

Emanating Tax Issues in the Real Estate Industry

Sep 07, 2020



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The Real estate industry has always been an Industry prone to a lot of tax disputes due to the complexity of transactions and multiple state and central legislations applicable simultaneously on every single transaction. One of the several issues that have been keenly watched has been taxability on development rights and the sale of plots. In this article, we will be discussing both the issues as per the recent GST rulings.

JOINT DEVELOPMENT AGREEMENT

As per Para 5(b) of schedule II of the CGST Act, 2017 read with section 7, Construction of a complex, building, civil structure or a part thereof, including a complex or a building intended for a sale to a buyer, wholly or partly, except where the entire consideration has been received after issuance of the completion certificate, where required, by the competent authority or after its first occupation, whichever is earlier shall be treated as supply of service. And, as per para 5 of Schedule III of CGST Act, sale of land and, subject to clause (b) of paragraph 5 of schedule II, sale of the building shall be treated neither as the supply of goods nor as supply of services. So, legally speaking, GST cannot be levied on the sale of immovable property. Only services in relation to immovable property are subject to GST.

Now if we look into the ruling, in the case of M/S Maarq spaces private limited, the applicant, a developer executed a Joint Development Agreement with the landowner for development of bare land into a plotted land which, inter-alia, included levelling of land, fencing, construction of roads, laying of sanitary pipes and drainage system, hence core competence and activity carried out are of land development and not a sale of land. The entire cost of development of land into a plotted colony was to be borne by the applicant. As consideration for the development of land into plots, the applicant was entitled to receive 25% of the revenue generated from the sale of plots.

The concern to be analyzed by the Authority was whether the development and sale of land by the applicant would be chargeable to GST. Applicant contended that this is a composite supply where the predominant supply is land and development activity is incidental to the sale of land. In other words, it is integrally connected with the sale of land, therefore Applicant is of the view that, sale of the developed plot is nothing but the sale of land, which falls under Entry 5 of Schedule III of the Act, therefore does not attract tax under GST. However, the authority noted that this contention of the applicant cannot hold good as composite supply means a supply comprising of two or more taxable supplies and a combination

of two activities one of which is not supply as per the GST Act cannot be said to be a composite supply.

Further, the authority held noted applicant cannot be considered to be the seller of land for the reason the ownership and title in land vests with the land-owner and not with the applicant and the activities of development of land by the applicant amounts to supply of services to the land-owner for which the applicant is entitled to receive 25% of the revenue generated from the sale of plots. In this case, the revenue sharing arrangement indicates that the applicant gets an amount on the sale of each individual plot. This shows that there are no fixed earmarked plots to which the applicant can claim an entitlement. Further, the amount received on the sale of the plots is credited to an escrow account and then only the same is divided. This shows that the applicant is not the owner of the plots and consequently cannot claim the sale of the plots as his supply. Accordingly, the Authority held that revenue share received by the developer shall be subject to levy of GST being the supply of services to the landowner. Some of the industry stalwarts disagree with the taxation of the said transactions under the GST regime, as such transactions were not taxed in the erstwhile tax regimes. We believe some important points observed by AAR needs to be noted before formulating any joint development agreement, firstly applicant was not the owner of land, secondly, applicant 's plots were not earmarked, thirdly applicant was providing service to landowners and landowners alone apply to the government authorities to obtain sanctioned plans. Thereby applicant is merely a contractor providing development services to the land-owner. These points were important and needs are answered by every tax professional in joint development agreement, otherwise, it would attract GST on the services by the contractor.

Sale of PLOT

Gujarat AAR in the case of Shree Dipesh Anilkumar Naik has ruled that GST is applicable on sale of a plot of land for which, as per the requirement of approved by the respective authority (i.e. Zilla Panchayat), Primary amenities such as, Drainage line, Waterline, Electricity line, Land levelling etc. are to be provided by the applicant.

AAR observed that the plotted development is a scheme which involves forming land into layout after obtaining necessary plan approval from the development authority, get all other permission required to take up, commence and complete what would be the layout, comprised of individual sites. Also, it was noticed that sellers are charging a price based on a super built-up basis and not the actual measure of the plot, which means that end consumers are being charged for common amenities, roads, the water tank, and other infrastructure on a proportionate basis.

AAR ruled that the sale of the developed plot is not equivalent to the sale of land but is a different transaction. Sale of such plotted development tantamount to the rendering of service and thereby would be chargeable to GST.

This ruling goes against the basic framework of GST which restricts the taxation of movable goods and services. Government must come out and issue a clarification in this regard to free the real estate industry from future litigations.

In the current financial & economic turmoil situation, the government needs to tax the real estate industry based on transparent, clear, and unambiguous tax policies. Otherwise, the complex framework of policies and regulations over the sector would lead to erosion of the jobs for people living at the lowest strata of the society.