismatch of CN and Transferee Co. to justify reduced liability payment, at time of assessment
Advance received by Transferor Co. and such advance adjusted or invoice issued against such advance by Transferee Co.	Transferee Co. to justify reduced liability payment on invoicing, at time of assessment  Or Transferr co. to issue refund voucher and claim refund of GST paid on advance. Transferee co. to issue GST invoice and pay GST
Export undertaken by Transferor Co., export invoices disclosed in GSTR 1 and GSTR 3B of Transferor Co. A. Thereafter, business is transferred. Who should file the refund?	<ul style="list-style-type: none"> <li>• Ideally refund also should be filed by Transferor Co. and then, file a letter for credit of refund to Transferee B stating transfer of business</li> <li>• Alternatively, continue to operate bank account of Transferor Co. post transfer of business.</li> </ul>
Invoice received from vendor in name of Transferor Co. However, the same is accounted in books of accounts of Transferee Co. Since, invoice is issued in the name of Transferor Co. the same gets reflected in GSTR 2B of Transferor Co. In this case who can avail the ITC?	Transferee Co. can avail ITC even though it appears in GSTR 2B of Transferor Co. It can be argued that, as a successor of Transferor Co. reflection of the invoice in Transferor Co.'s GSTR 2B should be sufficient compliance of Rule 36(4)

## Common Practical Challenges (2 of 3)

Practical Challenges	Possible Solution
<p>Invoice received from vendor in the name of Transferor Co., however, Transferor Co. did not avail ITC as same did not reflect in GSTR 2B of Transferor Co. A.</p> <p>Subsequently, business was transferred. Later vendor reflected invoice in his GSTR 1 in the name of Transferor Co. and the invoice got reflected in GSTR 2B.</p>	<p>Transferee Co. can avail ITC even though it appears in GSTR 2B of Transferor Co. It can be argued that as a successor of Transferor Co. reflection of the invoice in Transferor Co.'s GSTR 2B is a sufficient compliance of Rule 36(4)</p> <p>In case the vendor is not able to report such invoice in the name of Transferor Co. (since GST registration of Transferor Co. would have been cancelled), then vendor can report such invoice as B2C and issue certificate stating that the invoice is reported under B2C (due to system constraints) on which GST is paid. Practically, such certificate should suffice for availment of ITC by Transferee Co.</p>
<p>Transferor Co. reversed certain ITC on account of non-payment to vendor within 180 days.</p> <p>Subsequently the business was transferred to and Transferee Co. B made payment of such invoices to the vendor.</p> <p>Whether Transferee Co. can re-avail ITC?</p>	<p>Transferee Co. can avail ITC even though ITC was reversed by Transferor Co. A. It can be argued that as a successor of Transferor Co. payment to vendor and re availment of ITC by Transferee can be done and the same is sufficient compliance of 2nd and 3rd proviso of section 16(2)</p>

## Common Practical Challenges (3 of 3)

Practical Challenges	Possible Solution
Demands and recovery in case of demerger	<ul style="list-style-type: none"><li>• Section 85(1) - transferor and transferee shall be jointly and severally liable up to the time of transfer irrespective of whether liability is determined before or after date of transfer</li><li>• An issue may arise as to whether SCN is to be issued to the transferor or transferee in respect of liability upto the date of transfer.</li><li>• Demands for the liability upto the time of transfer is to be determined only against the transferor.</li><li>• It is only on non-recovery of the same that the recovery can be initiated against transferee.</li></ul>



THANK YOU

