

## **GST- ISSUES IN REAL ESTATE SECTOR**

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### **Introduction**

Currently, a Builder is subjected to numerous taxes such as VAT, service tax, entry tax, Octroi, LBT, CVD, SAD, etc. which come under the indirect tax net. The high level of compliances there-under and further the litigation involved therein has made the life of Builders difficult and burdensome. With the introduction of GST, major levies shall be subsumed into a single tax 'GST'; thereby putting to rest to old controversies.

The CGST, IGST, UTGST & SGST in some states have achieved finality with regard to provisions stated therein. In this article, a few important concepts pertaining to real estate sector and related issues have been dealt.

### **IMPORTANT CONCEPTS AND RELATED ISSUES**

#### **Levy**

While 'post Occupancy Certificate Sale' by itself is not covered under the ambit of GST, sale of under construction flat shall attract GST. Attention is drawn to Section 7(1) (d) read with Item 5(b) of Schedule II to the CGST Act, 2017/SGST Act, 2017 which deals with taxability of under construction flats.

The above-mentioned item of Schedule II is a reproduction of declared service as present under current Service Tax regime **except for the words 'after its first occupation**, whichever is earlier' The said reading of the amended item of Schedule II may lead to a conclusion that even if the completion certificate has not been received by the builder, if first occupancy in the premises has been taken place, builders may not be required to charge GST if entire consideration is received after first occupation. This would come as a blessing for the builders who due to certain reasons are unable to get the completion certificate from the local authority. However, the expression 'first occupation' is not defined in the Act and therefore, will be a subject matter of interpretation and litigation in absence of any clarification by the Government.

#### **Registration**

The concept of centralized registration shall be done away with under the GST Regime. As per Section 22 of CGST Act/SGST Act every supplier shall be liable to be registered in the State or Union territory **'from where'** he makes taxable supply. Further, location of supplier is defined to include 'fixed establishment' which, in turn, is defined vide Section 2(50) of the CGST Act/SGST Act.

Usually, wherever construction is carried out, a site office or temporary office is formed so as to effectively manage the construction and store materials, etc. Accordingly, there are chances that such site offices may be said to be fixed establishments and services may be said to be deemed to be provided from such site offices.

Therefore, appropriate tax i.e. CGST & SGST or IGST (depending upon place of supply rules) may be levied from each state from where taxable supply is made.

### **Rate**

As per the GST council, rate of construction service is recommended to be 12% and that of works contract is 18%. It is well known concept that construction service is sub-set and species of works contract with addition of 'land' element to it. Therefore, it appears that the difference in rate of works contract and construction services is primarily on account of land deduction which ought to be available to a builder.

### **Input Tax Credit**

Currently, under VAT & Service Tax regime numerous restrictions have been imposed on a Builder in order to claim the input credit resulting in significant loss of ITC. Under the GST Regime, a Builder shall be entitled to take ITC on inputs, input services & capital goods used in furtherance of business.

Section 17(5)(c) of the CGST Act/SGST Act provides for restriction of input tax credit on *'works contract services when supplied for construction of an immovable property (other than plant and machinery) **except where it is an input service for further supply of works contract service'***

A builder discharging 12% GST on construction service may not be in a position to take a stand that input services under the description of "works contract services" are used for **further supply of works contract service**. If that is the case, builder ought to pay GST at the applicable rate of works contract i.e. 18%. Therefore, in absence of any clarification, a builder discharging GST under construction service may not be entitled to ITC on input services under the description of "works contract service ("such as civil works, tiling work, grilling work, lobby works, etc.)

Apart from the above, a few minor restrictions have been given under Section 17(5) of the CGST Act/SGST Act such as motor vehicles, rent-a-cab, personal use of goods/ services, etc. Further, second proviso to Section 16(2) of the CGST

Act/SGST Act also provides for reversal of ITC in case payment to vendor is not made within a period of 180 days from the date of issue of invoice by the supplier.

Further, Section 17(2) provides for restriction/ reversal of Input Tax Credit in case of supply of 'exempt supplies'. Section 17(3) gives the meaning of 'exempt supplies' and it appears that sale proceeds of land, flats sold post Occupancy Certificate may get covered under 'exempt supplies' and therefore may warrant for reversal of ITC claimed. The manner for reversal of ITC is prescribed in detailed manner under the Rule 7 and Rule 8 of ITC Rules, 2017.

### **Transitional provisions**

Chapter XX of CGST Act/SGST Act provides for transitional provisions with respect to ITC under earlier laws. The carry forward of service tax credit does not appear to be an issue. However, with respect to VAT, State VAT Laws provide for composition scheme of 1%, 0.6%, etc. with a condition of not availing input tax credit. One will have to check the respective SGST Law in order to determine whether any provision for the same has been prescribed or not.

Further, one of the crucial aspects of transition is the excise duty, CVD, SAD suffered by the builder on its major components such as steel, cement, etc. In this regard, Section 140(3) of the CGST Act/SGST Act and proviso to Section 140(3) provides for availment of various duties on closing stock on appointed date (such as excise duty, CVD). As per Section 140(3), various conditions are imposed for availing such credit mainly possession of invoice and other prescribed documents which evidences payment of duty. A builder directly purchasing from a manufacturer or importer may be in possession of required documents and therefore may be in a position to avail the credit of excise, CVD, etc. A builder purchasing material from wholesaler, retailer may not be in a position to reproduce required documents and therefore such builders may not be in a position to claim the credit.

Without prejudice to the above and most importantly, Section 140(3) (v) provides that no abatement under GST Act should be availed. A builder (based on GST council's recommendation) will most likely be subjected to lower rate of 12% as against works contract rate of 18%. The moot question lies that whether prescription of lower rate of 12% is form of granting abatement or not? Prima facie it does not appear to be so and therefore even condition of Section 140(3) (v) stands fulfilled. However, if one takes a stand that the differential rate is form of abatement, builder may become ineligible to claim benefit under this transitory section.

Further, proviso to Section 140(3) envisages a situation for availing of credit of excise duty/ CVD, etc. where registered person is not in possession of duty

paying document. However, the proviso restricts manufacturer and supplier of service from its ambit. Builder being a service provider would not fall under the said proviso and therefore in absence of required documents, he may not be able to carry forward the credit.

## **OTHER IMPORTANT ISSUES**

### **Ongoing contracts**

Another crucial aspect with relation to transitional provisions is issue relating to ongoing contracts. For example, service tax liability is discharged based on completion of services method i.e. as and when milestones become due. Whereas, full VAT is paid based on agreement value or market value. Accordingly, in case of ongoing contracts, a situation may occur wherein full VAT is discharged but only part service tax is paid on the same flat. Accordingly, issue may arise as to proportion of payment of GST on such flats. Such issue is dealt with in Section 142(11) of the CGST Act/SGST Act wherein it has been provided that proportionate credit of full tax paid earlier may be available. However, it is advisable to check the applicable SGST Act for similar provisions in order to get the benefit of respective state VAT paid.

### **Floor Space Index (FSI)/Transfer of Development Rights (TDR)**

FSIs/ TDRs used by the Builders are effectively rights in land and not land by itself. As per Schedule III of the CGST Act/SGST Act not all immovable properties are excluded from ambit of GST but just sale of land. Accordingly, there are chances that such transaction of sale of FSI/ TDR may attract tax under GST. However, according to another school of thought FSI/ TDRs may still be counted as 'part of Land' and therefore stands excluded from GST net.

### **Intellectual Property Rights**

Schedule I of the CGST Act/SGST Act provides for levy of GST on supply of goods or services or both between related persons or distinct persons even when made without consideration. Usually in the Real Estate Sector, many entities of same group use single logo/ trademark without any consideration. Such transaction of IPR rights as well may come under the purview of GST in future by way of Schedule I.

### **Stock Transfers**

Many times, stock of several items such as cement, steel is transferred from one site to another. GST warrants for levying GST on all supplies. Accordingly, **inter-state** stock transfers shall be liable to GST.

### **Barter Transactions**

Many barter transactions are witnessed in Real Estate industry. For Example, giving away of free flats in lieu of 'development rights'. Many experts have been taking a stand under several state VAT laws that such barter transactions are not subjected to VAT on the basis of the term 'valuable consideration'. Further, the valuation of such transfers is also a burning issue under present service tax law. However, Section 7(1) (a) of CGST Act/SGST Act provides, amongst other things, for levy of GST on all forms of supply such as barter, exchange, etc. Therefore, GST shall be payable even in barter transactions. The value of supply shall be determined in accordance with GST (Determination of Value of Supply) Rules.

### **Anti-profiteering**

Section 171 of CGST Act/SGST Act provides for commensurate reduction of prices based on benefit availed by way of introduction of GST such as reduction in rate of tax, benefit of ITC. The Rules in this regard as to the quantum of reduction, manner of reduction is not yet notified. Therefore, unless clarity is brought in this regard, the possibility of different practices being adopted in the Industry cannot be ruled out. The aforesaid different practices shall lead to litigation.

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