

PROVIDENCE OF “SLUMP SALE” IN GST

INTRODUCTION

The taxation regime for “Slump Sale” in India has always been a matter of differential judicial views. In M&A transactions, “Slump Sales” are considered to be one of the most preferred ways of carrying out a deal due to various tax and stamp duty incentives associated with it. Slump sale, in simple terms mean, transfer of a whole or part of business as a going concern in which all the assets and liabilities of a business are transferred to a purchaser for a lump-sum consideration without assigning values to the individual assets and liabilities. In other words, there must be a sale of all assets and liabilities of the target business for a lump-sum price. As per Section 50 B read with Section 2(42C) of the Income Tax Act, 1961, Slump Sale means:-

- 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.

APPLICABILITY/NON-APPLICABILITY OF GST- A REASON FOR DOUBT

As per Section 7(1) of CGST Act 2017, the expression “supply” includes-- all forms of supply of goods or services or both such as sale, transfer, barter, exchange, license, rental, lease or disposal made or agreed to be made for a consideration by a person in the course or furtherance of business. From the perusal of this section it may be presumed that slump sale does not amount to sale of goods, as it is a contract for sale of business as a whole and not mere sale of goods. Further, slump sale is a transaction not carried out in the course or furtherance of business.

However, the definition of ‘business’ under section 2(17) of CGST Act 2017 includes *supply or acquisition of goods including capital goods and services in connection with commencement or closure of business*, thereby adding a contradictory view that the transaction of slump sale can be said to be ‘supply’ and, hence, leviable to GST.

CLARIFICATION ON APPLICABILITY OF GST ON SLUMP SALE BY ADVANCE RULING

The matter came up for consideration before AAR-Karnataka in the case of **M/S RAJASHRI FOODS PVT. LTD**(*Advance Ruling No. KAR ADRG 06/2018*) wherein it was held that

The activity of transfer of a going concern constitutes a supply of service. A going concern is a concept of accounting and applies to the business of the company as a whole. 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. Also, the transaction of transfer of one of the units of the Applicant as a going concern is covered under Sl. No. 2 of the Notification No. 12/2017-Central Tax (Rate) dated 28.06.2017 subject to the condition that the unit is a going concern.

SI. No. 2 of the Notification No. 12/2017-Central Tax (Rate) dated 28.06.2017 is reproduced herewith:

Table

Sl. No.	Chapter, Section, Heading, Group or Service Code (Tariff)	Description of Services	Rate (per cent.)	Condition
(1)	(2)	(3)	(4)	(5)
1	Chapter 99	Services by	Nil	Nil
2	Chapter 99	Services by way of transfer of a going concern, as a whole or an independent part thereof.	Nil	Nil

Accordingly the sale of slump sale will be treated as sale of going concern and thus will fall under entry 2 of the Notification No. 12/2017-Central Tax (Rate) dated 28.06.2017 and is fully exempt without any conditions attached to it.

AVAILABILITY OF INPUT TAX CREDIT IN CASE OF SLUMP SALE

That, since the lumpsum consideration received for 'Slump Sale' of business is exempt from GST, as stated above thus no tax would be charged on the consideration exchanged between the parties. The transferor would be issuing a bill of supply as per section 31(3) (c) of the CGST Act, 2017. Since no tax would be charged on the consideration, therefore the question of availability of input tax credit would not arise at all.

Further even otherwise in order to consider the availability of input tax credit in case of slump sale we need to refer the conditions for availing input tax credit under Section 16 of CGST Act 2017 which clearly states that no registered person shall be entitled to the credit of any input tax in respect of any supply of goods or services or both to him unless,--

(a) He is in possession of a tax invoice or debit note issued by a supplier registered under this Act, or such other taxpaying documents as may be prescribed;

(b) He has received the goods or services or both.

(c) subject to the provisions of section 41, the tax charged in respect of such supply has been actually paid to the Government, either in cash or through utilization of input tax credit admissible in respect of the said supply; and

(d) He has furnished the return under section 39

Since in the instant case the supplier is supplying the exempt supply as per Entry 2 of Notification No. 12/2017-Central Tax (Rate) dated 28.06.2017 thus he shall be issuing Bill of Supply as per Section 31(3) (c) of CGST Act 2017. This would debar him to avail the benefit of Input Tax Credit as he would not be in possession of tax invoice.

Input Tax Credit of ITC transferred on slump sale -On transfer of business

The next question that arises for consideration is that what will be the fate of ITC lying as credit balance in the account of the transferor entity?

As per Section 18(3) of CGST Act 2017 read with Rule 41 of CGST Rules 2017 it is amply clear that the registered person shall be allowed to transfer the input tax credit which remains unutilized in his electronic credit ledger to such sold, merged, demerged, amalgamated, leased or transferred business.

In case of transfer of credit on sale, merger, amalgamation, lease or transfer of a business.-

1. A registered person shall, in the event of sale, merger, de-merger, amalgamation, lease or transfer or change in the ownership of business for any reason, furnish the details of sale, merger, de-merger, amalgamation, lease or transfer of business, in **FORM GST ITC-02**, electronically on the common portal along with a request for transfer of unutilized input tax credit lying in his electronic credit ledger to the transferee.
2. 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.
3. The transferee shall, on the common portal, accept the details so furnished by the transferor and, upon such acceptance, the un-utilized credit specified in **FORM GST ITC 02** shall be credited to his electronic credit ledger.
4. The inputs and capital goods so transferred shall be duly accounted for by the transferee in his books of account
5. And by such way the transferee shall be entitled to the ITC transferred as part of transfer business as a going concern in the form of slump sale.

VALUATION UNDER SLUMP SALE

Once it is clear that the activity of transfer of a going concern constitutes a supply of service thus it is imperative to determine the valuation scheme applicable if the transaction is between 'related parties' even if it is fully exempt supply as per Notification No. 12/2017-Central Tax (Rate) dated 28.06.2017.

Since GST is levied on the value of supply therefore determination of Value of taxable supply is of utmost importance for determining the 'value' of the goods/services on which tax has to be calculated. In order to compute Value of taxable supply in above transaction one must refer Section 15 of CGST Act 2017 read with Rule 28 of CGST Rules 2017.

Rule 28 of CGST Rules 2017 provides three limbs to determine valuation between related parties. These are as follows:-

- (a) Open market value of such supply
- (b) If the open market value is not available, be the value of supply of goods or services of like kind and quality
- (c) If the value is not determinable under clause (a) or (b), be the value as determined by the application of rule 30 or rule 31, in that order

Provided that where the goods are intended for further supply as such by the recipient, the value shall, at the option of the supplier, be an amount equivalent to ninety percent of the price charged for the supply of goods of like kind and quality by the recipient to his customer not being a related person:

On applying the rationale of slump sale it shall be noted that:-

- ❖ Slump sale is not an open market sale, since it is not normally made available in the market
- ❖ Each slump sale is unique and there cannot be any services of a like kind and quality
- ❖ The proviso is not applicable as it is not intended for further supply as such
- ❖ Cost of production or manufacture is not applicable
- ❖ Cost of acquisition is not applicable as the supply is one of service of business as going concern

Thus in the light of the above analysis it is clear that Rule 28 is not applicable.

If we move further to Rule 30 of CGST rules the same deals with cost of provision of service. Now, again there might be a dilemma whether to treat slump sale as cost of provision of services or not. Thus to avoid all sorts of ambiguity one may straight away jump to Rule 31 of CGST Rules 2017.

Rule 31 of CGST Rules 2017 provides as follows:-

“31. Residual method for determination of value of supply of goods or services or both

Where the value of supply of goods or services or both cannot be determined under rules 27 to 30, the same shall be determined using reasonable means consistent with the principles and the general provisions of section 15 and the provisions of this Chapter”.

Hence we may conclude that the ‘transaction value’ will be the net consideration agreed between the parties.

To summarize:

1. The transaction of slump sale will be treated as Supply of service-Transfer of business as whole as going concern
2. The transaction is fully exempt under GST
3. The Supplier has to issue a Bill of Supply
4. The net consideration payable as agreed between the parties will be the transaction value of supply of service
5. The transferee is entitled for the ITC lying as credit balance of the transferor entity as part of slump sale

(The views expressed in the article are strictly personal.)

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