

GST ARTICLE

Transfer of going concern - Re(de)fining GST exemption

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In this economy on the superfast highway, transferring business by way of an outright sale, merger, demerger and amalgamation for a substantial amount of consideration in return has

ceased to be an exception and is a norm today. Transfer of a running business is given exemption from GST by way of [Notification No. 12/2017-Central Tax \(Rate\)](#) as long as it is in the nature of a going concern. Going concern is not defined under the Central Goods and Services Tax Act, 2017 ("CGST Act") and hence the term and therefore, the exemption is open to interpretation by the authorities and courts. Considering the enormous amount of money involved in such transfers, the primary concern of the parties involved is whether exemption is actually applicable on such business transfers. This may call for a purposive interpretation of the entry given under the exemption notification as the ultimate objective behind the exemption is to support the businesses that are suffering losses or are about to become insolvent so that they are revived and given a fresh lease of life so as to result in a win-win situation for all - employer, employees and the economy. In these circumstances, it may not be reasonable to levy GST on such transfers. Considering the importance of this exemption, this article attempts to throw light on various rulings on this issue to decipher the pattern of interpretation.

Sale of factory as a whole

One of the earliest rulings on this issue is by Uttarakhand Authority for Advance Ruling in the case of *Innovative Textiles* [[2019-VIL-125-AAR](#)]. In this case, the applicant was in the business of manufacturing of textile yarns, fabrics and garments and intended to sell a particular manufacturing facility as a whole along with all assets and liabilities to another company engaged in the same field

of business. The question dealt in this case was whether as per the "Business Transfer Agreement" (BTA), transfer as a going concern on slump sale basis was exempted from the levy of GST as per Notification No. 12/2017-CT (Rate). The AAR after analyzing the facts observed that the business which was sought to be transferred from the applicant to the purchaser was in a running state and as a going concern on slump sale basis along with all assets and liabilities. Further, AAR observed that the transfer fell under the scope of the term 'business' given under [Section 2\(17\)](#) of CGST Act and with the aim of continuing the business as it is. Therefore, the ruling went in favour of the applicant effectively exempting the transfer from GST.

Transfer of under-construction project

In a subsequent ruling by the same AAR involving a real-estate developer, a strange question was involved since an under-construction project was transferred to a new entity [*Rajeev Bansal & Sudershan Mittal - [2020-VIL-83-AAR](#)*]. The applicant was a partnership firm engaged in the business of constructing residential / commercial complexes and intended to sell one of their under-construction projects to another company which intended to complete the construction and sell it. The issue dealt in this case was whether transfer of such under-construction project as a going concern was exempted from levy of GST. The transfer included transfer of ownership of land, incomplete flats constructed on the land and the approved map/blueprint of the project. The AAR was satisfied that there was a transfer of business as a whole along with an intention to continue it. This ruling also went in favour of the applicant exempting the said transfer from GST.

Admissibility of exemption when liabilities are not transferred

In contrast to the above rulings, the Andhra Pradesh AAR ruled against the applicant holding that they were not entitled to exemption [*SCV Sky Vision - [2021-VIL-294-AAR](#)*]. In this case the applicant was engaged in cable operation business and they entered into a 'Business Transfer Agreement' with another company, which was also engaged in provision of similar services. In terms of

the BTA, all rights, title and interest in the business, assets, subscribers/ customers, linked local cable operators would be transferred from applicant to the buying entity as a going concern except the liabilities which have presently arisen or will arise for the past business relationship/ earlier period and the employees.

The AAR observed that in order to be considered as a 'going concern', the assets and liabilities being transferred should constitute a business activity capable of being run independently for a foreseeable future, which was the ratio as per the judgment of the Supreme Court in *Allahabad Bank v. ARC Holding* [AIR 2000 SC 3098] and Delhi High Court in *Indo Rama Textile Limited* [(2013) 4 Comp LJ 141 (Del)]. Since, the liabilities were not transferred by the applicant, the transfer was not a transfer as going concern and not covered under exemption provided in S. No. 2 of Notification No.12/2017-Central Tax (Rate).

Transfer of an independent part

The recent ruling on this issue is in the case of Airport Authority of India (AAI) wherein bidding was conducted to develop and run the Sardar Vallabhbhai Patel Airport (Ahmedabad) under PPP model [[2021-VIL-349-AAR](#)]. The successful party was awarded Letter of Award and in pursuance of the same, concessionaire was required to form Special Purpose Vehicle Company (SPV), which will enter into concessionaire agreement with the AAI for operation, management and development of the airport. The Applicant sought advance ruling as to whether the transfer of such part of the business is supply as a going concern and therefore, exempted from GST.

The Authority for Advance Ruling (AAR) observed that the plain meaning of the words "services by way of transfer of a going concern" in the exemption notification is 'transfer of a going concern service' and transfer of business may be as a whole or independent part which is supply of service. It held that according to the contract, the transfer in this case was "Transfer of going concern service" as an independent part and the concession fee was a part of the consideration paid by SPV to the applicant and the same would be exempted

from GST on the ground that the SPV will continue to successfully operate the said business for a foreseeable future of fifty years.

Conclusion

A brief analysis of the above rulings may lead to the conclusion that the term "going concern" is required to be statutorily defined in order to avoid interpretation contrary to the objective behind the exemption granted to transfer of business. The entry in S. No. 2 of Notification No. 12/2017-Central Tax (Rate) may require an amendment to include transfers where despite retention of one or two assets and liabilities by the transferor, the transaction shall be considered as transfer of going concern so long as the business can be carried on independently and the intention of the parties is to transfer such independent business unit.

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