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EY Tax Alert

Gujarat HC disallows ITC refund in case of amalgamation due to statutory non-compliance

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Executive summary

This Tax Alert summarizes recent ruling of the Gujarat High Court (HC)[1] on refund eligibility of unutilized input tax credit (ITC) on account of exports, in case of amalgamation, where statutory provisions under Goods and Services Tax law (GST law) had not been complied with.

The key observations of the HC are:

- Under GST law, upon amalgamation, the transferee entity is required to obtain registration first, followed by timely cancellation of the transferor's registration. Any deviation from this prescribed statutory sequence creates legal inconsistencies and complications.
- The refund of unutilized ITC is strictly governed by statutory provisions. Such refund can be availed only in the manner prescribed under the GST law and cannot be claimed *dehors* the statutory mechanism, even in cases of amalgamation.
- Where a specific mechanism exists for transfer of unutilized ITC through FORM GST ITC-02, the same must be strictly adhered to. Failure to comply with this mechanism disentitles the transferor as well as the transferee from claiming refund of such ITC.
- Applying the doctrine of *pari delicto*, the High Court noted that the action of both the entities and the jurisdictional officer failed to strictly follow the statutory provisions regarding registration and cancellation.
- Consequently, the entities cannot seek the benefit of refund.

Thus, HC dismissed the writ petition and directed Revenue to issue appropriate instructions for following the mandate of statutory provisions in cases of amalgamation, to avoid future complications.

[1] TS-29-HC(GUJ)-2026-GST

Background

- The petitioner emanated from the amalgamation of three companies (transferors) *vide* a National Company Law Tribunal (NCLT) order, which was thereafter filed with Registrar of Companies (RoC) for issuance of certificate of incorporation.

- In anticipation of NCLT order, the petitioner applied for GST registration. Registration was made effective from a date prior to the issuance of NCLT order.

- One of the transferor entities transferred a part of unutilized input tax credit (ITC) to the petitioner's new registration by filing Form GST ITC-02.

- For the remaining unutilized ITC pertaining to exports made prior to amalgamation, various refund applications were filed by the transferor entity under its erstwhile registration.

- The adjudicating authority partly allowed the refund, however, the same was set aside by the appellate authority vide order-in-appeal.

- During the aforesaid proceedings, the GST registration of the transferor was cancelled by the Revenue.

- Aggrieved, the petitioner (transferee entity) filed a writ-petition before the Gujarat High Court (HC).

- The chronological events are set out below:

Events	Date of event
GST registration application filed by transferee	10 May 2023
Effective date of GST registration of transferee	25 May 2023
NCLT order approving amalgamation	28 August 2023
Certificate of incorporation issued by RoC	22 September 2023
ITC-02 filed (partial ITC transfer)	20 October 2023
Refund application filed by transferor (for remaining unutilized ITC)	4 January 2024
Revenue cancelled transferor's GST registration	29 November 2024

Petitioners' Contention

- Pursuant to the NCLT order and scheme of amalgamation:

  - *The Transferee Company is obliged to bear both the burdens and benefits of all legal, taxation, and other claims or investigations of whatsoever nature pertaining to the transferor companies.*

  - *Any claim against the Transferor Companies in respect of direct and indirect taxes shall be settled by the Transferee Company. In respect of the GST proceedings initiated against the Transferor Company, the Transferee Company i.e. the petitioner, is obligated to prosecute and / or defend the same.*

  Once the GST registration of the transferor stood cancelled, the transferor cannot be said to have had any legal existence so as to be capable of instituting or prosecuting any legal proceedings.

  Accordingly, all the rights and liabilities of transferor are now of transferee.

- Section 16 of the Integrated Goods and Services Tax Act, 2017 (IGST Act) creates the statutory right to claim refund of unutilized ITC in respect of exports of goods and services.

  Further, the refund claim shall be governed by Section 54 of the Central Goods and Services Tax Act, 2017 (CGST Act), subject to such conditions, safeguards, and procedures as may be prescribed.

- In the present case, Revenue is neither disputing the fulfillment of the substantive conditions for eligibility to avail ITC, nor is there any dispute in the transferor, being exporter, claiming refund of unutilized ITC under Section 54.

- Thus, a vested and enforceable right to claim refund is accrued in favour of the transferor under Section 16(3) of the IGST Act, 2017.

- Moreover, Section 18(3) of the CGST Act provides that where there is a change in the constitution (*inter alia* amalgamation) or transfer of business of a registered person, the unutilised ITC may be transferred to such successor business, in the prescribed manner. This provision is permissive and not mandatory.

- The expression *"transfer of the entire unutilized ITC"* is conspicuously absent in the aforesaid Section as well as in Rule 41 of the Central Goods and Services Tax Rules, 2017 (CGST Rules).

- Unlike the case at hand *viz* amalgamation, in case of demerger, a certain restrictive covenant has been incorporated by providing that the ITC shall be apportioned in the ratio of value of assets of the new unit.

  Wherever the legislature wanted to use the word *"entire"*, it has done so, as can be discerned from perusal of Explanation to Rule 41(1) of the CGST Rules where the phrase *"entire asset of business"* has been used.

- Further, there exists no provision under the CGST Act which empowers the authorities to compel such transfer or to take any punitive action for non-transfer.

  Accordingly, the decision to transfer ITC and the quantum of ITC to be transferred lies entirely within the domain of the transferor.

- The liability in case of amalgamation or merger of companies has been prescribed under Section 87 of the CGST Act.

  Sub-section (2) of Section 87 directs that two or more companies are to be treated as *"distinct companies"* for the period up to the date of order passed by court or tribunal and the registration certificates of the said companies shall be cancelled with effect from *"the date of the said order"*.

  Further, Section 29 of the CGST Act empowers the proper officer to cancel the registration on his own motion or on an application filed by the registered person, in specified cases, *inter alia,* discontinuance of business.

- Though GST law prescribes filing of application for cancellation of registration by transferor, the power and responsibility to cancel registration is statutorily vested in the Revenue and not the petitioner.

  Given the Revenue was duly intimated of the amalgamation, no such obligation can be foisted upon the transferor.

- Even, when the Revenue authorities consciously chose to cancel the registration, such cancellation happened only prospectively and not retrospectively, which means the transferor can be said to be in existence at the time of filing refund.

  In these circumstances, the petitioner cannot be accused of having violated Section 87(2) of the CGST.

- Alternatively, it is requested that the Court safeguard petitioner's vested refund rights inherited through amalgamation by allowing a fresh manual refund application to be filed and processed notionally, without objections relating to Section 16(3) IGST compliance, portal-related technical issues, or limitation.

  The amounts already disbursed should not be recovered and may instead be adjusted against the fresh refund order, as an equitable approach consistent with the law governing zero-rated supplies.

Revenue's Contention

- There exists no statutory provision enabling the petitioner-transferee company to seek encashment of such unutilized ITC in any form, including by way of a refund application.

- Further, there is no provision permitting partial transfer of unutilized ITC of the transferor company to the transferee entity in case of amalgamation.

- It was the obligation of the transferor company to apply for cancellation of its GST registration on account of amalgamation.

  Even after the lapse of more than one year from the effective date of amalgamation, no application for cancellation of GST registration was filed. The same could have been done by the petitioner as well.

- Thus, the application for cancellation of registration was deliberately not filed with a *mala fide* intention to encash the unutilized ITC by way of a refund application, which is otherwise impermissible under the statute.

High Court Ruling

- Section 22(4) of the CGST Act requires that in case of amalgamation, the transferee entity shall be liable to be registered, with effect from the date on which the Registrar of Companies (RoC) issues a certificate of incorporation.

  In the present case, the petitioner-transferee company applied for registration months before the NCLT order and issuance of certificate of incorporation. This itself was *de hors* the provisions of the CGST Act.

- Section 29(1)(a) provides for cancellation of registration on account of discontinuance of business, which is applicable in the present case.

  Rule 20 of the CGST Rules requires filing of an application for cancellation of registration in FORM GST REG-16 *"within a period of thirty days of the occurrence of the event warranting the cancellation"*.

  In context of amalgamation, the above-mentioned FORM provides following instructions for filing of application for cancellation, *"The new entity in which the applicant proposes to amalgamate itself shall register with the tax authority before submission of the application for cancellation. This application shall be made only after the new entity is registered"*.

- In the present case, the event warranting the cancellation would be the amalgamation of three transferor entities to form a petitioner-transferee entity.

  Accordingly, the transferor entity was required to file for cancellation of its registration within 30 days of effective date of amalgamation.

- Transferor had given an assurance to the jurisdictional officer that it is in the process of undertaking and ensuring the fulfilment of all relevant compliance and procedures applicable under the GST laws, which indubitably include the compliance of statutory provisions relating to cancellation of registration. In wake of the above assurance, the officer did not exercise his power to *suo motu* cancel the registration.

- In any case, Rule 22 starts with the sentence *"Where the proper officer has reasons to believe that the registration of a person is liable to be cancelled"*.

Thus, where officer had the knowledge of the details of amalgamation, its effective date, the date of certificate of incorporation of new entity, he was required to form an opinion relating to cancellation of registration under aforesaid rule.

- Further, Section 29(2) empowers the proper officer for retrospective cancellation of registration on specified grounds. The present case does not fit in any of the grounds specified therein.

- Under Section 87, the identity of the transferor company as distinct company exists till the date of order of NCLT, and its registration is required to be cancelled with effect from the date of such order.

  In the instant case, the action of registration and cancellation of registration is at odds with the settled legal precedent that the amalgamating entity ceases to exist upon the approved scheme of amalgamation.

- Reading of Section 18(3) with Rule 41 is required to be construed in its fundamental sense.

  Where a mechanism is prescribed by the statute for transferring the unutilized ITC in the business interest of the new entity, the intention of such enabling provision cannot be used in a manner, which frustrates the transfer of unutilized ITC on amalgamation as done in the present case.

- If the issue of registrations of both the entities had been undertaken as prescribed by the statutory provisions, there would have been no impediment to claim the refund of unutilized ITC by petitioner-transferee.

- It is to be noted that the action of both transferor and transferee entities, and the jurisdictional officer failed to strictly follow the statutory provisions. Accordingly, applying the *Doctrine of Pari Delicto* (in equal fault), the law aids neither party.

  Thus, the transferor entity cannot seek any benefit of refund arising from the fault of the jurisdictional officer when it is equally at fault.

  Correspondingly, petitioner-transferee also cannot be allowed to claim refund since the statute does not permit the course suggested by petitioner.

- Basis above, the HC dismissed the writ petition and directed the Revenue to issue appropriate instructions for scrupulously following the mandate of statutory provisions while dealing with the registrations in case of amalgamation, so as to avoid future complications.

Comments

a. While HC has strictly construed the 30-day time limit to cancel registration, CBIC vide Circular No. 69/43/2018-GST had clarified that 30-day deadline may be liberally interpreted and the taxpayers' application for cancellation of registration may not be rejected because of the possible violation of the deadline.

b. It is common industry practice in similar situations to retain the transferor entity's registration for filing refund claims as submitting such applications through transferee's registration may lead to complications in substantiating the claim. In light of this judgment, this practice may require reconsideration.

Our offices

Ahmedabad

22nd Floor, B Wing, Privilon
Ambli BRT Road, Behind Iskcon Temple
Off SG Highway
Ahmedabad - 380 059
Tel: + 91 79 6608 3800

8th Floor, Building No. 14A
Block 14, Zone 1
Brigade International Financial Centre
GIFT City SEZ
Gandhinagar - 382355, Gujarat
Tel +91 79 6608 3800

Bengaluru

12th & 13th Floor
"UB City", Canberra Block
No.24 Vittal Mallya Road
Bengaluru - 560 001
Tel: + 91 80 6727 5000

Ground & 1st Floor
11, 'A' wing
Divyasree Chambers
Langford Town
Bengaluru - 560 025
Tel: + 91 80 6727 5000

3rd & 4th Floor
MARKSQUARE
#61, St. Mark's Road
Shantala Nagar
Bengaluru - 560 001
Tel: + 91 80 6727 5000

1st & 8th Floor, Tower A
Prestige Shantiniketan
Mahadevapura Post
Whitefield,
Bengaluru - 560 048
Tel: + 91 80 6727 5000

Bhubaneswar

8th Floor, O-Hub, Tower A
Chandaka SEZ, Bhubaneswar
Odisha – 751024
Tel: + 91 674 274 4490

Chandigarh

Elante offices, Unit No. B-613 & 614
6th Floor, Plot No- 178-178A
Industrial & Business Park, Phase-I
Chandigarh - 160 002
Tel: + 91 172 6717800

Chennai

6th & 7th Floor, A Block,
Tidel Park, No.4, Rajiv Gandhi Salai
Taramani, Chennai - 600 113
Tel: + 91 44 6654 8100

Delhi NCR

Aikyam
Ground Floor
67, Institutional Area
Sector 44, Gurugram - 122 003
Haryana
Tel: +91 124 443 4000

3rd & 6th Floor, Worldmark-1
IGI Airport Hospitality District
Aerocity, New Delhi - 110 037
Tel: + 91 11 4731 8000

4th & 5th Floor, Plot No 2B
Tower 2, Sector 126
Gautam Budh Nagar, U.P.
Noida - 201 304
Tel: + 91 120 671 7000

Hyderabad

THE SKYVIEW 10
18th Floor, "SOUTH LOBBY"
Survey No 83/1, Raidurgam
Hyderabad - 500 032
Tel: + 91 40 6736 2000

Jaipur

9th floor, Jewel of India
Horizon Tower, JLN Marg
Opp Jaipur Stock Exchange
Jaipur, Rajasthan – 302018

Kochi

9th Floor, ABAD Nucleus
NH-49, Maradu PO
Kochi - 682 304
Tel: + 91 484 433 4000

Kolkata

22 Camac Street
3rd Floor, Block 'C'
Kolkata - 700 016
Tel: + 91 33 6615 3400

Mumbai

14th Floor, The Ruby
29 Senapati Bapat Marg
Dadar (W), Mumbai - 400 028
Tel: + 91 22 6192 0000

5th Floor, Block B-2
Nirlon Knowledge Park
Off. Western Express Highway
Goregaon (E)
Mumbai - 400 063
Tel: + 91 22 6192 0000

3rd Floor, Unit No 301
Building No. 1
Mindspace Airoli West (Gigaplex)
Located at Plot No. IT-5
MIDC Knowledge Corridor
Airoli (West)
Navi Mumbai – 400708
Tel: + 91 22 6192 0003

Altimus, 18th Floor
Pandurang Budhkar Marg
Worli, Mumbai - 400 018
Tel: +91 22 6192 0503

Pune

C-401, 4th Floor
Panchshil Tech Park, Yerwada
(Near Don Bosco School)
Pune - 411 006
Tel: + 91 20 4912 6000

10th Floor, Smartworks
M-Agile, Pan Card Club Road
Baner, Taluka Haveli
Pune - 411 045
Tel: + 91 20 4912 6800

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