

GST Implications On Sale of Plotted Land

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Introduction:

Real estate development can take place for residential, industrial, or commercial objectives. It's equally eye-catching in the area of plotted land development. Development of these plotted lands involves deployment of both goods and services and thereby the said works if provided under a contract will qualify under works contract under GST. Works contracts have always been a source of contention. The goal of this article is to investigate and critically evaluate GST liability, compliance requirements of plotted development, and works contracts concerning various types of activities associated with the real estate sector, while also soliciting multiple perspectives from industry experts on various issues.

Scope of supply under CGST ACT 2017:

As defined under GST law, immovable property is not included in the definition of goods. Consequently, GST only applies to mobile property and not to immovable property, such as land.

A Works contract as defined in GST law is a contract for the construction, fabrication, completion, erection, installation, fitting out, improvement, modification, repair, maintenance, renovation, alteration, or commissioning of any immovable property, wherein the performance of such contract involves the transfer of property in goods (whether as goods or in some other form). Thus, works contract under GST encompasses only immovable property contrary to VAT and Service tax regime which included both moveable and immovable property.

According to Para No. (5) of Schedule III, "Sale of Land, and, subject to clause (b) of paragraph 5 of Schedule II, sale of building" are activities that are neither a supply of goods nor a supply of services. And under Para 6(a) of Schedule II of CGST Act, 2017, it has been specified that works contract supply shall be treated as supply of services.

Development of plotted land if carried out under a contract, the contractor is liable to pay GST. Since it is not a sale of Land, it will not fall under Schedule III. It will fall under the definition of works contract since it is an improvement of immovable property i.e. land.

Input Tax Credit (ITC) Availability

The Good and Services Act was supposed to solve the largest problem of cascading effects by allowing for a smooth flow of input tax credits, however the terms are more vague, causing problems with ITC in the event of construction of immovable property other than plant and machinery.

As per section 17(5), Benefits of the Input tax credit cannot be availed if construction of an immovable property (Except plant and Machinery) is undertaken on its own account and the same has been capitalized in the books of account. Further, It should be noted that if the same has been recognized as revenue expense then only input tax credit shall be available.

However, if construction of an immovable property (except plant and machinery) is undertaken for further supply of works contract services, then input tax credit shall be available to the supplier.

On analysis, it seems quite contradictory to the government motive to block the input tax credit on works contracts? It results in an unnecessary reduction in the working capital of business entities.

Let's discuss the availment of ITC on material and services purchased with some illustrations:

Case 1: XYZ Ltd gives contract of works contract services to ABC Ltd amounting to Rs. 10 crores. In such a case, the input tax credit shall not be available to XYZ Ltd on works contract services by virtue of section 17(5).

Case 2: In the given case if, ABC Ltd further subcontracted the contract of the building to YZ Ltd. In this case, the input tax credit on the works contract of the subcontracted part shall be available to ABC Ltd by virtue of section 17(5) to use such services for further supply of services.

Case 3: If, ABC Ltd (a constructing company) constructs the immovable property other than plant & machinery for their own purpose, not for further supply of services, then, the input tax credit in relation to the works contract service shall not be available to ABC Ltd.

Case laws & Judgements

- CCE v. Solid & Correct Engg. Works [Civil Appeal No. 960-966 of 2003, dated 8-4-2010]:

The Hon'ble Supreme Court observed that as per General Clauses Act "movable property" shall mean property of every description, except immovable property. And immovable property" shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth."

Section 3 of the Transfer of Property Act, however, gives the following meaning to the expression "attached to the earth":

1. rooted in the earth, as in the case of trees and shrubs;
2. imbedded in the earth, as in the case of walls and buildings;
3. attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached."

As per the above-mentioned observations, it was pronounced that the amenities like Roads, Drains, etc., provided by the landowner will be considered as things attached to the Land i.e., an Immovable property.

- **Safari Retreat (P.) Ltd V.Chief CCG & ST [TS-350-HC-2019(ORI)-NT]**

The Orissa High Court in its judgment has clearly stated that provision contains in 17(5)(d) cannot be applied in the case of Renting services. Hon'ble High Court allowed ITC in case of material and services used for construction of a mall in which shops were leased out post-construction. The Hon'ble High Court has commented on the provisions of Section 17(5)(d) of the Act and held that this is a narrow interpretation of the revenue with respect to the provisions of Section 17(5)(d) which is not acceptable.

Liability on Sale of Developed Land by Land Owner

To market a landed property, the landowner must build common utilities such as roads, drains, and power supply, which will be maintained by the respective government authorities after the sale. Following are the important points to be kept in mind for checking whether any development on land intended for sale by a person will be subject to GST:

1. Any land improvement is liable to tax under GST in circumstances where there is an agreement to execute works contracts wherein transfer of property in goods (whether as goods or in some other form) is involved in the execution of such contract for consideration.
2. But a self-development by a landowner for sale shall not come under the ambit of works contract to levy GST.
3. As per Section 17(5)(d), no Input Tax Credit is available in respect of any goods or services received by a taxable person for construction of an immovable property on his own account even if such inputs and input services are used in the course and furtherance of business.
4. Thereby the levy under the works contract cannot be implemented in circumstances where the Land Owner constructed the common facilities on his own.
5. In most circumstances, a qualified individual is hired by the landowner to prepare all common facilities in exchange for a specified sum of money or a specific number of developed plots granted to him. In such cases, the construction contractor gets taxed.

Conclusion

In the context of the above issue, we can conclude that the construction of roads, drainage, and other common utilities is deemed immovable property and does not fall under the category of goods because it is permanently attached to the land. The sale is for landed property, not primarily for shared facilities. The sale of developed land is not the same as the sale of commodities or services and thus, no GST can be imposed. Further, works Contract services shall be treated as supply of services irrespective of quantum of Goods and Services in works contract supply. With respect to ITC, as we all know we have restrictions in terms of the time limit to take ITC, taxpayers can use the aforementioned judgment of Orissa High Court in similar nature of business in order to take the credit (but should not utilize the credit) until the matter is not pronounced by Supreme Court. If the decision comes adverse, then he can reverse the credit without calculation of Interest thereon otherwise in the affirmative situation, he will have ITC to utilize it further. However, the officer might challenge this position and levy interest and penalty. Hence, a cautious decision shall be made after a detailed cost-benefit analysis.