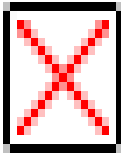


Slump sale versus Transfer of going business and Merger under GST

AUGUST 05 , 2020

By K Srinivasan



BUSINESS

restructuring is a comprehensive process, be it financial or technological or market or organizational. Business can be re-arranged by way of mergers, demergers, disinvestments, takeovers, strategic alliance or slump sale.

But transfer of a going concern is quite different from the above, in the sense that it has its independent existence even after its transfer and it needs to be functional and not defunct but really a going concern, regardless of whether it is profit making or not, to fit the above description.

Concept of Slump Sale

The concept of slump sale originates from the Income Tax Act, 1961. The IT Act, in section 2(42C) defines slump sale as the 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.

Further as per explanation 1 to section 2(19AA), "undertaking here shall include any part of an undertaking or a business activity taken as whole, but does not include individual assets or liabilities or any combination thereof not constituting a business activity.

Therefore, slump sale implies:

1. Sale of one or more undertakings
2. No individual value should be assigned to assets and liabilities, and the same to be sold for a lump sum consideration, and
3. All assets and liabilities of the undertaking must be transferred.

A major precondition of a slump sale is that all assets and liabilities of the business undertaking must be transferred together, to the buyer.

While doing so, the immovable part namely Land and buildings or Plant, would be rightly excludable from the scope of Supply, and the consideration for the same will not enter the valuation as per Explanation to Sec 17(3) of the Act, in view of Para 5 of Schedule III, treating it as neither a good nor a service.

As per Section 50B of IT Act, the cost of acquisition of such sale shall be the net worth (book value of assets and liabilities) of the undertaking.

Explanation 1 provides the method of computing the net worth of an undertaking or a division sold on slump sale basis. As per Explanation 1 - For the purposes of this section, net worth shall be the aggregate value of total assets of the undertaking or division as reduced by the value of liabilities of such undertaking or division as appearing in its books of account.

There are various judicial pronouncements where there is difference of opinion that it is not essential to transfer all assets and liabilities for a transaction to qualify for a slump sale.

That even if some assets are retained by the transferor and the undertaking after such transfer carries out its business activities without any obstruction, it shall still qualify to be a slump sale.

Since all assets and liabilities are to be transferred in a slump sale, it is important for one to understand the concept of going concern to distinguish one from another.

Concept of Going Concern

The terminology, going concern is not precisely mentioned in the definition of slump sale. Transfer as a going concern means transfer of a business or a unit which is capable of being carried on by a purchaser as an independent business.

To constitute a slump sale, it is not necessary that the business should be ongoing at the time of its transfer.

An enterprise is normally viewed as a going concern, that is, as continuing in operation for the foreseeable future. It is assumed that the enterprise has neither the intention nor the necessity of liquidation nor of curtailing materially the scale of the operations.

To constitute a slump sale, all the assets and liabilities of the undertaking need to be transferred. Therefore, it can be said that companies whose operations are shut; is into liquidation may also opt for slump sale provided the conditions mentioned above are met.

The intention of such condition is to ensure that the business will continue in the new hands with regularity and a sense of permanence.

Further, it is not necessary that the entity should be a profit making company. The only valid point to be considered for a transfer to constitute as a going concern is, to mean if it constitutes a business activity capable of being run independently into a foreseeable future.

The term going concern, finds no mention except in Para 4(c)(i) of Schedule II to the GST Act, where it implies negatively that it is a supply of service by excluding it from the scope of supply of goods.

However, one can also refer to the pronouncement of the Advance Authority Ruling in case of Rajashri Foods Pvt. Ltd - [2018-TIOL-36-AAR-GST](#) for the same as mentioned below:

1. A going concern is a concept of accounting and applies to the business of the company as a whole.
2. Transfer of a going concern means transfer of a running business which is capable of being carried on by the purchaser as an independent business
3. Such transfer of business as a whole will comprise comprehensive transfer of immovable property, goods and transfer of unexecuted orders, employees, goodwill etc.

Transfer of business assets as referred to in Para 1 of Schedule I to the CGST Act implies, where part of the assets are transferred and not the whole business, i.e. the liabilities remain in the books of the transferor, whereas in transfer of business, all assets and liabilities are transferred together, then the ITC availed on the same would require reversal of the same. [N. N o. [12/2017- Central Tax \(Rate\)](#) dated 28th June 2017 vide Serial No. 2 read with Sec 17(2) of the CGST [Act, 2017](#) & Rule 42 of the CGST [Rules, 2017](#) refers]

The concept of transfer of going concern comes in to play when the business as a whole is transferred with all its assets and liabilities and in which case the ITC availed also gets to be transferred to the buyer.

However, case laws and analysis do point at the likelihood of transfer of assets alone to also mean transfer of a business as a going concern.

Therefore, it is not known conclusively whether transfer of going business mandates transfer of not only assets but also liabilities together with such transfer of business as a going concern.

Merger

In terms of Section 18(3) of the GST Act, if 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.

ITC remaining un-utilized in his electronic credit ledger can be transmitted to such sold, merged, demerged, amalgamated, leased or transferred business in the manner prescribed in the GST Rules, 2017 by declaring the same, electronically, on the common portal in Form GST ITC-02.

Rule 41(2) of the CGST Rules provides that the transferor shall also submit a copy of a certificate issued by a practicing chartered accountant or cost accountant certifying that the sale, merger, de-merger, amalgamation, lease or transfer of business has been done with a specific provision for the transfer of liabilities.

[The Author is a former Assistant Commissioner of GST, Chennai and a CBIC Master Trainer, GST and currently a Senior Associate, Indirect & Corporate Taxes, at a Chennai-based Law Firm, RANK Associates. The views of the Author are purely personal.]

(DISCLAIMER : The views expressed are strictly of the author and Taxindiaonline.com doesn't necessarily subscribe to the same. Taxindiaonline.com Pvt. Ltd. is not responsible or liable for any loss or damage caused to anyone due to any interpretation, error, omission in the articles being hosted on the site)