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Issues in Real Estate Sector

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Transferable Development Rights (TDR)

a) Taxability of TDR

   i. Upto 31.03.2019

   ii. From 01.04.2019

b) Whether sale of TDR by society is in course or furtherance of business.

c) Surrendering of tenancy rights.

d) Taxability of free flats in the hands of landowner.

i. Taxability upto 31.03.2019

1. Object behind implementation of GST was mere consolidation of taxes of earlier regime – Thus when a transaction of immovable property which was not taxable in earlier regime cannot be intended to be taxed under GST by merely stretching the definition of services.
2. Sale of TDR will be treated as sale of Land and thereby not leviable to GST
3. In terms of entry no. 5 of Schedule III of CGST Act, 2017 sale of land will neither considered as supply of goods nor as supply of services.TDR is considered as Land as per the definition of the Land in various statues:
4. Department has been consistently treating the transaction of sale of TDR as transaction of land.
5. Transfer of TDR cannot be covered under the definition of service as such definition has to be read in the context of the GST Act.
6. Transaction of immovable property are special species of contract
7. The term "services" has to be given popular and common parlance meaning and therefore cannot include transaction of sale of immovable property.
8. Constitution of India treats TDR as land itself
9. The Schedule II entries further enhance the interpretation that Transaction of sale of TDR is not covered under the scope of GST.
10. Entry No. 2(a) of Schedule II of CGST Act refers to lease, tenancy, easement, license relating to immovable properties but does not cover sale of immovable properties per se
11. Transaction of sale of TDR should not be taxable because the same was never done with an intention to do business or in the course of furtherance of any business by the landlord
12. The activity of transfer of development rights is not taxable under Sl. No. 16(iii) of Notification No. 11/2017-CT (Rate) as the Activity of sale of TDR are not in the nature of Real Estate Services.
13. The levy of GST fails as no rate has been prescribed in Notification No. 11/2017- Central Tax (Rate), dated 28-6-2017 and thus GST on the same cannot be demanded.
14. The leviability of tax cannot be determined on the basis of merely entries appeared on any Rate / exemption notification or any other notification

ii. Taxability from 01.04.2019

- **Notification No. 4/2019-CT (Rate) dated 29-3-2019 – Exemption in respect of development rights, FSI and Long lease and RCM on same**

  Notification No. 4/2019-CT (Rate) dated 29-3-2019 effective from 1-4-2019 has amended notification No. 12/2017-CT (Rate) to provide exemption in respect of some development rights, FSI and Long lease. The relevant entry is reproduced below:

Sl. No	***Service Code (Tariff)***	***Description of Services***	***Rate***	***Condition***
1	***2***	***3***	***4***	***5***
41A	*9972*	*Service by way of transfer of development rights (herein refer TDR) or Floor Space Index (FSI) (including additional FSI) on or after 1st April, 2019 for construction of residential apartments by a promoter in a project, intended for sale to a buyer, wholly or partly,*	*Nil*	*Provided that the promoter shall be liable to pay tax at the applicable rate, on reverse charge basis, on such proportion of value of development rights, or FSI (including additional FSI), or both, as is attributable to the residential apartments, which remain un-booked on the date of issuance of*

		except where the entire consideration has been received after issuance of completion certificate, where required, by the competent authority or after its first occupation, whichever is earlier. *The amount of GST exemption available for construction of residential apartments in the project under this notification shall be calculated as under:* *[GST payable on TDR or FSI (including additional FSI) or both for construction of the project]* ***x*** *(carpet area of the residential apartments in the project ÷ Total carpet area of the residential and commercial apartments in the project)*		*completion certificate, or first occupation of the project, as the case may be, in the following manner -* *[GST payable on TDR or FSI (including additional FSI) or both for construction of the residential apartments in the project but for the exemption contained herein] x (carpet area of the residential apartments in the project which remain un- booked on the date of issuance of completion certificate or first occupation ÷ Total carpet area of the residential apartments in the project)* *Provided further that tax payable in terms of the first proviso hereinabove shall not exceed 0.5 per cent. of the value in case of affordable residential apartments and 2.5 per cent. of the value in case of residential apartments other than affordable residential apartments remaining un- booked on the date of issuance of completion certificate or first occupation* *The liability to pay central tax on the said portion of the development rights or FSI, or both, calculated as above, shall arise on the date of completion or first occupation of the project, as the case may be, whichever is earlier.*

- **Notification No. 5/2019-CT (Rate) dated 29-3-2019- Reverse charge in respect of non exempt development rights, FSI and Long lease**

Notification No. 5/2019-CT (Rate) dated 29-3-2019 has amended notification No. 13/2017-Central Tax (Rate) so as to tax under reverse charge basis in respect of non exempt development rights, FSI and Long lease:-

Sl. No.	***Category of Supply of Services***	***Supplier of service***	***Recipient of Service***
5B	*Services supplied by any person by way of transfer of development rights or Floor Space Index (FSI) (including additional FSI) for construction of a project by a promoter.*	*Any person*	*Promoter*

iii. Whether sale of TDR by society is in course or furtherance of business

- Definition of supply as per section 7 of CGST Act, 2017 is reproduced below:

7. (1) For the purposes of this Act, the expression "supply" includes—

(a) all forms of supply of goods or services or both such as sale, transfer, barter, exchange, licence, rental, lease or disposal made or agreed to be made for a consideration by a person ***in the course or furtherance of business;***

(b) ……..

- **Definition of business as provided under section 2(17) of CGST Act, 2017 is reproduced below:**

(17) "business" includes—

(a) any trade, commerce, manufacture, profession, vocation, adventure, wager or any other similar activity, whether or not it is for a pecuniary benefit;

(b) any activity or transaction in connection with or incidental or ancillary to sub-clause (a);

(c) any activity or transaction in the nature of sub-clause (a), whether or not there is volume, frequency, continuity or regularity of such transaction;

(d) supply or acquisition of goods including capital goods and services in connection with commencement or closure of business;

(e) provision by a club, association, society, or any such body (for a subscription or any other consideration) of the facilities or benefits to its members;

(f) admission, for a consideration, of persons to any premises;

(g) services supplied by a person as the holder of an office which has been accepted by him in the course or furtherance of his trade, profession or vocation;

(h) activities of a race club including by way of totalisator or a license to book maker or activities of a licensed book maker in such club; and

(i) any activity or transaction undertaken by the Central Government, a State Government or any local authority in which they are engaged as public authorities;

iii. SURRENDER OF TENANCY RIGHTS

- The CBEC *vide* Circular No. **44/18/2018-CGST dated 2-5-2018** clarified that transfer of tenancy rights against the consideration in the form of tenancy premium is a supply of service liable to GST as the same is in form of lease or renting of immovable property which is declared to be a service in para 2 of Schedule II of CGST Act, 2017. Though transfer of tenancy rights is subject to stamp duty and registration charges it would not preclude the transaction from the scope of "supply" and from payment of GST. Thus, it cannot be treated as sale of land or building in terms of para 5 of Schedule III of CGST Act, 2017.

- Transfer of tenancy rights to a new tenant against consideration in the form of tenancy premium is taxable. However, renting of residential dwelling for use as a residence is exempt **[Sl. No. 12 of notification No. 12/2017-Central Tax(Rate)].** Hence, grant of tenancy rights in a residential dwelling for use as residence dwelling against tenancy premium or periodic rent or both is exempt**. As regards services provided by outgoing tenant by way of surrendering the tenancy rights against consideration in the form of a portion of tenancy premium is liable to GST.**

- It must be noted that an activity can be considered as an supply only when it is carried out in course or furtherance of business. **The circular has not examined whether surrender of tenancy rights is in course or furtherance of business.**

2. Valuation

a) SRA Building

b) Free units supplied to land owner

c) Applicability of Vasantha Green Projects (2018 (5) TMI 889 - CESTAT Hyderabad)

- Relevant valuation rules are reproduced below:

27. Value of supply of goods or services where the consideration is not wholly in money.-*Where the supply of goods or services is for a consideration not wholly in money, the value of the supply shall,-*

(a) be the open market value of such supply;

(b) if the open market value is not available under clause (a), be the sum total of consideration in money and any such further amount in money as is equivalent to the consideration not in money, if such amount is known at the time of supply;

(c) if the value of supply is not determinable under clause (a) or clause (b), be the value of supply of goods or services or both of like kind and quality;

(d) if the value is not determinable under clause (a) or clause (b) or clause (c), be the sum total of consideration in money and such further amount in money that is equivalent to consideration not in money as determined by the application of rule 30 or rule 31 in that order.

28. Value of supply of goods or services or both between distinct or related persons, other than through an agent.-*The value of the supply of goods or services or both between distinct persons as specified in sub-section (4) and (5) of section 25 or where the supplier and recipient are related, other than where the supply is made through an agent, shall-*

(a) be the 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:

Provided further that where the recipient is eligible for full input tax credit, the value declared in the invoice shall be deemed to be the open market value of the goods or services.

30. Value of supply of goods or services or both based on cost.-*Where the value of a supply of goods or services or both is not determinable by any of the preceding rules of this Chapter, the value shall be one hundred and ten percent of the cost of production or manufacture or the cost of acquisition of such goods or the cost of provision of such services.*

Relevant extract of **Vasantha Green Projects (2018 (5) TMI 889 - CESTAT Hyderabad)** is reproduced below:

> *7. It has to be construed, in the above factual matrix, that construction of villas for the land owners is a consideration towards the land on which villas were constructed and offered for sale to prospective customers* ***. It would not be a rocket science to understand that the value which has been arrived at for sale of villas to prospective customers, would include the consideration paid or payable for acquisition of land. It is not a case that appellant has not discharged the service tax liability on the value received for the villas from prospective customers. In our view, if the consideration towards the acquisition of the land has been included in the value of the villas sold to prospective customers and appropriate service tax liability has been discharged the same value, it cannot be again made liable to service tax under the premise that sale value of the villas given to land owners is a consideration on which service tax liability was not discharged. It would be imperative to reproduce the provisions of Section 67 of the Finance Act, 1994 which would apply in the case in hand, as also rule 3 of the Service Tax (Determination of the Value) Rules, 2006.***

3. Input tax credit

a) Interest cost to be included in computation of 80% limit. Notification no. 3/2019-Central Tax (Rate) dated 29th March 2019 brings the said provision under column no. 5.

Provided also that eighty percent of ***value of input and input services, [other than services by way of grant of development rights, long term lease of land (against upfront payment in the form of premium, salami, development charges etc.) or FSI (including additional FSI), electricity, high speed diesel, motor spirit, natural gas],*** *used in supplying the service shall be received from registered supplier only;*
Provided also that inputs and input services on which tax is paid on reverse charge basis shall be deemed to have been purchased from registered person;

*Provided also that where value of input and input services received from registered suppliers during the financial year (or part of the financial year till the date of issuance of completion certificate or first occupation of the project, whichever is earlier) falls short of the said threshold of 80 per cent., [1]**[**central tax**]** shall be paid by the promoter on value of input and input services comprising such shortfall at the rate of 2[nine] percent on reverse charge basis and all the provisions of the Central Goods and Services Tax Act, 2017 (12 of 2017) shall apply to him as if he is the person liable for paying the tax in relation to the supply of such goods or services or both;*

Provided also that notwithstanding anything contained herein above, where cement is received from an unregistered person, the promoter shall pay tax on supply of such cement at the applicable rates on reverse charge basis and all the provisions of the Central Goods and Services Tax Act, 2017 (12 of 2017), shall apply to him as if he is the person liable for paying the tax in relation to such supply of cement;

THANK YOU

BALANCED VIEW

PRESENTED BY

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