

The background of the slide is a blurred office scene. On the left, a computer monitor displays a blue and white data visualization, possibly a chart or spreadsheet. In the center, the back of a person's head and shoulders, wearing a dark suit jacket, is visible. On the right, a window with a grid pattern is seen, looking out onto a bright, possibly overcast day. A large, bright yellow trapezoidal shape is overlaid on the right side of the image, containing the text.

Mergers, Acquisitions, Demergers & Business Structuring – Indirect Tax Issues & Solutions

May 2023

Mechanisms

Supply – Transfer - Sale

Transfer of business –
supply of service

Permanent / temporary

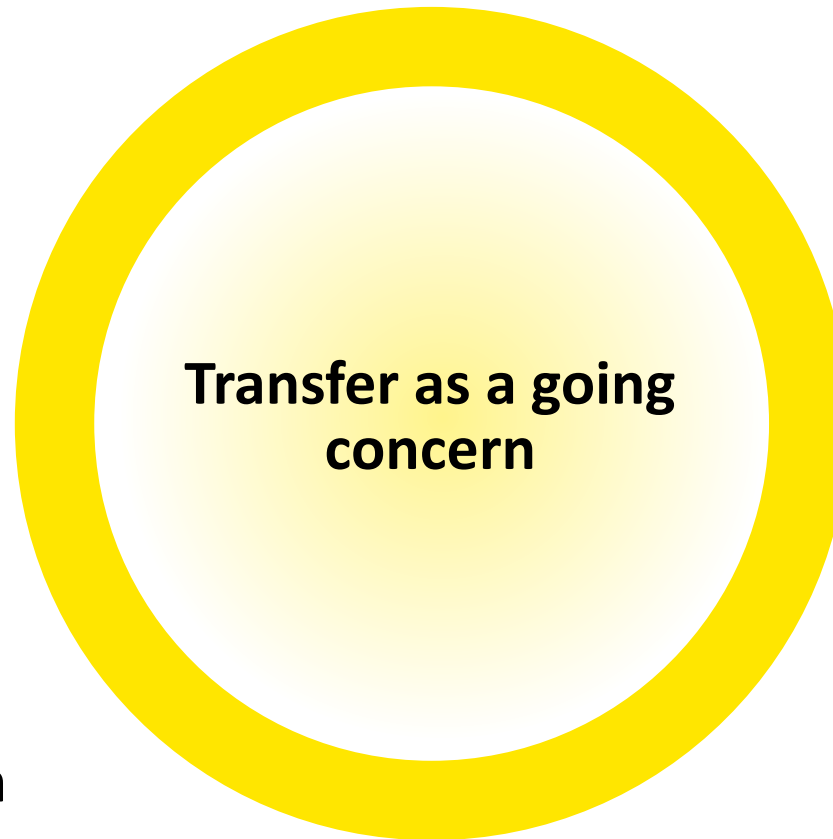
Transfer – exclusion of
the transferee

Of a going concern

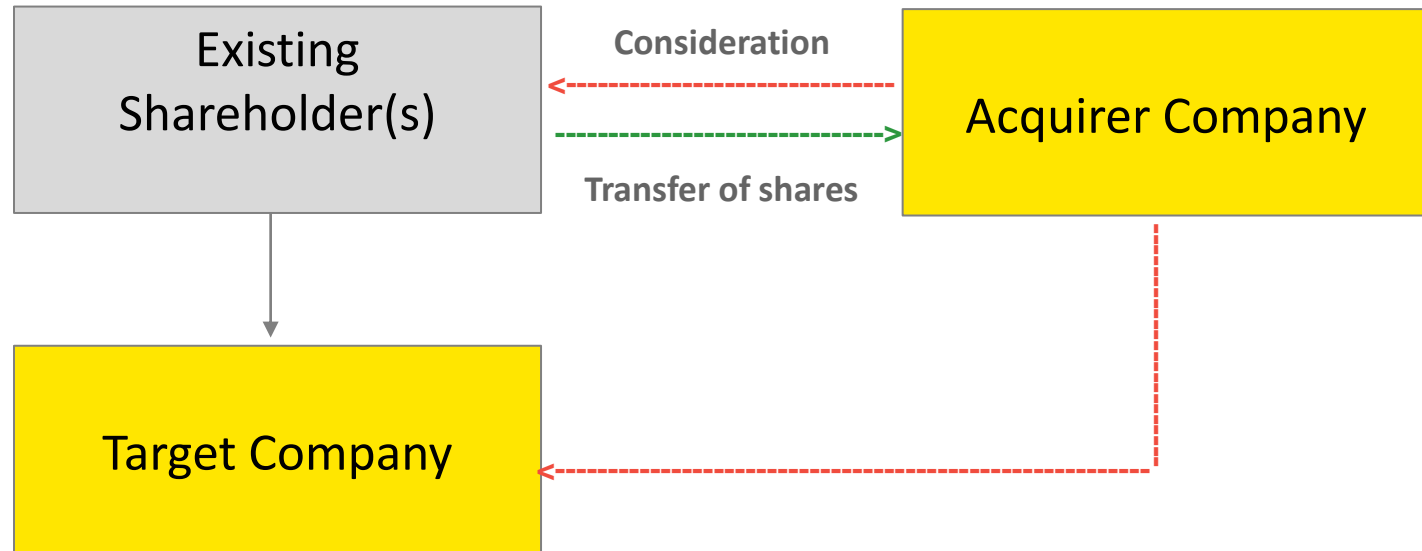
Transfer of liabilities

Lumpsum consideration

In the course of
furtherance of
business



Transfer through Share Acquisition



Other Implications

Transferor Co

1% of the Value of transferred shares is Exempt supply. ITC reversal required

Transferee Co

No explicit restriction to claim ITC in respect of goods or services procured for shares acquisition.

GST Implications

Output Tax

- ▶ Securities excluded from definition of good as well as services.
- ▶ Hence, not taxable under GST

Input Tax Credit

For Co. whose shares are transferred

No impact

For transferor of shares

Exempt supply as per Sec 17(3) of the CGST Act.

Itemised Sale



Output Taxability

Particulars	Output Tax
Fixed assets	At rate applicable on such goods
Land & Building	No GST on sale
Investments	No GST on transfer
Stock in trade	At rate applicable on such goods

Input Tax Credit

Transferor	Transferee
Can avail ITC of goods or services procured for making taxable supplies.	Can avail ITC on GST paid on procurement of assets.
ITC will not be available in respect of exempt or non-taxable supplies	

Key Points

- ▶ Itemised sale, values are assigned to individual assets
- ▶ Mixed supply where separate consideration is not identified
- ▶ GST to apply – rate of tax, location of supply?

Slump Sale

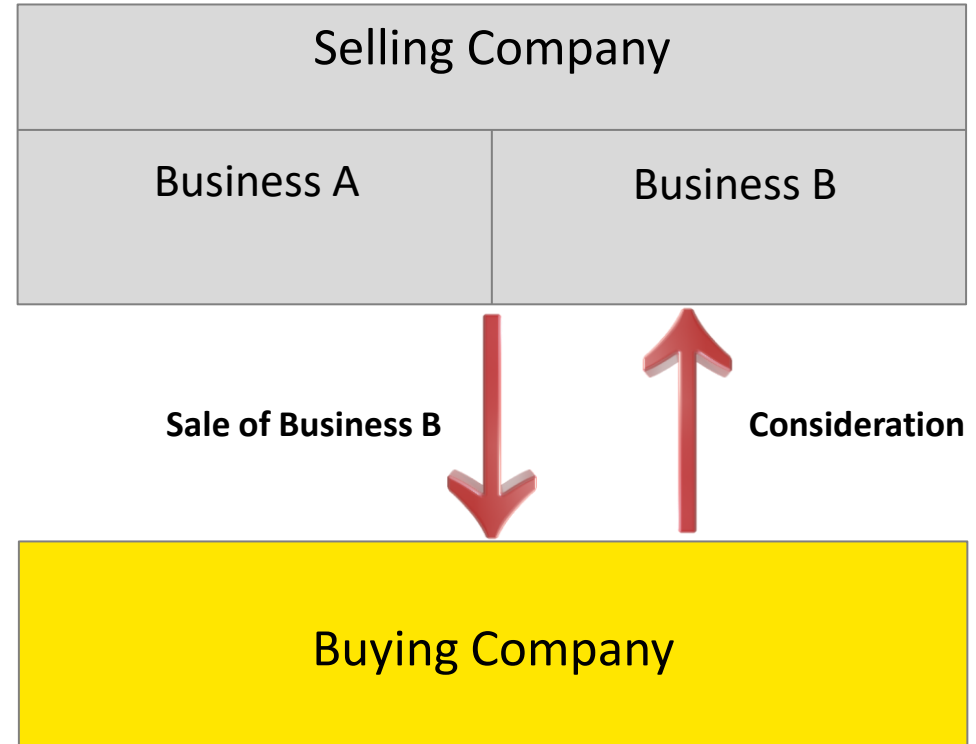
▶ No reference or definition of slump sale under the GST Act

▶ Slump Sale defined under Income Tax Act which means:

*“the transfer of one or more **undertaking** as a result of the sale for a lump sum consideration without values being assigned to the individual assets and liabilities in such sales.”*

▶ Undertaking includes

“any part of an undertaking, or a unit or division of an undertaking or a business activity taken as a whole, but does not include individual asset or liabilities or any combination thereof not constituting a business activity”



Generally, slump sale would qualify as transfer of business on a going concern basis

Rulings by Authority of Advance Rulings (AAR)

» Rajshree Foods Private Limited

- ▶ Karnataka AAR has held that transfer of one of the units of the applicant as a going concern is covered under the exemption entry and hence, no GST leviable on business transfer.

» B M Industries

- ▶ Haryana AAR has observed that as per para 4(c) of the Schedule II, transfer of business as a going concern is not a supply and thus same stands excluded from the scope of supply. Accordingly, the transferor is not liable to pay GST.

» AAI

- ▶ Rajasthan AAR held that transfer of business by AAI to M/s Adani Jaipur International Airport Private Limited shall be considered as supply.
- ▶ Transfer of business shall be covered under exemption notification as it is transfer by way of going concern.

Implications on Input Tax Credit

For transferor

- ▶ Services by way of transfer as a going concern is exempt, ITC not available in respect of supply used for such business transfer. **(AAR, Rajasthan, M/s Airport Authority of India, 2023(4) TMI 959)**
- ▶ Goods or services procured partly utilized for taxable and partly for exempt supplies, whether consideration received for slump sale will form part of exempt turnover for calculating ITC attributable to exempt supplies?
- ▶ Whether transfer of business can be treated as in the course or furtherance of business? **(AP High Court in case of Coromandel Fertilizers Limited—[1999] 112 STC 1 (AP)**

For Transferee

- ▶ No explicit restriction to claim ITC in respect of goods or services procured for business acquisition
- ▶ Transferee is not providing the exempt supply of business transfer and hence, ITC restriction which applies to transferor does not apply to transferee.
- ▶ Credits to be transferred by transferor through ITC-02 – can multiple transfer be done?

Balance of Unutilized Input Tax Credit

Section 18(3) of CGST Act provides for transfer of utilized ITC in case of transfer of business

*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.*

Unutilized ITC

- In case of transfer of business, transfer of balance unutilized ITC (matched) shall be allowed

Transfer of liabilities

- Imposes condition of transfer of liabilities
- Whether all liabilities or any specific class of liabilities to be transferred?

Whether transfer mandatory

- Transfer of unutilized ITC is not mandatory (M/s Bharti Airtel Ltd-2018-TIOL-1484-CESTAT-CHD)

Slump Sale

(cntd..)

Rule 41-Transfer of credit on sale, merger, amalgamation, lease or transfer of a business.



Circular 133/03/2020-GST dated 23 March 2020

Value of assets - means value of entire assets of the business, whether or not input tax credit has been availed thereon **(At state level)**

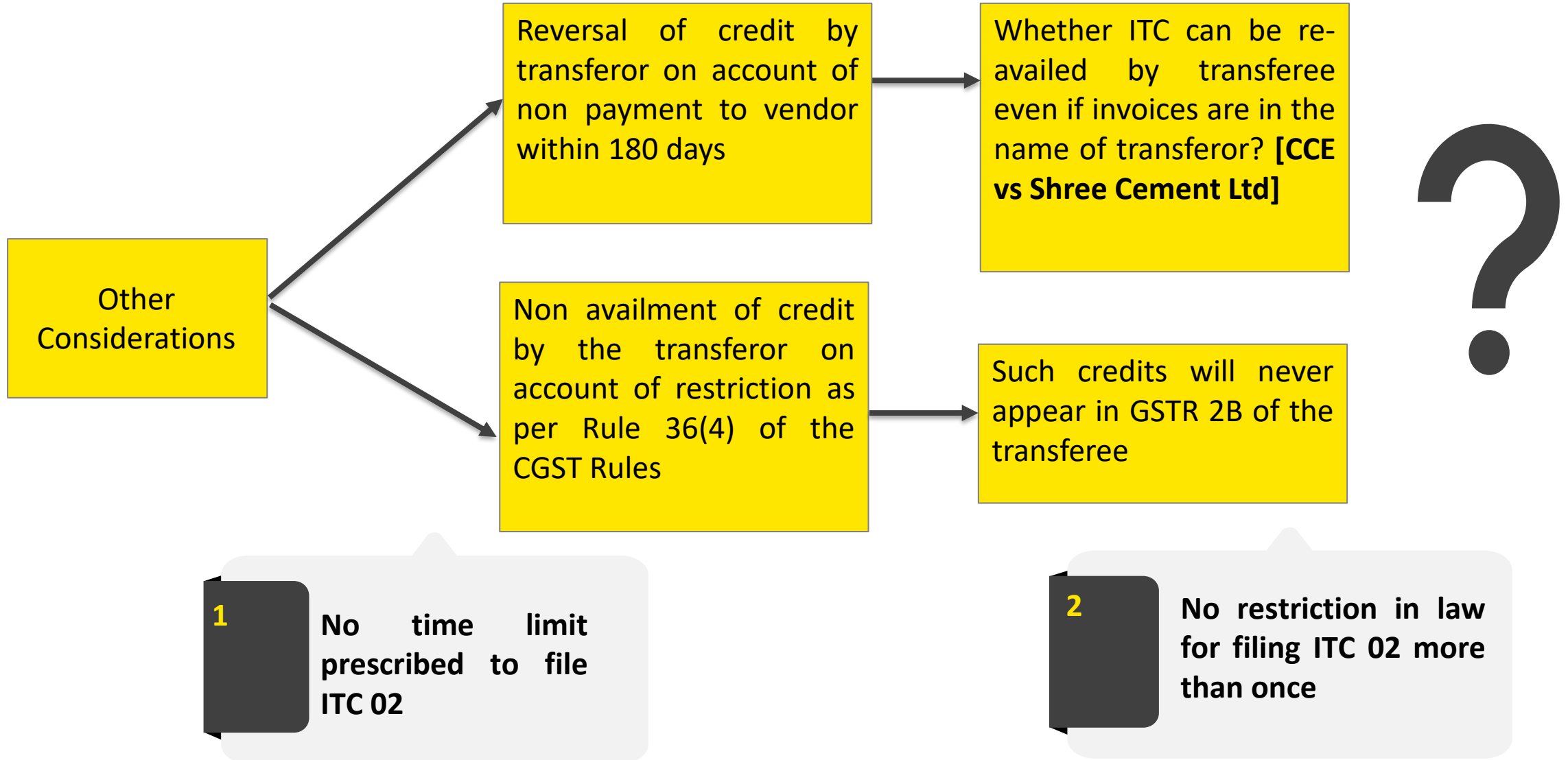
Formula applicable to all scenarios that results in partial transfer of business assets along with liabilities. (Rule 41 and Circular is contrary)

Ratio to be applied on unutilized ITC. Transferor has liberty to determine the amount to be transferred under each tax head subject to balance available

The ratio of the value of assets should be taken as on the “appointed date of demerger”

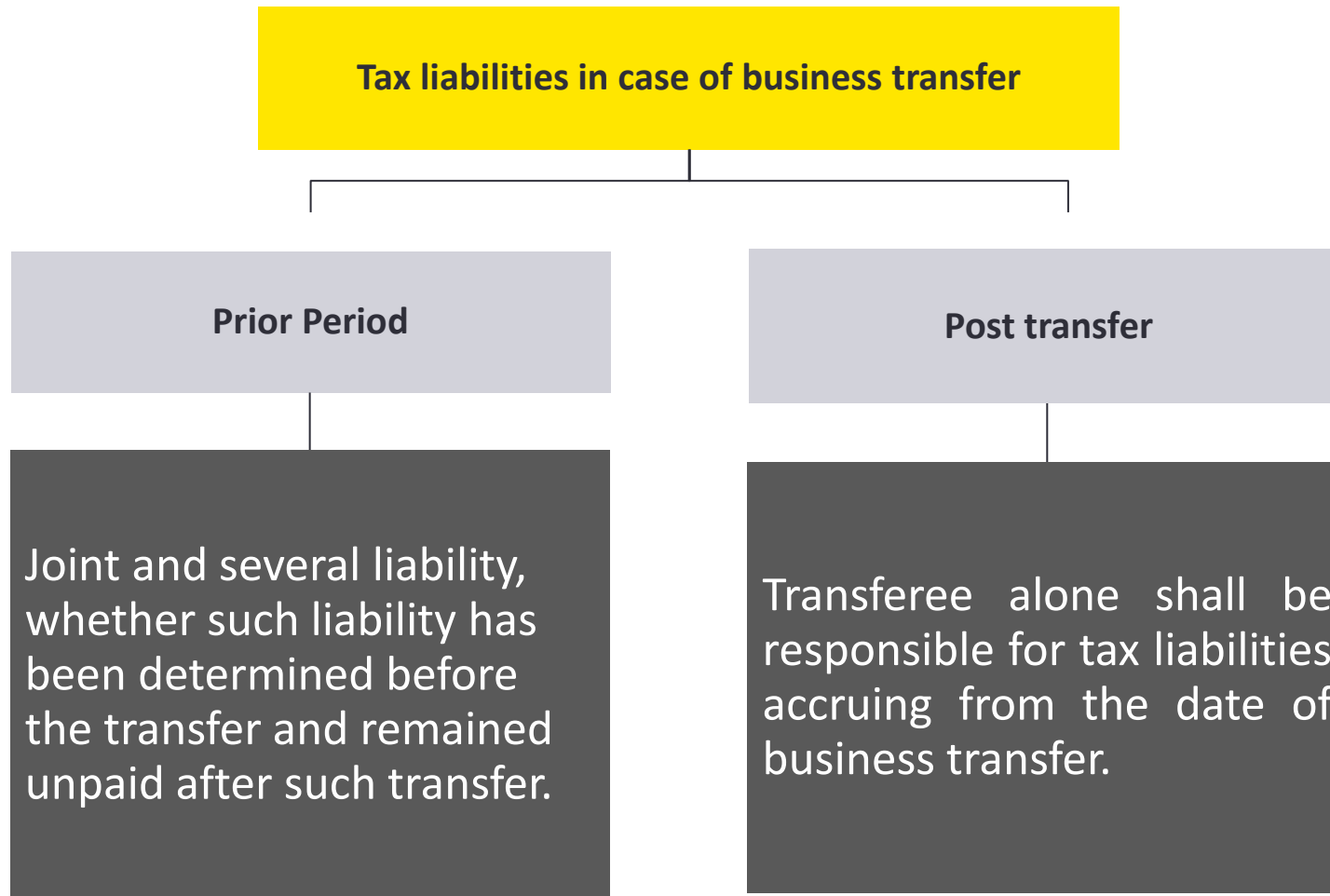
Slump Sale

(cntd..)



Slump Sale

(cntd..)



Other Considerations for prior period liability.

- ▶ Revenue can recover liability either from transferor or transferee, irrespective of the arrangement between them. .
- ▶ The Business Transfer Agreement may provide that if revenue recovers any liability from transferee, the said amount shall be reimbursed to transferee.
- ▶ Whether such reimbursement shall be construed as supply liable to GST?

Slump Sale

(cntd..)

Registration

- ▶ Transferee, if not registered, shall be liable to register w.e.f. date of transfer within 30 days [Sec 22(3)]
- ▶ If already registered – raise necessary amendment application.
- ▶ Determine registration State wise?

Cancellation

- ▶ Transferor can cancel the registration- if not required
- ▶ Application for cancellation is to be filed within 30 days of occurrence of event.
- ▶ Cancellation after ITC-02 is filed & accepted
- ▶ Assessment likely during cancellation event?

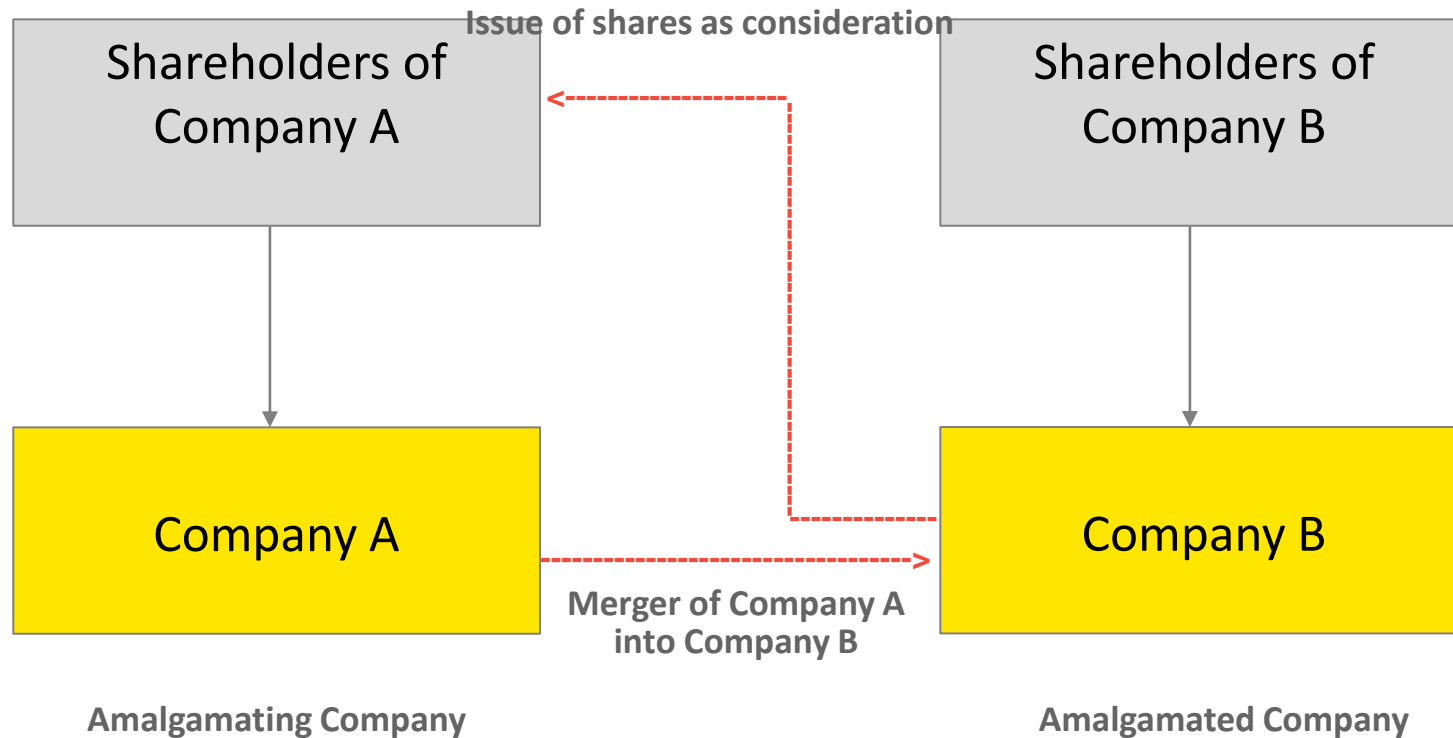
Invoicing & Returns

- ▶ Issue Bill of Supply
- ▶ Within 3 months from the date of cancellation of order, transferor to file GSTR 10-Final Return.
- ▶ Annual return still to be filed by transferor for period during which registration was in force. [Handbook on GST Annual Return issued by ICAI and FAQ's on Form GSTR 9]

Refunds

- ▶ Transferee may face issue while applying for refund for transactions undertaken by transferor prior to business transfer.
- ▶ Wherever possible, transferor should apply for refund prior to the business transfer.

Mergers/ Amalgamations



Key Points

- ▶ M&A involves consolidation of two or more entities.
- ▶ Existing company merge to another existing entity or two or more entities merge to form a new entity.
- ▶ Transfer of all assets and liabilities.
- ▶ Transferee company issues shares to shareholder of transferor company.

Mergers/ Amalgamations

Key Points

- ▶ Transfer of a going concern is an exempt service.
- ▶ Share allotment - neither treated as goods nor services
- ▶ No ITC - on supplies procured exclusively for transfer
- ▶ Unutilized ITC balance - allowed to be transferred
- ▶ The merged entity and the merging entity will be joint and severally liable for tax liabilities for the period prior to the date of merger.

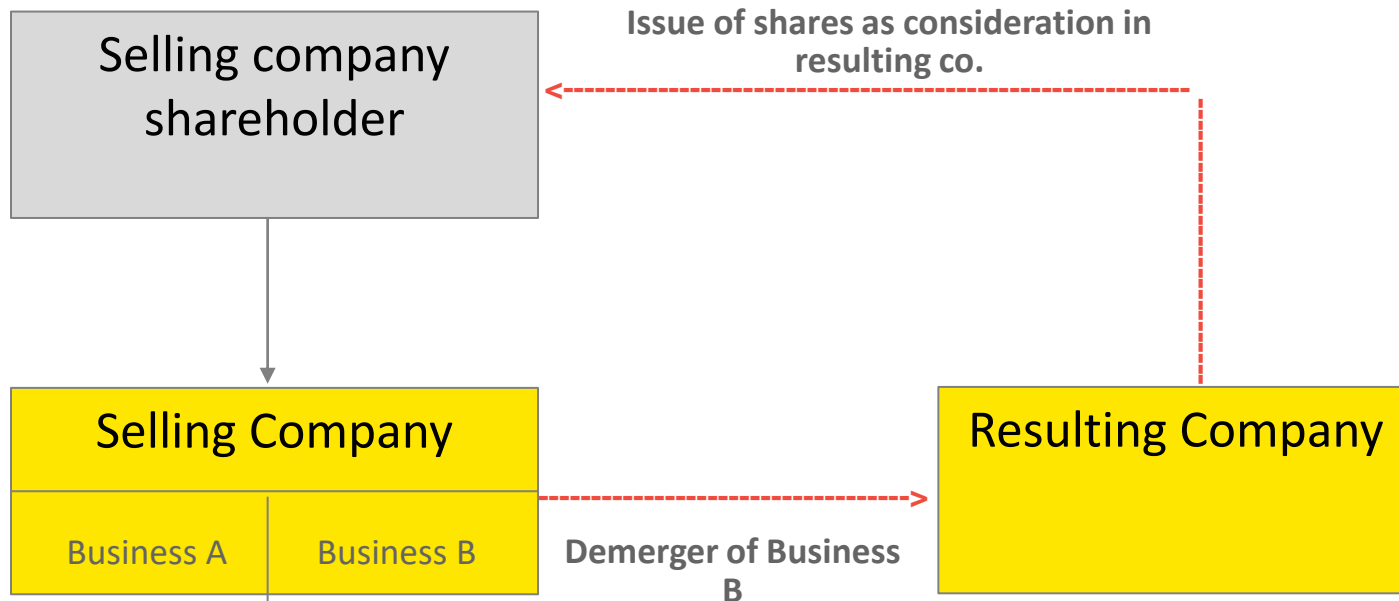
Application of registration by transferee

- ▶ GST registration - the date on which the High Court order is filed with Registrar of Companies giving effect to the order approving scheme of merger.

Liability during interim period

- ▶ Scheme may become effective from a date earlier than the date of order
- ▶ Supply of goods or services - during the period commencing on the date from which the order takes effect till the date of the order – liable to GST
- ▶ Transferor and transferee to be considered as distinct persons for the period up to the date of the order
- ▶ Till the order of the court, the merging entities will continue to file returns separately

Demerger



Key consideration

- 1 ▶ Transferor and Transferee-Jointly and severally liable for tax liabilities.
- 2 ▶ Can Transferor and Transferee be treated as single registered person upto the date of order of the court?

- 1 Tax treatment similar to tax treatment in case of merger
- 2 Transfer of business or part of the business is an exempt service.
- 3 Transferor will not get ITC of supplies procured exclusively for such demerger.
- 4 Unutilized ITC pertaining to the business which is demerged, is allowed to be transferred to resulting entity.
- 5 ITC shall be apportioned in the ratio of value of assets of the new unit as specified in demerger scheme.

Post M&A implications relating to Related Party and Distinct persons

Valuation- Non related persons

- ▶ Transaction value is the taxable value.

Valuation between related persons

- ▶ Transaction value cannot be adopted.
- ▶ Valuation is to be done as per valuation rules.

Supplies without consideration

- ▶ Supplies between related and distinct persons without consideration will also be a taxable supply attracting GST. [Entry 2 of Schedule I of the CGST Act]

Taxability between distinct persons in cross border M&A transactions.

Explanation I in Section 8 of the IGST Act

Where a person has an establishment in India and any other establishment outside India, then such establishments shall be treated as establishment of distinct persons.

Section 2(6)(v) of the IGST Act

For qualifying as export of services, the supplier and the recipient of service should not merely be establishment of distinct persons

Sr. No 10F of Notification No. 15/2018-IGST (Rate)

Services supplied by an establishment of a person in India to any establishment of that person outside India, which are treated as establishments of distinct persons shall be exempted from GST provided the place of supply is outside India.

Other GST implications

Assets remaining with transferor

- ▶ Entry 4 (c) of Schedule II - deemed supply of goods in case person ceases to be taxable person
- ▶ This will not be applicable if business is transferred as going concern
- ▶ Where person does not cease to be taxable person, entry 4(C) of Schedule II does not apply

Itemised sale

- ▶ Certain assets retained by the transferor
- ▶ Transferor ceases to be a taxable transfer (closure of business)
- ▶ Retained assets deemed to be as per Entry 4 (C) of Schedule II
- ▶ Provision does not apply if transferor does not cease to be a taxable person

Additional ITC post merger or acquisition

- ▶ Transferor or transferee- ITC blockage due to no registration in a particular state. For e.g.: Hotel accommodation
- ▶ Other entity may have registration in that state
- ▶ After M&A, ITC will be eligible which was blocked earlier

Transfer of incentives

- ▶ Incentives – Central/ State, area based, sector based, capex based.
- ▶ Transfer of entitlements subject to conditions and procedures stated in respective schemes.
- ▶ Generally, entitlement under the schemes could be transferred in case of transfer of business as a going concern.



Thank You!