

EY Tax Alert

HC allows inter-state ITC transfer in case of amalgamation

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Executive summary

This Tax Alert summarizes a recent ruling of the Goa Bench of the Bombay High Court (HC)¹ regarding inter-state transfer of unutilized input tax credit (ITC) in cases of amalgamation under Section 18(3) of the Central Goods and Services Tax Act, 2017 (CGST Act).

The key observations of the HC are:

- ▶ Goods and Services Tax (GST) is a unified, destination-based tax system designed to eliminate cascading taxes and enable seamless ITC flow across the supply chain.
- ▶ Section 18(3) read with Rule 41 of the Central Goods and Services Tax Rules, 2017 (CGST Rules) allows transfer of unutilized ITC in the event of merger, demerger or amalgamation without any restriction on the geographical location of the transferor and transferee.
- ▶ While Section 22(4) specifically requires the transferee entity to obtain registration from the date on which the Registrar of Companies issues a certificate of incorporation implementing the scheme, no such stipulation has been specified while permitting the transfer of ITC under Section 18(3).
- ▶ Applying established principles of statutory interpretation, courts cannot read into a statute words that are not present, nor can they infer prohibitions where the legislature has chosen to remain silent.
- ▶ Since CGST and IGST are centrally administered, inter-state transfer of these credits does not result in Union's revenue loss. The petitioner also waived SGST claims, mitigating any potential State-level impact.

In view of the above, HC directed the authorities to effect manual transfer of CGST and IGST credits and advised the GST Council and GSTN to update the system to enable such transfers in future cases.

¹ Writ Petition No. 463 of 2024



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Background

- ▶ The Petitioner is a company registered in the State of Maharashtra, formed pursuant to a scheme of amalgamation approved by the National Company Law Tribunal (NCLT).
- ▶ At the time of amalgamation, the transferor located in the State of Goa, attempted to transfer the unutilized input tax credit (ITC) to the Petitioner by filing ITC-02. However, the request was rejected with an error message stating: *“Transferee and Transferor should be of the same State/UT”*.
- ▶ Not getting any resolution on the issue from the Goods and Services Tax Network (GSTN) and concerned State tax officer, the Petitioner filed writ petition², which was later withdrawn with liberty to re-approach the Goa Bench of the Bombay High Court (HC).
- ▶ Consequently, the present writ petition³ was filed challenging the denial of transfer of unutilized ITC pursuant to amalgamation, solely on the ground that the transferor and transferee companies are registered in different States.

Petitioners' Contention

- ▶ Section 18(3) of the Central Goods and Services Tax Act, 2017 (CGST Act) expressly allows transfer of unutilized ITC in cases of sale, merger, demerger, amalgamation, lease, or transfer of business, provided liabilities are also transferred.

Rule 41 of the Central Goods and Services Tax Rules, 2017 (CGST Rules), prescribes procedure for transfer of credit on transfer of business. These provisions do not impose any restriction on transfer of unutilized ITC to a new entity arising out of amalgamation merely because it is located in a different State.

- ▶ Article 269-A and 289 of the Constitution, read with the approved scheme of amalgamation, clearly establishes that the transferee company has assumed all liabilities of the transferor company. Consequently, having taken over the tax obligations, it is entitled to ITC available in the transferor's electronic credit ledger.
- ▶ Authority for Advance Ruling (AAR), Andhra Pradesh, has also affirmed that unutilized ITC can be transferred from one unit to another located in a different state⁴.
- ▶ The decision of Madras HC in MMD Heavy Machinery (India) Pvt Ltd⁵, which disallowed transfer of unutilized ITC from one State to another, is clearly distinguishable.

That case pertained to accumulated credit under the erstwhile Cenvat Credit Rules, 2004 and involved a situation where the petitioner had shut down a factory in one state and relocated operations to another. The credit sought to be transferred was from a non-operational unit, unlike the present case, which involves amalgamation approved under a statutory scheme, with liabilities and business continuity intact.

Revenue's Contention

- ▶ Section 16 of the CGST Act governs the eligibility and conditions for availing ITC. The benefit is available to a registered person on inputs used in the course or furtherance of business, and such credit is reflected in the credit ledger of that specific registered person.
- ▶ The term "registered person" under Section 2(94), refers to a person who is registered under Section 25 but does not include a person having a Unique Identity Number.
- ▶ Section 25 of the CGST Act lays down the procedure for registration and mandates that every person liable to be registered under Section 22 or 24 must obtain separate registrations in each State or Union Territory from where taxable supplies are made.

Further, as per Section 25(2), a person is allowed only one registration per State or UT, while the proviso permits separate registrations for multiple places of business within the same State or UT, subject to conditions.

Section 25(4) treats each such registration as a "distinct person" for the purposes of the Act.

- ▶ Section 18(3) read with Rule 41 must also be read in consonance with the scheme of the enactment, which treats each registered person a completely different entity.

Accordingly, ITC earned by a registered person in one State cannot be transferred to an entity registered in another State pursuant to sale, merger, demerger, or amalgamation.

- ▶ Even Madras HC in MMD Heavy Machinery (supra) has held that ITC cannot be availed in a State different from the one in which it is accrued.
- ▶ GST system is aligned with Circular No. 133/03/2020-GST, which clarifies that ITC-02 can only be filed where both entities are registered in the same state, therefore, making it mandatory that both the transferor and transferee are registered in the same state.
- ▶ Section 22, read with Section 25 of the CGST Act, specifies that a business must register in the State from where it makes taxable supplies.

² (L) No. 4263 of 2022

³ 463 of 2024

⁴ 2020-VIL-199-AAR

⁵ (2021) 53 GSTL 3

In case of inter-State amalgamation or transfer, the transferee must treat the transferor's location as an additional place of business and obtain registration in that State. Only then, ITC-02 could be filed, and transfer of ITC could proceed.

High Court's Ruling

- ▶ The GST framework, enacted pursuant to the 101st Constitutional Amendment, establishes a unified, destination-based tax regime with the objective of eliminating the cascading effects of multiple taxes and ensuring seamless flow of ITC across the supply chain.
- ▶ A careful reading of Section 18(3) along with Rule 41, there appears to be no statutory bar on transfer of ITC merely because the transferee and transferor entities are registered in different States.
- ▶ The term "registered person" under Section 2(94) is defined to mean a person registered under Section 25, excluding those with a Unique Identity Number.
- ▶ Section 25 provides for registration procedure, while Section 22 specifies who is liable to register. Every person making taxable supplies from any State or Union Territory is required to register if the aggregate turnover exceeds prescribed limits.
- ▶ Further, Section 22(4) specifically addresses situations involving merger, demerger, or amalgamation pursuant to a HC or NCLT order. In such cases, the transferee entity is required to obtain registration from the date on which the Registrar of Companies issues a certificate of incorporation implementing the scheme.

However, while permitting the transfer of ITC, no such stipulation has been specified. Had the legislature had any intention to cast an embargo or impose a restriction with reference to Section 22(4) to the effect that, unless and until the transferee is registered, ITC cannot be availed, it should have so specified.

- ▶ In the present case, the petitioner complied with all procedural requirements, including the submission of ITC-02 and requisite CA certification. However, the GST portal rejected the request on the basis of a system-generated error - "*Transferor and Transferee should be of the same State/UT.*"

This denial, based purely on technical configuration of the portal is not supported by statute. The same cannot override a legal entitlement conferred by the Act and Rules.

- ▶ Further, the Tribunal while approving scheme of amalgamation expressly records that the transferee would assume all liabilities of the transferor company, therefore, transferee is entitled, under Section 18(3), to the unutilized ITC lying in the transferor's ECL, irrespective of the fact that the two entities were registered in different States.

- ▶ It is a well settled position that the intention of Legislature shall be primarily gathered from the language used, which means that attention should be paid to what has been said as also to what has not been said.

- ▶ The *Crawford v. Spooner*⁶ principle asserts that courts cannot fill legislative gaps or correct perceived defects in a statute through interpretation. It is impermissible to add, omit, or substitute words unless clearly warranted by the statute itself. Courts must interpret the law as written, not legislate from the bench.

In *Gladstone v. Bower*⁷, Devlin LJ reaffirmed the principle of *casus omissus*, stating that courts may adopt a less literal interpretation if it better aligns with legislative intent. However, they cannot fill gaps simply because something appears to have been overlooked. Doing so would cross the line into lawmaking, which is beyond the judiciary's role.

- ▶ In light of these principles, it is held that Section 18(3) of the CGST Act must be read as it stands. Since it does not impose any restriction on inter-state transfer of unutilised ITC in cases of merger or amalgamation, such a prohibition cannot be read into the statute.
- ▶ Revenue's reliance on the *MMD Heavy Machinery judgment (supra)* is not acceptable as it is distinguishable on both factual and legal grounds.
- ▶ Under the GST regime, both CGST and IGST are centrally administered taxes. Therefore, allowing the credit of such components to be utilised in another State does not result in any financial loss to the Union of India.

However, utilization of SGST credit in a different State could lead to revenue impact. In the present case, the petitioner made a categorical statement giving up its claim to SGST credit, thereby eliminating any such concern.

- ▶ Accordingly, HC directed the authorities to manually allow transfer of CGST and IGST credits from transferor to the petitioner.
- ▶ Further, request was also made to the GST Council and the GST Network to implement appropriate system-level changes for facilitating such inter-state ITC transfers in similar future cases.

⁶ (1846) 6 Moore PC 1

⁷ (1960) 3 All ER 353 (CA)

Comments

- a. This ruling serves as a landmark affirmation that statutory entitlements under the CGST Act, including the right to transfer unutilized ITC as outlined in Section 18(3), cannot be undermined by procedural or technical limitations of the GST portal.
- b. The judgement may be relied upon in disputes where authorities have denied ITC transfers based on State-specific registration, despite full compliance with procedural requirements under Rule 41. The interpretation establishes a clear precedent for the seamless portability of ITC across state boundaries, in case of change in constitution of business of a person.
- c. The issue of SGST credit transfer may still remain unresolved. Taxpayers with significant SGST balances should carefully assess the applicability of the principle laid down to their circumstances, considering the legal uncertainties and lack of a defined mechanism for such transfers.

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