Pune Branch of WIRC of ICAI

Topic: - Issues on real estate, TDR & development agreement

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REAL ESTATE – TOPICS

1) Before & After 01-04-2019
2) Option of Ongoing Project
3) Rate of Tax on Affordable & Non-Affordable Apartment
4) Supply of TDR/Long Term Lease
5) Reverse Charge of TDR/Long Term Lease
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12) Cancellation of Flat
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❑ BEFORE AND AFTER 01-04-2019

- Upto 31.03.2019, rate of construction of residential complex service after claiming deduction of 1/3rd for the value of land was 12% and construction of flats under affordable housing was taxed at the rate of 8%.

- W.e.f. 01.04.2019, new rates were notified and builders were given an option to avail one option. Either they can continue to charge 12% and 8% and avail input tax credit or they can opt for new rates and forgo the input tax credit.

The provisions related to new rates are explained in the upcoming slides.

❑ BEFORE AND AFTER 01-04-2019

- Gujarat High Court in the case of **Munjaal Manishbhai Bhatt 2022 (5) TMI 397** has held that deeming fiction of 1/3rd land abatement can be applied only where actual value is not ascertainable and the mandatory application of such deeming fiction where the actual value of land is ascertainable is clearly contrary to the provisions of CGST Act. Relevant para reads as follows,

123. While we so conclude, the question is whether the impugned paragraph 2 needs to be struck down or the same can be saved by reading it down. In our considered view, while maintaining the mandatory deduction of 1/3rd for value of land is not sustainable in cases where the value of land is clearly ascertainable or where the value of construction service can be derived with the aid of valuation rules, such deduction can be permitted at the option of a taxable person particularly in cases where the value of land or undivided share of land is not ascertainable.

124. The impugned paragraph 2 of Notification No. 11/2017-Central Tax (Rate) dated 28th June 2017 and the parallel State tax Notification is read down to the effect that the deeming fiction of 1/3rd will not be mandatory in nature. It will only be available at the option of the taxable person in cases where the actual value of land or undivided share in land is not ascertainable.

❑ Option of Ongoing Projects

- As on the date of change over as on 01/04/2019, the notification provided the option to on-going projects either to continue with the old rate of tax with credit or switch over to new rate of tax.

- The builder/developer was required to reverse the appropriate amount of credit on or before September-2019.

- In case the option to shift to new tax regime is selected, the method of computation for reversal of credit is given in Annexure-1 and Anneuxre-2 of Notification No. 3/2019 – CT (Rate) which amends Notification No. 11/2017 – CT (Rate) needs to be followed.

- As per the notification such option was to pay the tax at the old rate required to be exercised by availing Annexure-IV of the Notification with the Jurisdictional Commissioner of the registered person.

❑ Option of Ongoing Projects

- However, even if the Annexure IV is not filed, it was presumed that the builder/developer has opted to pay the tax on new regime. The Annexure-4 was:
  a) Required to be filed for each projects separately.
  b) It was required to be submitted physically.
  c) Option once exercised could not be changed subsequently.

- **Issue 1: Can developer & landowner opt for different rates (i.e. 12% / 5%) under the same project which has single RERA registration?**

- **Issue 2: Suppose, a builder has opted for 12% rate and filed Annexure IV accordingly. However, now the project is taken over by new builder who cannot file Annexure IV now. Whether new builder will have to pay 5% or 12% GST?**

- **Issue 3: A company is developing a project under a single RERA registration comprising of 1,00,000 sq. ft. area. Company has opted to GST @ 12%. After April 2019, extra area of 5,000 sq. ft. has been added to the existing project. Whether the project will still be considered as "ongoing" w.r.t. 5,000 sq. ft. area?**

❑ Rate of tax on Affordable and Non-Affordable Apartments

- The term 'affordable apartments' have been defined in clause 4(xvi) of Notification No. 11/2017-CT (Rate). The tax rate is 1%.

- The alternative definition is given in clause (a) and (b). The condition for sale price of Rs. 45 lacs are only applicable for clause (a) and not applicable for clause (b). The clause (a) and (b) is reproduced below:

(a) a residential apartment in a project which commences on or after 1st April, 2019, or in an ongoing project in respect of which the promoter has not exercised option in the prescribed form to pay central tax on construction of apartments at the rates as specified for item (ie) or (if) against serial number 3, as the case may be, having carpet area not exceeding 60 square meter in metropolitan cities or 90 square meter in cities or towns other than metropolitan cities and for which the gross amount charged is not more than forty five lakhs rupees.

For the purpose of this clause, -

(i) Metropolitan cities are Bengaluru, Chennai, Delhi NCR (limited to Delhi, Noida, Greater Noida, Ghaziabad, Gurgaon, Faridabad), Hyderabad, Kolkata and Mumbai (whole of MMR) with their respective geographical limits prescribed by an order issued by the Central or State Government in this regard;

(ii) Gross amount shall be the sum total of; -

A. Consideration charged for the services specified at item (i) and (ic) in column (3) against sl. No. 3 in the Table;

B. Amount charged for the transfer of land or undivided share of land, as the case may be including by way of lease or sub lease; and

C. Any other amount charged by the promoter from the buyer of the apartment including preferential location charges, development charges, parking charges, common facility charges etc.

(b) an apartment being constructed in an ongoing project under any of the schemes specified in sub-item (b), sub-item (c), sub-item (d), sub-item (da) and sub-item (db) of item (iv); sub-item (b), sub-item (c), sub-item (d) and sub-item (da) of item (v); and sub-item (c) of item (vi), against serial number 3 of the Table above, in respect of which the promoter has not exercised option to pay central tax on construction of apartments at the rates as specified for item (ie) or (if) against serial number 3, as the case may be.

- Thus, the builder/developer who were availing benefit of concessional rate of tax in different clauses of Entry No. 3 of Notification No. 11/2017 – CT (Rate) will continue to avail such benefits even if the sale price of the apartments is above Rs. 45 lacs in clause (b).

- The notification itself laid down the method of computing Rs. 45 lacs. Therefore, the provisions of Section 15 for determination of transaction value will not apply.

- In case of apartments are non-affordable the tax rate of 5% is payable for all the apartments.

❑ SUPPLY OF TDR / LONG TERM LEASE

- The Entry No. 41A of Notification No. 12/2017 – CT (Rate) which has been added by Notification No. 4/2019 – CT (Rate) exempts supply of TDR from payment of tax used for construction of residential apartments subject to the conditions specified therein.

- The condition is that the promoter is required to compute the payment of tax by two methods discussed below (specified in the notification) and pay the tax amount whichever is higher.

a) Compute the tax @ 18% on value of TDR. The value of TDR will be the value of apartments as on the date of transfer of TDR, remaining unsold on the date of Occupation Certificate.

b) 5% of the value of apartments remaining unsold as on the date of Occupation Certificate. The value of apartments will be determined on the basis of rate prevailing on the date of receipt of Occupation Certificate.

❑ SUPPLY OF TDR / LONG TERM LEASE

- In case, the project is for construction of wholly commercial apartments, the exemption from payment of tax will not be available. However, the tax will be continued to be paid by the promoter on reverse charge basis as per Notification No. 5/2019 – CT (Rate).

- However, in case of RREP/REP projects, the tax on TDR to the extent used for commercial apartments will be payable by the promoter, and for residential apartments, the tax on sale of TDR will be exempt subject to the conditions mentioned in Notification No. 12/2017-CT (Rate).

- In case supply of TDR is for construction of commercial apartments and supplier receives the consideration in any form other than the constructed premises, the tax will be payable upfront on supply of TDR. For example, revenue sharing or upfront amount.

- However, if it is not considered as project under RERA, supply of TDR is not exempt from payment of tax. Tax will be payable by supplier. The tax will also be payable upfront.

- However, if the consideration to the supply is in the form of constructed premises, the tax will be payable on the date of receipt of Occupation Certificate. However, it will be advisable to pay tax earlier so that the credit can be obtained by the landowner.

- The Local Authority/ SRA provides FSI for re-development of slum or construction of various premises which are to be used by Local Authority for various purposes like allotting premiss to project affected persons, etc. GST is not payable on reverse charge on such FSI allotted by Local Authority in view of provision of Notification No. 14/2017-CT (Rate) which reads as follows:

  > "Services by way of any activity in relation to a function entrusted to a Panchayat under article 243G of the Constitution or to a Municipality under article 243W of the Constitution."

  The various functions specified in Article 243W inter-alia includes regulation of land use, construction of buildings, urban planning including town planning. It is felt that such allotment of FSI is to regulate the use of land as well as construction of building.

  The department has served show cause notice to various developers alleging that tax is payable under reverse charge by developer. Most of the builders have approached High Court by filing Writ Petition. High Court has admitted petition and granted interim stay.

❑ Reverse Charge of TDR / Long Term Lease

- Notification No. 13/2017-CT (R) has been amended by Notification No. 05/2019-CT (R) to provide for payment of tax on reverse charge basis of following supplies,

Sr. 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	Promotor
5C	Long term lease of land (30 years or more) by any person against consideration in the form of upfront amount (called as premium, salami, cost, price, development charges or by any other name) **and/or periodic rent** for construction of a project by a promoter.	Any person	Promotor

- **RCM is applicable even for Commercial property & even for periodic rent towards long term lease.**

- The valuation of premises allotted to SRA or members of the society is to be determined as per Rule 27 which reads as follows:

Rule 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.*

Illustration :

(1) *Where a new phone is supplied for twenty thousand rupees along with the exchange of an old phone and if the price of the new phone without exchange is twenty four thousand rupees, the open market value of the new phone is twenty four thousand rupees.*

(2) *Where a laptop is supplied for forty thousand rupees along with the barter of a printer that is manufactured by the recipient and the value of the printer known at the time of supply is four thousand rupees but the open market value of the laptop is not known, the value of the supply of the laptop is forty four thousand rupee*

The phrase ‘open market value’ and ‘like, kind and quality’ is defined in explanation below Rule 35 of the GST Rules which is reproduced below:

(a) *"open market value" of a supply of goods or services or both means the full value in money, excluding the integrated tax, central tax, State tax, Union territory tax and the cess payable by a person in a transaction, where the supplier and the recipient of the supply are not related and the price is the sole consideration, to obtain such supply at the same time when the supply being valued is made;*

b) *"supply of goods or services or both of like kind and quality" means any other supply of goods or services or both made under similar circumstances that, in respect of the characteristics, quality, quantity, functional components, materials, and the reputation of the goods or services or both first mentioned, is the same as, or closely or substantially resembles, that supply of goods or services or both.*

If the allotted premises does not fit in the above definition the value will have to be determined under Rule 30 of GST Rules on the basis of cost of construction plus 10%.

- **Self development**

Some of the society also undertake development of society by themselves. By deeming fiction under Section 7 sub-section (1) (aa), the activities or transactions other than individual to its members for valuable consideration is taxable supply. Therefore, it is felt that GST is payable on premises allotted to members of society.

❑ LANDOWNER-PROMOTER

- The landowner who are unable to develop the property themselves transfers the development right to the developer in consideration of constructed premises.

- The developer is liable to pay GST on such constructed premises handed over to the landowner.

- Notification No. 11/2017-CT (Rate) specifically provides that the landowner will be entitled to the credit of such GST paid which can be utilized by him on payment of GST on sale of such premises.

- The credit can be availed by the landowner only when the sale of property and the payment of tax by the builder happens while the property is under construction.

- The notification is applicable only for residential property.

❑ TIME OF PAYMENT

- As per Notification No. 6/2019 – CT (Rate) the tax on the constructed premises handed over to the landowner/developer will be payable at the time of obtaining Occupation Certificate.

- However, the tax on the supply of TDR on reverse charge basis will be payable upfront when the TDR is supplied for development of commercial apartments and the consideration is not paid in the form of constructed premises.

- If the consideration is paid in the form of constructed premises, the tax will be payable at the time of Occupation Certificate.

❑ Issues in Redevelopment

- Whether a view can be taken that no GST is payable in case of receipt of development rights from society as it is not in course of business?
- Whether a view can be taken that no GST is payable on area developed for society or land owner on the basis of Vasantha Greens judgement?
- What will be the value of flats given to society members in case of society redevelopment where the flats sold in open market are having altogether different amenities and different construction quality?
- What is the time of payment of GST in case of redevelopment?

❑ Compliance to conditions for New Rate

- Tax shall be paid in Cash. Closing balance of ITC should not be used.
- ITC cannot be taken except to the extent of transition credit as calculated as per Annexure I & II of the notification.
- Where value of input and input services received from registered suppliers falls short of the said threshold of 80%, tax will have to be paid by the promoter under RCM @ 18%.

(a) In computing value of 80%, the purchase/obtaining of services by way of grant of TDR/FSI, long term lease premium of land, electricity, high speed diesel, motor spirit, natural gas will not be computed.

(b) Where cement is received from an unregistered person, the promoter shall pay tax at the applicable rates of cement under RCM. [benefit of 80% is not available]. Tax shall be paid in the month in which cement is received.

❑ Compliance to conditions for New Rate

(c) Values of inward supplies received should be calculated during the financial year (or part of the financial year till the date of issuance of CC/OC) and for each project.

(d) The said tax payments on the shortfall shall be submitted in the prescribed form electronically on the common portal by end of the quarter following the financial year. The said tax liability be added to the output tax liability in the month not later than June following the end of the financial year.

- Inputs and input services on which tax is paid on reverse charge basis shall be deemed to have been purchased from registered person;

- ITC not availed shall be reported every month by reporting the same as "Ineligible Credit" in Row No. 4(D)(2) in GSTR-3B.

❑ Reversal of Credit

- Rule 42 of the CGST Act has been amended w.e.f. 01/04/2019. As per this rule, the credit will have to be reversed based on the carpet area of the project and not on the basis of value.

- **For RREP**
- In case of ongoing projects, if the developer has opted to continue to pay the tax at the earlier rate the reversal of credit will be done at the time of obtaining Occupation Certificate based on the area.

- In case the developer has opted to pay the tax at the new rate, reversal will be done at the time of opting for new rate.

- In case of new project, the question for reversal does not arise as the reversal cannot be taken.

❑ Reversal of Credit

- **For REP**
- In case of ongoing projects, if the developer has opted to continue to pay the tax at the earlier rate the reversal of credit will be done at the time of obtaining Occupation Certificate based on the area.

- In case the developer has opted to pay the tax at the new rate, reversal will be done at the time of opting for new rate.

- In case of new project, proportionate reversal as per Rule 42 will be done on monthly basis since ITC w.r.t. commercial apartment is eligible. Final reversal as on the date of OC will have to be done.

❑ Maintenance of Records

- The builder will have to maintain the records for each project separately to substantiate that 80% cost of inputs and input services have been obtained from registered persons.

- He will also have to ensure that the credit not availed by him is reflected in Form GSTR-3B.

❑ Activity of Plotted Development

- As per Sr. No. 5 of Schedule III of the CGST Act, 2017, sale of land is kept outside the purview of GST.

- In case of plotted development, the land is sold by the developer to plot owner and activities like levelling, laying drainage lines, electricity lines etc. is carried out.

- As per Circular No. 177/09/2022 – TRU dated 03-08-2022 (para 14), land sold after some development, like levelling, laying down of sewage lines etc., is also covered within Sr. No.5 of Schedule III and hence no GST is payable.

- It appears that other services provided by the developer to the plot owner, such as club house facility, garden, maintenance services, etc. is liable to GST.

❑ Cancellation of Apartment

- It is very common in Real Estate Sector that the customer cancels the flat booked by him. In such case, the company must have already paid GST @ 5% while receiving advance at the time of booking from the customer.

- Company may forfeit the amount of advance already paid or may separately charge cancellation charges.

- **Issue: Whether the company will be liable to charge GST @ 18% on cancellation charges received or GST @ 5% is to be charged since it is not a separate supply?**

- Recent CBIC Circular No. 178/10/2022-GST dated 03-08-2022 has clarified that facilitation supply of allowing cancellation of an intended supply against payment of cancellation fee or retention or forfeiture of a part or whole of the consideration or security deposit in such cases should be assessed as the principal supply. Hence, it will attract same GST Rate as that of principal supply.

CANCELLATION OF APARTMENT

- Refund of GST on cancellation of apartment – It is possible to obtain refund of GST paid within 2 years provided the application is made by the purchaser

- The Hon. Tribunal in the case of M/s. Persipina Developers Pvt. Ltd. (Order No. 85298-85316/2024 dated 01/03/2024 allowed the refund of service tax paid by purchaser of flat on cancellation of apartments. It will be advisable that the application for refund is made by the purchaser of the premises. As per clause (g) of Explanation-2 below Section 54(14) of the CGST Act, 2017 will be the date of cancellation of premises as clarified by CBIC in Circular.

ANTI-PROFITEERING

- There have been lots of dispute regarding passing on the benefit of credit by the builder to the purchaser. It was argued number of times before the National Ant-profiteering Authority (NAA) that the method followed by NAA for computing the profiteering is not proper. The Delhi High Court in the case of M/s. Reckitt Benckiser India Pvt. Ltd. reported in 2024-(1)-TMI-1248 (Del.) has in para 129 held that the method followed by NAA is faulty. They also held that the increase in cost due to other factors should also be considered while determining the anti-profiteering.

THANK YOU

Presented by

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