

# All India Federation of Tax Practitioners JOURNAL

Volume 28 | No. 9 | December 2025



## DIRECT TAXES

Moving in circles: The SAGA of Search induced Assessments under the Income Tax Act, 1961

Corporate Tax Reform: Insights into Section 115BAA

Unexplained Expenditure in Tax Assessments: Lessons from Recent High Court Rulings on Bogus Purchases

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## Liability to pay in certain special circumstances under GST (S. 85 to S. 94 of the CGST Act)

CA Badrinath NR

The Goods and Services Tax (GST) rests on the principle that the taxable person supplying goods or services is primarily responsible for paying tax – could be the supplier under forward charge; recipient under reverse charge or the e-commerce operators under S. 9(5). Having said that, while the person liable to pay tax may be so said, the recovery of the tax could be even from person other than the one who was required to discharge that. These situations are contained in Chapter XVI of the CGST Act, 2017 between S. 85 to S. 94 – typically due to circumstances such as liquidation, transfer of business, restructuring or even death of the tax payer. To safeguard revenue, the legislature has enacted these provisions, which impose liability on connected persons such as successors, directors, partners, legal heirs, guardians or trustees, embodying the doctrine of vicarious liability – viz., tax dues, for the right reasons don't get extinguished merely because the original taxpayer ceases to exist or carry on business.

### Relevance of this topic

1. With the increase in corporate restructuring and M&A activity, there are more business transfers, amalgamations and insolvency-driven acquisitions, especially post-COVID. The successor liability under S. 85, S. 86 and S. 87 has therefore become a practical risk in transactions, not just for the Government to be able to administer, monitor and

recover the taxes, but even for the parties in the transaction to be able to absorb the liabilities.

2. The interplay between S. 88 (company in liquidation) and the Insolvency and Bankruptcy Code, 2016 (IBC) has led to litigation on priority of Government dues over the secured creditors.
3. With the increased focus of the tax office on identifying fake invoicing, there is increased scrutiny of directors and partners too. Tax authorities are increasingly invoking S. 89 and S. 90 to hold partners and directors personally liable when companies / firms are in default, consequently raising concerns about the balance between revenue protection and the corporate limited liability principle on one side and on the expectations or responsibilities between the companies / firms and the directors / partners *inter-se*, on the other.
4. Many family-owned businesses are undergoing generational change, making the provisions relating to legal heirs (S. 93 and S. 94) and guardians / trustees (S. 91) practically significant.

Thus, this topic is not merely academic but certainly lies at the heart of corporate governance and transactional structuring and litigation, in today's environment.

## Overview of the Provisions

### A. S. 85 – Liability in case of transfer of business

This section provides that when a business is transferred in any manner (sale, gift, lease, lease and license or hire or in any other manner), both the transferor and transferee will be jointly and severally liable for any tax, interest, or penalty due, up to the date of transfer.

- **Purpose:** Prevents taxpayers from avoiding dues by transferring business to another entity and forces such a transfer to be a more diligent and informed one, from a transferee's point of view.
- **Safeguard:** The liability applies only for the period up to the date of transfer. Post-transfer, the transferee / successor will be solely liable for his own compliance and payment of taxes.
- **Compliance:** The compliance under the GST provisions will be the responsibility of the transferee, for filing of returns upto the date of transfer, continuation of pending proceedings and initiation of new proceedings by tax office and cancellation of registration (if relevant). Procedurally, whilst any proceedings that have already been initiated or any new proceedings are being initiated, it would be under the same (transferor) GSTIN, the liability to discharge the taxes or any other amounts thereto would be the joint and several liability of both, the transferor and the transferee.

### B. S. 86 – Liability of agent or principal

Similar to how the law applies in case of transfer of business, for any supplies by the agent on behalf of the principal, the liability would be joint and several, between both, the agent as well as the principal. In this context, it is important to note that it is only the agent's

liability for supplies made on behalf of the principal, that is joint and several and not vice-versa (liability of principal, if any does not become a liability of the agent).

### C. S. 87 – Liability in case of amalgamation or merger

If two or more companies amalgamate / merge, the transferee company automatically inherits the GST dues of the amalgamating companies - all the dues of the amalgamating company can be recovered from the amalgamated company. In this breath, it is relevant to take note of the ruling of Karnataka HC in the case of Trelleborg Sealing Solutions India Private Limited (KHC 24866 dt. 02.07.2024) - Citing the Supreme Court verdict in Maruti Suzuki (India) Ltd, the HC stated, "once an amalgamating entity ceases to exist upon an approved Scheme of Amalgamation, the question of continuing the proceedings as regards the non-existent company cannot be permitted." Accordingly, the HC quashed the SCNs and set aside the demand of tax including interest and penalty. This ruling establishes that the proceedings (new and already initiated ones) should be continued or pursued only against the amalgamated company and nothing can continue against the amalgamating company.

On a different note, the law also provides that if there were any transactions between the two or more companies that are amalgamating or merging and where the effective date of merger is an earlier date, S. 87 specifically provides that all such transactions during the interregnum would remain as such and continue to be included in the supplies made / received (as the case may be) by the respective entity. Whilst from a financial statement perspective (Balance Sheet and Profit and Loss Account), these transactions would get eliminated in the process of consolidation, the same would not impact or have any consequence for GST – it would remain a supply made by the entity which initially supplied and receipt by the

entity which received. The liability for payment of output taxes, claim of input credits and all other consequential compliances would remain status-quo. It also provides that, such entities would be reckoned as 'distinct entities' for the limited purposes of GST provisions during this interregnum (from the effective date of amalgamation upto the date of cancellation of registrations of such amalgamating entities).

Broadly, it would be safe to infer that the route of amalgamations and mergers or demergers should not, and more particularly, cannot be used as a tax evasion mechanism.

Practically, whether of the amalgamated company liability applies from the appointed date or effective date of amalgamation is often litigated – in line with the above, the liability of the amalgamated company would ideally be from the effective date of amalgamation. Thus, all compliances upto the effective date would vest with the amalgamated companies, though it would be a joint and several liability of both the entity from a tax administration and recovery point of view.

*Additional notes: On amalgamation or merger of entities, the Bombay HC in the case of Umicore Autocat India Private Limited, Goa Bench (WP No. 463/2024) held that S. 18(3) read with R. 41 allows transfer of unutilised ITC across States, and the GSTN portal or any Circular cannot restrict ITC-02 to "same-State" cases. It ordered that the ITC should be allowed to move from the transferor GSTIN (Goa) to the transferee GSTIN (Maharashtra) after an NCLT-approved amalgamation with transfer of liabilities.*

#### **D. S. 88 – Liability in case of company in liquidation**

When a company is being wound up irrespective of the reasons for the same, the liquidator (or administrator under IBC) must inform the jurisdictional Commissioner within 30 days of appointment that the company is into liquidation.

Thereafter, the Commissioner would be required to notify the liquidator within 3 months, the amount which he deems sufficient to cover the liability of company upto the date of the liquidation. Legally, there would be no assessment and confirmation of demands at this stage. The intimation by the Commissioner is only an estimate which he believes would be sufficient towards the amount of taxes, interest and penalties, after which date and upto such amount, it becomes the duty of the liquidator to ensure that GST dues are settled before distributing assets.

Nonetheless, as an extended liability, if any dues cannot be recovered from the company, the directors of the company (during the period of default) can be held personally liable, unless they prove that non-recovery was not due to their gross neglect, misfeasance or breach of duty. This would include liabilities both, in respect to proceedings that were initiated prior to the liquidation as well as any proceedings that are initiated subsequently during the process of liquidation.

*Additional notes: This provision should to be read along with the Insolvency and Bankruptcy Code, 2016, which prescribes its own waterfall of priority for creditors.*

#### **E. S. 89 – Liability of directors of a private company**

If a private company fails to pay its GST dues for reasons whatsoever, and such dues cannot be recovered from its assets, the 'directors at the time of default' can be made personally liable. Only exception and safeguard for the directors would be if they are able to demonstrate that the non-payment was not due to their gross neglect and if they had taken adequate care within their reach from this misfeasance or breach of duty. The burden of proof completely lies on directors to reverse the usual presumption of *mens-rea*.

One exception being, where a company is converted from a private to a public limited

company, if any dues of the private company could not be recovered prior to it becoming a public limited company, such un-recovered liability cannot be subsequently recovered from the directors of the private company.

Another important aspect to note is that 'personal penalty or liability of a director' is different from 'recovery of company's tax dues from a director'. While the former is a penalty on the director in his capacity as a director for mis-conduct or participation in any misfeasance, the latter is recovery of company's liability from the director – where the tax liability is crystallised in the hands of the company but the tax office is unable to recover from the company. The provisions of S. 89 applies only to liability of a company that is recoverable from a director.

On the question of when and what types of dues can be recovered from a director, the *Telangana HC in the case of Valluripalli Nagarjun v. DC*, (2022 (11) TMI 1271) held that any recovery of arrears of tax due from a private limited company from the Directors of the company can be initiated and recovered only in line with S. 27 of the Andhra Pradesh Revenue Recovery Act, 1864 read with S. 16-B of the APGST Act, which is only when the company is in liquidation and not otherwise. The stand of the respondent that since the 3rd respondent in the petition has been amalgamated with the 4th respondent, the same is to be deemed to be under winding up, does not appeal this Court for acceptance for the reasons that the amalgamation is undertaken under S. 397 of the Companies Act, 1956, whereunder there would be transfer of assets and liabilities of the company being taken over by the other company with which it is being amalgamated and thus, it cannot be considered as deemed to be wound up. The procedure for winding up of a company is prescribed under Part II of Chapter XX of the Companies Act, and it operates in a different field and cannot be considered same as in the case of amalgamation. Therefore, in the light of the settled position of law as enunciated by this Court in *Maddi Swarna*

*v. CTO*, (2001 (6) TMI 795 – AP HC), this Court held that the action of the 1st respondent in issuing the impugned notice of attachment in Form 5 dt.22.08.2007 under section 27 of the Act of 1864, cannot be countenanced.

Additional notes:

- a. The GST provisions does not distinguish between whole time directors, non-whole time directors and independent directors. The difference in roles and responsibilities under the corporate laws would not be relevant and cannot be used as a safeguard under the GST laws. The only exception or safeguard being if the director is able to demonstrate that he / she was not involved in the misfeasance.
- b. Again, the liability of a managing director and other directors also would not have any differential treatment under the GST laws. Nonetheless, if the contracts and / or roles and responsibilities of each of them are clearly defined, it could help demonstrate the non-involvement in the misfeasance.
- c. It will be important to note that this recovery provision applies only to the directors of a private company and does not extend to public companies.
- d. Former directors cannot be held responsible for the liabilities of a subsequent period. As a reference, the Madras High Court in the case of *DV Rao v. Deputy DGFT* (2024 (6) TMI 204) held that *the penalty imposed on a company cannot be recovered from its former director who had resigned and filed necessary documents with the Registrar of Companies. The court quashed the order imposing penalty on the director and directed implementation against others, excluding the petitioner director (former director). The important procedure to insulate oneself being intimation to the tax authorities, of*

the retirement or resignation or any other form of separation of the director from the company.

#### **F. S. 90 – Liability of partners of a firm**

Every partner of a partnership firm would be jointly and severally liable for GST dues of the firm, irrespective of profit-sharing ratios. This would be, for the complete period upto the date of intimation of such retirement or resignation or any other form of separation, where the intimation is filed beyond 1 month (it would be upto the date of separation, where the intimation is filed within 1 month).

Here again, the key to insulate oneself would be the intimation to the tax authorities, of the retirement or resignation or any other form of separation of the partner, either by the firm or by self (by the partner).

Apropos, in the case of death of a partner, the legal heirs would continue to be liable, subject to intimations.

#### **G. S. 91 – Liability of guardians, trustees or agents**

When a business is run on behalf of another person, such as a minor, incapacitated person or beneficiary, the guardian, trustee, or agent managing the business would be deemed and treated as the taxable person. The underlying principle being that the tax liabilities cannot be avoided merely because the beneficial owner is legally incapacitated or where the proceedings cannot be legally initiated against the beneficial owner. *Eg: A trust runs a school cafeteria. The trustee must discharge GST dues, even though the beneficiaries (students/guardians) ultimately enjoy the surplus.*

#### **H. S. 92 – Liability of Court of Wards, Administrators, etc.**

Where the management of a business is taken over by a Court of Wards, Administrator

General, Official Trustee, or other legal authority, such body will be treated as the taxable person and becomes liable for the GST dues. All the provisions, not limited to ensuring compliance and recovery of taxes, but in entirety will apply *mutatis mutandis*, to the person who, in fact manages the business. *Eg: If a court-appointed administrator is running the affairs of an estate business, that administrator must ensure GST compliance.*

#### **I. S. 93 and S. 94 – Liability in case of discontinued business**

If a business is discontinued (due to closure, dissolution or otherwise), the persons in charge of the business at the time of discontinuance, viz., the partners, directors, trustees, etc. will continue to remain liable for tax dues incurred during the operation of the business.

However, in case death of the tax payer, the legal representative would be responsible for both, the liabilities upto the date of death as well as the liabilities for the period thereafter, if the business is continued. The safeguard on the amount of recovery for the period upto the date of death is limited to the extent the liabilities can be met out of the estate of the deceased.

Further, where the tax payer is either an HUF or an AOP, where the property is distributed amongst the members upon its dissolution, all such members would be jointly and severally responsible for the dues upto the date of dissolution. Apropos a partnership firm, all the partners would be jointly and severally responsible for all the dues upto the date of dissolution. These would however be subject to any specific provisions in the IBC, 2016.

Practically, where the tax payer is A but the business is run by B (typically between siblings, spouses, parents-children), it is important to note that the liability is and will always be the responsibility of the person registered as tax payer and not the person conducting the business (in the instant case A and not B). God

forbid, if B (person managing the business) expires, irrespective of the fact that A was not involved and A is not aware of the business / transactions, the liability will always vest with A.

In the case of *Om Prakash Wadhawan v. State of UP (Writ Tax No. - 1032 of 2025)*, where a notice was issued against a dead person, the Allahabad High Court held that the same is not sustainable. It found that though the show cause notice, reminders and the subsequent tax determination were directed to the deceased, since the same were issued after the death, it ought to have been issued to the legal representative and not the deceased. Upholding the provisions of S. 93, the Court held that while a legal representative may be liable for tax arising from a deceased person’s business, the statute does not permit making a determination against a dead person; the legal representative must be served and given an opportunity to respond.

Next, in the case of *Sunil Thampy Nair v. State of Maharashtra (TS-679-HC(BOM)-2025-GST)*, the

Bombay High Court set aside the demand order and the consequential notice for attachment of properties on the premise that the order would be a nullity since it is made against a dead person. The proceedings ought to have been initiated and demand raised against the legal representative. Nonetheless, the HC permitted the Revenue to initiate fresh proceedings against the legal representatives, in accordance with law. So also, in the case of *Amit Kumar Sethia (Deceased) v. State of UP (TS-243-HC (ALL)-2025-GST)*, the Allahabad High Court took a similar view while holding that, once the provision deals with the liability of a legal representative on account of death of the proprietor of the firm, it is sine qua non that the legal representative is issued a show cause notice and after seeking response from the legal representative, the determination should take place.

Thus, in case of a death of the tax payer, it clearly follows that the proceedings should thereafter be initiated only the against legal representative and any steps taken against the deceased would be invalid.

### Some issues and summing-up

Collectively, S. 85 to S. 94 ensure that GST dues are “sticky” and they attach to the business, its controllers, and its estate, ensuring tax recovery and continuity of liability across transfers, succession, or discontinuance.

Issue	Explanation
1. Broad and uncertain scope of liability	“Joint & several liability” can implicate innocent partners/directors.
2. Conflict with Companies Act	Companies Act provides limited liability; GST overrides by making directors personally liable.
3. Successor liability in business transfer	Buyers face risk of inheriting hidden GST dues, affecting M&A certainty.  Practically, insisting the transferor to provide a “tax clearance certificates” could be a security for the transferee.
4. Liability of legal heirs	Legal heirs are liable only to extent of estate, but law does not provide the procedure to quantify or assess the value of inheritance.

Issue	Explanation
5. Overlap with Insolvency & Bankruptcy Code (IBC)	S. 86 liability conflicts with IBC's waterfall distribution.  Note: The hon'ble SC has clearly provided that once the resolution plan is approved, there can be no further liabilities (if any, it would extinguish).
6. Burden of proof on directors/partners	GST shifts burden on directors to prove innocence and filing of intimations.
7. Continuity of liability even after dissolution	Partners/directors remain liable indefinitely even after discontinuance.
8. Transparency in pending dues	Buyers, investors, or heirs cannot easily verify pending GST dues. Utmost, as indicated above, the transferee can insist on 'tax clearance certificates', but anyways, this would not insulate them from any joint and several liabilities.
9. Joint and several liability	While the law elaborately explains the joint and several liabilities in different circumstances, it is important to note that from a tax administration perspective, procedurally, the liability to pay tax and other amounts is essentially on the primary person. The joint and several nature of liability does not empower the tax office to directly recover the said amounts from the other person. It follows that the tax office should demand the taxes and other amounts from the primary person and if unrecoverable, the recovery should be initiated against the other.

To sum up, whilst S. 85 to S. 94 of the CGST Act represents and provide for the legislature's determination to secure government revenue even in the face of liquidation, succession or business transfer, the judiciary has consistently upheld the principle of continuity of liability, but with an important caveat - that the liability should not be imposed mechanically but must always respect principles of fairness and natural justice. Goes without saying that the liability should be imposed only on culpable persons rather than innocent stakeholders, but the responsibility to prove innocence would solely be on such person and could be a matter of litigation, especially where the liability is a natural fallout and this exception is not carved out.

*The insights shared in this article reflect the author's personal understanding and interpretation of the subject matter. While feedback and differing perspectives are welcome to enrich the discussion, the contents in this article should not be construed as tax, legal, or financial advice. Professional advice should be sought before taking any action based on the information provided.*

*(Source : This article is published in souvenir of 28th National Convention which was held on 13th & 14th December, 2025 at Bengaluru)*

